



# MISSISSIPPI CODE 1972

*Annotated*

Civil Practice and Procedure

( § 11-37-1  
to end )

Evidence, Process and Juries

Limitation of Actions and  
Prevention of Frauds

**Titles 11 to 15**

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# MISSISSIPPI CODE

## 1972

*ANNOTATED*

ADOPTED AS THE OFFICIAL CODE OF THE  
STATE OF MISSISSIPPI  
BY THE  
1972 SESSION OF THE LEGISLATURE

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### VOLUME FOUR

**CIVIL PRACTICE AND PROCEDURE;  
EVIDENCE, PROCESS AND JURIES  
LIMITATION OF ACTIONS AND PREVENTION  
OF FRAUDS**

**§§ 11-37-1 to 15-3-121**

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CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI  
TO THE END OF THE 2012 REGULAR LEGISLATIVE SESSIONS



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## PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER  
ATTORNEY GENERAL



## PUBLISHER'S FOREWORD

This 2012 Replacement Volume 4 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1972 bound volume, and 2002 Replacement Volume, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2012 Regular Legislative Session.

This volume contains the text of Title 11, Chapters 37 to end and Title 13 of the Mississippi Code of 1972 Annotated, as amended through the 2012 Regular Legislative Session.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals. These cases will be printed in the following reporters:

- Southern Reporter, 3rd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 2nd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 6th Series
- American Law Reports, Federal Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

## **PUBLISHER'S FOREWORD**

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at [customer.support@bender.com](mailto:customer.support@bender.com), or write to: Mississippi Code Editor, LexisNexis, 701 E. Water St., Charlottesville, VA 22902-5389.

September 2012

LexisNexis



## User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
- Advance Sheets
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- Analyses
- Attorney General Opinions
- Code Status
- Comparable Legislation from other States
- Court Rules
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- Statute Headings
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at [customer.support@bender.com](mailto:customer.support@bender.com), or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

### ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

### ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

## AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are available online from 1991 until the present in the Mississippi Legislative Archive.

## ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

## ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

## CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

## COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooper-

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ation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

## COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

## CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects*.

## EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

## EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

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### FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

### INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

### JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

### JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note



will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

### ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indentation scheme is applied to suggest the relative value of each unit within this hierarchy.

### PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

### REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

### RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

### SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. :

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

### STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

### TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
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- Consolidated Tables of amendments and repeals of 1942 Code sections.
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### §§ 11-37-1 through 11-37-57. Repealed.

Repealed by Laws of 1975, ch. 508, § 30, eff from and after July 1, 1975.

§ 11-37-1. [Codes, Hutchinson's 1848, ch. 56, art. 11(2); 1857, ch. 56, art. 2; 1871, § 1529; 1880, § 2613; 1892, § 3707; 1906, § 4214; Hemingway's 1917, § 3043; 1930, § 3079; 1942, § 2841]

§ 11-37-3. [Codes, 1880, § 2635; 1892, § 3708; 1906, § 4215; Hemingway's 1917, § 3004; 1930, § 3080; 1942, § 2842]

§ 11-37-5. [Codes, 1880, § 2634; 1892, § 3709; 1906, § 4216; Hemingway's 1917, § 3045; 1930, § 3081; 1942, § 2843]

§ 11-37-7. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1530; 1880, § 2614; 1892, § 3710; 1906, § 4217; Hemingway's 1917, § 3046; 1930, § 3082; 1942, § 2844]

§ 11-37-9. [Codes, 1880, § 2636; 1892, § 3711; 1906, § 4218; Hemingway's 1917, § 3047; 1930, § 3083; 1942, § 2845]

§ 11-37-11. [Codes, 1880, § 2615; 1892, § 3712; 1906, § 4219; Hemingway's 1917, § 3048; 1930, § 3084; 1942, § 2846]

§ 11-37-13. [Codes, 1880, § 2639; 1892, § 3713; 1906, § 4220; Hemingway's 1917, § 3049; 1930, § 3085; 1942, § 2847]

§ 11-37-15. [Codes, 1880, § 2622; 1892, § 3714; 1906, § 4221; Hemingway's 1917, § 3050; 1930, § 3086; 1942, § 2848]

§ 11-37-17. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1531; 1880, § 2616; 1892, § 3715; 1906, § 4222; Hemingway's 1917, § 3051; 1930, § 3087; 1942, § 2849; Laws, 1924, ch. 166]

§ 11-37-19. [Codes 1892, § 3716; 1906, § 4223; Hemingway's 1917, § 3052; 1930, § 3088; 1942, § 2850]

§ 11-37-21. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1531; 1880, § 2617; 1892, § 3717; 1906, § 4224; Hemingway's 1917, § 3053; 1930, § 3089; 1942, § 2851; Laws, 1926, ch. 151]

§ 11-37-23. [Codes, 1892, § 3718; 1906, § 4225; Hemingway's 1917, § 3054; 1930, § 3090; 1942, § 2852]

§ 11-37-25. [Codes, 1880, § 2638; 1892, § 3719; 1906, § 4226; Hemingway's 1917, § 3055; 1930, § 3091; 1942, § 2853]



§ 11-37-27. [Codes, Hutchinson's 1848, ch. 56, art. 11 (8); 1857, ch. 56, art. 9; 1871, § 1536; 1880, § 2626; 1892, § 3720; 1906, § 4227; Hemingway's 1917, § 3056; 1930, § 3092; 1942, § 2854]

§ 11-37-29. [Codes, Hutchinson's 1848, ch. 56, art. 11 (9); 1857, ch. 56, art. 10; 1871, § 1537; 1880, § 2627; 1892, § 3721; 1906, § 4228; Hemingway's 1917, § 3057; 1930, § 3093; 1942, § 2855]

§ 11-37-31. [Codes, 1880, § 2618; 1892, § 3722; 1906, § 4229; Hemingway's 1917, § 3058; 1930, § 3094; 1942, § 2856]

§ 11-37-33. [Codes, 1880, § 2619; 1892, § 3723; 1906, § 4230; Hemingway's 1917, § 3059; 1930, § 3095; 1942, § 2857]

§ 11-37-35. [Codes, 1880, § 2620; 1892, § 3724; 1906, § 4231; Hemingway's 1917, § 3060; 1930, § 3096; 1942, § 2858]

§ 11-37-37. [Codes, Hutchinson's 1848, ch. 56, art. 11 (4); 1857, ch. 56, art. 4; 1871, § 1532; 1880, § 2621; 1892, § 3725; 1906, § 4232; Hemingway's 1917, § 3061; 1930, § 3097; 1942, § 2859; Laws, 1960, ch. 269]

§ 11-37-39. [Codes, Hutchinson's 1848, ch. 56, art. 11 (5); 1857, ch. 56, art. 5; 1871, § 1533; 1880, § 2622; 1892, § 3726; 1906, § 4233; Hemingway's 1917, § 3062; 1930, § 3098; 1942, § 2860]

§ 11-37-41. [Codes, 1880, § 2623; 1892, § 3727; 1906, § 4234; Hemingway's 1917, § 3063; 1930, § 3099; 1942, § 2861]

§ 11-37-43. [Codes, 1880, § 2623; 1892, § 3728; 1906, § 4235; Hemingway's 1917, § 3064; 1930, § 3100; 1942, § 2862]

§ 11-37-45. [Codes, 1857, ch. 56, art. 7; 1871, § 1535; 1880, § 2624; 1892, § 3729; 1906, § 4236; Hemingway's 1917, § 3065; 1930, § 3101; 1942, § 2863]

§ 11-37-47. [Codes, 1880, § 2628; 1892, § 3730; 1906, § 4237; Hemingway's 1917, § 3066; 1930, § 3102; 1942, § 2864]

§ 11-39-49. [Codes, 1880, § 2629; 1892, § 3731; 1906, § 4238; Hemingway's 1917, § 3067; 1930, § 3103; 1942, § 2865]

§ 11-39-51. [Codes, 1880, § 2630; 1892, § 3732; 1906, § 4239; Hemingway's 1917, § 3068; 1930, § 3104; 1942, § 2866]

§ 11-39-53. [Codes, 1880, § 2631; 1892, § 3733; 1906, § 4240; Hemingway's 1917, § 3069; 1930, § 3105; 1942, § 2867]

§ 11-39-55. [Codes, 1880, § 2632; 1892, § 3734; 1906, § 4241; Hemingway's 1917, § 3070; 1930, § 3106; 1942, § 2868]

§ 11-39-57. [Codes, 1880, § 2633; 1892, § 3735; 1906, § 4242; Hemingway's 1917, § 3071; 1930, § 3107; 1942, § 2869]

**Editor's Note** — Laws of 1975, ch. 508, § 30, effective July 1, 1975, additionally provides that "nothing in this act shall be construed to defeat or affect in any manner whatsoever any proceeding or cause of action commenced prior to the effective date of this act under the authority of the statutes hereby repealed." As to current statutory provisions dealing with replevin actions, see §§ 11-37-101 et seq.

Former § 11-37-1 related to how replevin commenced.

Former § 11-37-3 related to form of affidavit.

Former § 11-37-5 related to venue.

Former § 11-37-7 related to the writ.

Former § 11-37-9 related to form of the writ.

Former § 11-37-11 related to how and when writ may be executed.

- Former § 11-37-13 related to form of return of officer.
- Former § 11-37-15 related to officer's valuation prima facie evidence.
- Former § 11-37-17 related to property restored to defendant on bond.
- Former § 11-37-19 related to form of bond by defendant.
- Former § 11-37-21 related to plaintiff may give bond and receive property — bond to cover damage to, or depreciation in value of, property covered.
- Former § 11-37-23 related to plaintiff in certain cases has first right to bond.
- Former § 11-37-25 related to form of plaintiff's replevin bond.
- Former § 11-37-27 related to bond returned, and may be excepted to.
- Former § 11-37-29 related to new bond may be required.
- Former § 11-37-31 related to property to be sold, when.
- Former § 11-37-33 related when property not taken, plaintiff may elect to recover damages.
- Former § 11-37-35 related to duplicate, alias, and pluries writs, and publication.
- Former § 11-37-37 related to the pleadings.
- Former § 11-37-39 related to judgment for plaintiff — default — writ of inquiry.
- Former § 11-37-41 related to judgment for defendant — default — writ of inquiry.
- Former § 11-37-43 related to judgment where no bond is given.
- Former § 11-37-45 related to execution.
- Former § 11-37-47 related to claim of property by third person.
- Former § 11-37-49 related to claim of property by third person — issue, trial and judgment.
- Former § 11-37-51 related to claim of property by third person — judgment in favor of claimant.
- Former § 11-37-53 related to claim of property by third person — claimant considered a plaintiff.
- Former § 11-37-55 related to laws applicable in case of death.
- Former § 11-37-57 related to replevin not maintainable in certain cases.

### **§ 11-37-101. How replevin commenced; immediate seizure of property sought.**

If any person, his agent or attorney, shall file a complaint under oath setting forth:

- (a) A description of any personal property;
- (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
- (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
- (d) That the property is in the possession of the defendant; and
- (e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to a justice of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice court judge or other duly elected judge, such justice or judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff. The said writ shall be directed to the sheriff or other lawful officer,

returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount. The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

**SOURCES:** Laws, 1975, ch. 508, § 1; Laws, 1990, ch. 344, § 1, eff from and after July 1, 1990.

**Cross References** — Attachment of perishable commodities, see §§ 11-1-43 to 11-1-49 and 11-1-55.

Proceedings in replevin, attachment, and enforcement of liens, see § 11-9-135.

Attachment against parters, see § 11-33-5.

Replevin of attached property, see §§ 11-33-45 et seq.

Alternative procedure where immediate seizure of property is not sought, see §§ 11-37-131 et seq.

Cases in which replevin is not maintainable, see § 11-37-155.

Replevy of an animal, see § 69-13-27.

Repossession by secured party of collateral by action under Uniform Commercial Code, see § 75-9-609.

Replevy of exempt property wrongfully levied upon, see § 85-3-9.

Posting of bond and replevy of property seized, see § 85-7-47.

Selling of goods not replevied, see § 89-7-69.

Procedure when goods are replevied, see §§ 89-7-89 et seq.

Salvage of abandoned boats, logs, etc., see §§ 89-17-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

## JUDICIAL DECISIONS

### 1. In general.

After reviewing the replevin code provisions, Miss. Code Ann. § 11-37-101 through Miss. Code Ann. § 11-37-157, the appellate court found no requirement that a replevin order had to be issued by means of an agreed order, and nothing indicated that the trial court was without authority to enter a non-agreed order, which was essentially what it did, and any error on the part of the trial court simply did not rise to the level of reversible error where the order merely enforced a settlement agreement to which the husband had already agreed. *Madison v. Madison*, 922 So. 2d 832 (Miss. Ct. App. 2006).

Prisoner, who was proceeding pro se in replevin action against police officers, failed to set forth proof that property was in possession of officers, and thus prisoner failed to meet essential element of his

claim and officers were entitled to judgment as matter of law. *Hyde v. State*, 666 So. 2d 445 (Miss. 1995).

Section 11-37-101 was redrafted by the legislature after it was found to be unconstitutional in *Wyatt v. Cole* (S.D. Miss. 1989) 710 F. Supp. 180, and the statute now meets minimum due process requirements. *Underwood v. Foremost Fin. Servs. Corp.*, 563 So. 2d 1387 (Miss. 1990).

A circuit judge erred in deciding not to subject a creditor to liability for injurious violation of a debtor's constitutional right to due process when the creditor seized the debtor's mobile home and furnishings in compliance with § 11-37-101 simply because the creditor acted pursuant to a presumptively valid (albeit unconstitutional) statute. An evidentiary hearing should have been held, and the creditor's claim of good faith reliance on a presump-



tively valid statute should have been considered in light of not only the sincerity in its belief that it was acting properly, but the reasonableness of its actions under the circumstances. A fact finder conceivably could have concluded that the creditor's "surprise" seizure of the debtor's mobile home and its contents was, under the circumstances, unreasonable and compensable, where the record indicated no explanation for the necessity of an immediate seizure. *Underwood v. Foremost Fin. Servs. Corp.*, 563 So. 2d 1387 (Miss. 1990).

Replevin proceedings are governed by statute (§§ 11-37-101 et seq.), supplemented only by so much of Mississippi Rules of Civil Procedure as are not inconsistent with statute. *Hall v. Corbin*, 478 So. 2d 253 (Miss. 1985).

Since agreed judgment in replevin action was entered by consent, the fixing of the indebtedness was appropriate; however, absent clear agreement between parties, there can be no transfer of title from the debtor to the creditor. In *re Fred's Dollar Store of Hernando, Inc.*, 44 B.R. 491 (Bankr. N.D. Miss. 1984).

A default judgment in a replevin action would be set aside where the value of each separate article, as required by statute, was not given in the declaration or in the final judgment, and where the location of the hearing on the writ of inquiry was contrary to the order entered on the minutes of the court. *Birdsong v. Trans-American Van Serv., Inc.*, 369 So. 2d 751 (Miss. 1979).

## RESEARCH REFERENCES

**ALR.** Sufficiency of proof in replevin of defendant's possession at time of commencement of action. 2 A.L.R.2d 1043.

Remedy of replevin where agent, employed to purchase personal property, buys it for himself. 20 A.L.R.2d 1140.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract. 45 A.L.R.3d 1233.

Modern views as to validity, under federal constitution, of state prejudgment

attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 1, 5 et seq.

Initiating pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 11 et seq.

Answers and other responsive pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 231 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 271 et seq. (prejudgment seizure or repossession).

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

## § 11-37-103. Judge may determine value of bond.

Should the judge to whom such pleadings are presented determine that the property in question is not properly valued, then he may, in his order,



require a bond in an amount double the value of the property in question, as determined by such judge.

**SOURCES:** Laws, 1975, ch. 508, § 2, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### § 11-37-105. Form of plaintiff's replevin bond.

The plaintiff's bond in replevin shall be in the following form, to-wit:

"Be it known, that we, \_\_\_\_\_, the principal and plaintiff, and \_\_\_\_\_ and \_\_\_\_\_, sureties, agree and bind ourselves to pay to \_\_\_\_\_, the defendant, the sum of \$\_\_\_\_\_, unless the said principal and plaintiff shall prosecute to effect his replevin action against the defendant for possession of (here describe the property in detail), now to be seized and delivered to the plaintiff; and shall, without delay, return said property to the defendant, if return thereof be adjudged, and shall pay to the defendant such damages as he may sustain by the wrongful suing out of a writ of replevin, and such costs as may be awarded against the plaintiff, and save harmless the officer who seizes and delivers said property to the plaintiff herein; otherwise to be of no force and effect.

WITNESS OUR SIGNATURES, this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

The above bond is approved by me this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

**SOURCES:** Laws, 1975, ch. 508, § 3, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin § 46.

### § 11-37-107. Venue.

The action of replevin may be instituted in the circuit or county court of a county or in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

**SOURCES:** Laws, 1975, ch. 508, § 4; Laws, 1981, ch. 471, § 37; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws of 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

**Cross References** — Venue of actions generally, see §§ 11-11-1 et seq.  
Seizure of person or property, see Miss. R. Civ. P. 64.

## RESEARCH REFERENCES

**ALR.** Proper county for bringing possessory action. 60 A.L.R.2d 487. **Am Jur.** 66 Am. Jur. 2d, Replevin § 40.

### § 11-37-109. The writ.

The writ of replevin shall command the sheriff, or other lawful officer, to immediately seize and take possession of the property described in the writ and deliver it to the plaintiff after two (2) days, unless bonded by the defendant, and summon the defendant to appear before the court shown in the writ, in termtime or in vacation, and to answer to the action of the plaintiff.

**SOURCES:** Laws, 1975, ch. 508, § 5, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 47 et seq.

### § 11-37-111. Form of the writ.

The writ of replevin shall be in the following form, to-wit:

"State of Mississippi

County of \_\_\_\_\_

To the sheriff of any lawful officer of \_\_\_\_\_ County:

We command you to immediately seize and take into your possession (here describe the property as shown in the declaration) alleged by \_\_\_\_\_, the plaintiff, to be wrongfully detained by \_\_\_\_\_, the defendant, and to deliver said property to the plaintiff unless bonded by the defendant; and to summon the said defendant to appear before the \_\_\_\_\_ court of \_\_\_\_\_ County, Mississippi, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., on the \_\_\_\_\_ day of \_\_\_\_\_,

2\_\_\_\_\_, to answer the suit of the plaintiff for the wrongful detention of said property, and have then and there this writ.

WITNESS MY HAND, this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.  
\_\_\_\_\_”

**SOURCES:** Laws, 1975, ch. 508, § 6, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### § 11-37-113. How writ may be executed.

The writ may be executed by seizing the property described therein and summoning the defendant as in other civil actions, with a copy of the declaration and exhibits attached thereto to be attached to said writ, so as to fully inform the defendant as to the claim being made against him.

**SOURCES:** Laws, 1975, ch. 508, § 7, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 71  
et seq.

### § 11-37-115. Property restored to defendant on bond.

If the defendant\*shall, within two (2) days from the seizure of the property, enter into bond, with sufficient sureties, to be approved by the officer or the court, payable to the plaintiff, in double the value of the property, conditioned that it shall be forthcoming to satisfy the judgment of the court, the property shall be restored to him pending final judgment.

**SOURCES:** Laws, 1975, ch. 508, § 8, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin  
§§ 49.

### § 11-37-117. Form of return of officer.

The officer's return on such writ may be in the following form, to-wit:

“Executed the within writ, by taking possession of (here describe the property described in the writ which has been seized by the officer) found in the



possession of the defendant, and by summoning the defendant (naming him) according to the command of said writ, and I have delivered him a true copy of the writ, declaration and exhibits (or otherwise, as the case may be). The plaintiff (or defendant) having entered into bond, conditioned according to law, I delivered said property to the plaintiff (or defendant) and now return said writ.

This \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_  
Sheriff"

**SOURCES:** Laws, 1975, ch. 508, § 9, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### § 11-37-119. New bond may be required of plaintiff.

If the defendant in a replevin suit shall at any time deem any bond taken to be insufficient, such defendant may, upon filing a motion in the court where the suit is pending, obtain a hearing to determine the sufficiency of such bond. The court shall, after hearing the evidence upon such motion determine the sufficiency or insufficiency of the bond. If the bond given by the plaintiff be adjudged insufficient, the plaintiff shall be required to give a new and sufficient bond, or restore the property to the defendant within the time limited by the court; and, in default thereof, the defendant shall be entitled to proceed and enter judgment as in case the plaintiff had nonsuited or otherwise made default.

**SOURCES:** Laws, 1975, ch. 508, § 10, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## JUDICIAL DECISIONS

### 1. In general.

It is not necessary to take exception to the sufficiency of a replevin bond as a prerequisite to causing the sheriff to be

liable thereon for his lack of reasonable care in determining the sufficiency of the sureties. *McKenzie v. Curet*, 313 So. 2d 396 (Miss. 1975).

### § 11-37-121. When property not taken, plaintiff may elect to recover damages.

If the return of the officer on the writ shows a failure to take the goods and chattels, but the defendant has been summoned, the plaintiff may declare and prosecute the action for the recovery of the value of the property, and damages for the taking or detention of the property, as if he had thus commenced his action, and the plaintiff and his sureties shall, upon motion, be discharged on their bond.



**SOURCES:** Laws, 1975, ch. 508, § 11, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**ALR.** Interest on value of property where property itself cannot be recovered. 36 A.L.R.2d 404. **Am Jur.** 66 Am. Jur. 2d, Replevin §§ 73 et seq.

### § 11-37-123. Duplicate, alias, and pluries writs or process, and publication.

The plaintiff shall be entitled to duplicate writs or process to other counties, and alias and pluries writs or process to take the property or to summon the defendant, as in other actions. When property shall be taken under the writ, but the defendant cannot be found, the defendant shall be notified by publication, as provided in case of attachment under like circumstances, as provided in Section 11-33-37, Mississippi Code of 1972, except that said cause may be triable five (5) days after completion of publication.

**SOURCES:** Laws, 1975, ch. 508, § 12, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin § 47.

### § 11-37-125. Trial of replevin actions.

All replevin actions, whether followed by writ of replevin as herein provided or by summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

**SOURCES:** Laws, 1975, ch. 508, § 13, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 67 et seq.

## § 11-37-127. Judgment for plaintiff.

If, upon a trial, the judgment shall be for the plaintiff, he shall retain possession of the property delivered to him under the writ of replevin, or if said property has not been found, then the plaintiff shall have a judgment for its value as determined by such hearing, or the value of the plaintiff's interest therein. Upon the entry of a judgment for the plaintiff in such replevin action, the plaintiff and the sureties on his bond shall be fully and finally discharged and said bond cancelled. If the defendant shall have bonded the property after seizure and the judgment shall be for the plaintiff, then such judgment shall be that the defendant shall immediately deliver up said property to the plaintiff, with the defendant and the sureties on his bond to be liable to the plaintiff for any damage to or depreciation in the value of such property from the date of its surrender to the defendant under his bond until the date of its surrender by the defendant in obedience to the judgment of the court, in addition to any other damage the plaintiff may have sustained by reason of the wrongful taking or detention of such property by the defendant, all as determined upon writ of inquiry; or that the plaintiff recover from the defendant and his sureties the value of said property at the date of its return to the defendant under bond.

**SOURCES:** Laws, 1975, ch. 508, § 14, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### JUDICIAL DECISIONS

#### 1. In general.

The trial court in a replevin action erred in submitting the combined issues of possession and damages for decision by the jury at the same time; if either party to such an action seeks damages, they must

be sought after judgment on the issue of possession on a writ of inquiry, and not by way of counterclaim or recoupment filed with the answer. *Finance Am. Private Brands, Inc. v. Durbin*, 370 So. 2d 1356 (Miss. 1979).

### RESEARCH REFERENCES

**ALR.** Credit for upkeep or other expense in computing damages for use or detention of property in replevin. 7 A.L.R.2d 933.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like. 33 A.L.R.2d 774.

Interest on damages for period before judgment for injury to or detention, loss or destruction of, property. 36 A.L.R.2d 337.

Allowance of loss of profits from deprivation of use of detained property. 48 A.L.R.2d 1053.

Recovery of attorney's fees as damages by successful litigant in replevin or detinue action. 60 A.L.R.2d 945.

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 72 et seq.

Verdict for plaintiff, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 531.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

**§ 11-37-129. Judgment for defendant; default; writ of inquiry.**

If the judgment be for the defendant, the plaintiff and the sureties on the plaintiff's bond shall restore to the defendant the property, if to be had, or pay to him the value thereof and any damages for the wrongful suing out of the writ, as assessed upon writ of inquiry. If the defendant shall have made bond for such property, he and his sureties shall be fully discharged and he may recover any damages from the plaintiff and his sureties for the wrongful suing out of said writ. In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquiry to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon an issue found for him.

**SOURCES:** Laws, 1975, ch. 508, § 15, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

**JUDICIAL DECISIONS**

**1. In general.**

In an action by a person whose agent pledged equipment as security for a bank overdraft seeking to replevy a truck and trailer from the possession of a person who had obtained possession of the equipment by paying off a lien held by the bank, the trial court improperly granted a monetary judgment against plaintiff for the amount of defendant's lien, where the trial court made no finding as to who was entitled to possession of the property, and replevin is a possessory action only. *Ferris v. Hawkins*, 418 So. 2d 811 (Miss. 1982).

The trial court in a replevin action erred in submitting the combined issues of possession and damages for decision by the jury at the same time; if either party to such an action seeks damages, they must be sought after judgment on the issue of possession on a writ of inquiry, and not by way of counterclaim or recoupment filed with the answer. *Finance Am. Private Brands, Inc. v. Durbin*, 370 So. 2d 1356 (Miss. 1979).

**RESEARCH REFERENCES**

**ALR.** Interest on damages for period before judgment for injury to or detention, loss or destruction of, property. 36 A.L.R.2d 337.

Recovery of attorney's fees as damages by successful litigant in replevin or detinue action. 60 A.L.R.2d 945.

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 72 et seq.

Verdict for defendant, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 532.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.



### § 11-37-131. How replevin commenced—immediate seizure of property not sought.

If any person, his agent or attorney, shall desire to institute an action of replevin without the necessity of posting bond, and without requesting the immediate seizure of the property in question, he shall file a declaration under oath setting forth those matters shown in subparagraphs (a) through (e) of Section 11-37-101 and shall present such pleadings to a judge of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, and such judge shall issue a fiat directing the clerk of such court, or a deputy clerk, to issue a summons to the defendant, to appear before a court or judge having jurisdiction, as determined by the value of the property as alleged in the declaration, and as outlined in Section 11-37-101, with said process being returnable in termtime or in vacation, upon at least five (5) days' notice, summoning the defendant to appear for a final hearing to determine the rights of the parties as to possession, and upon such final hearing the court shall enter judgment accordingly.

**SOURCES:** Laws, 1975, ch. 508, § 16, eff from and after passage (approved April 8, 1975).

**Cross References** — Alternative procedure where immediate seizure of property is sought, see §§ 11-37-101 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

### JUDICIAL DECISIONS

#### 1. Possession properly granted to lender.

Because the parties were allowed to argue their claims to certain equipment, and because the buyer did not dispute that the lender had a valid prior, perfected security interest in the equipment by vir-

tue of a properly filed financing statement, the lender was entitled to possession of the equipment under Miss. Code Ann. § 11-37-131. *Hammond v. Caterpillar Fin. Servs. Corp.*, 66 So. 3d 700 (Miss. Ct. App. 2011).

### RESEARCH REFERENCES

**ALR.** Sufficiency of proof in replevin of defendant's possession at time of commencement of action. 2 A.L.R.2d 1043.

Conversion as precluded by resort to replevin. 3 A.L.R.2d 230.

Remedy of replevin where agent, employed to purchase personal property, buys it for himself. 20 A.L.R.2d 1140.

Action by landowner for recovery by possession of cut timber after revocation of license. 26 A.L.R.2d 1197.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate,

against personal representative. 42 A.L.R.2d 418.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under



retail instalment sales contract. 45 A.L.R.3d 1233.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 1, 5 et seq.

Initiating pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 11 et seq.

Answers and other responsive pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 231 et seq.

## § 11-37-133. Form of summons.

The summons may be in the following form, to-wit:

"The State of Mississippi

To the sheriff of \_\_\_\_\_ County, Greetings:

We command you hereby that you summons \_\_\_\_\_, (put full address) defendant, if to be found in your county, so that he be and appear before the \_\_\_\_\_ court, to be holden in and for the County of \_\_\_\_\_, at the courthouse thereof in the City of \_\_\_\_\_, Mississippi, on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_M., to answer the plaintiff's declaration in replevin filed herein, a copy of which is attached hereto, and for a final hearing to determine the rights of the parties herein as to the possession of the property as described in the declaration in replevin.

Declaration filed when summons issued.

ISSUED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_ Clerk"

**SOURCES:** Laws, 1975, ch. 508, § 17, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## § 11-37-135. How summons shall be executed.

The summons in replevin shall be executed by summoning the defendant as in other civil cases, a copy of the declaration and exhibits being attached to said summons, directing the defendant to appear before the court shown in said summons, to answer the plaintiff's declaration under oath. The officer serving said process shall determine whether or not the defendant is then in possession of the property described in the declaration and shall so indicate on his return.

**SOURCES:** Laws, 1975, ch. 508, § 18, eff from and after passage (approved April 8, 1975).

**Cross References** — Summons and their execution generally, see §§ 13-3-5 et seq. Seizure of person or property, see Miss. R. Civ. P. 64.

## ATTORNEY GENERAL OPINIONS

A summons for a replevin hearing wherein the property is not immediately seized may be served by placing a true copy on the door of the defendant's usual place of abode. Parker, May 3, 2002, A.G. Op. #02-0225.

A constable may serve a summons for a replevin by any of the means set forth in

Section 13-3-5; if the constable is unable to determine whether or not the defendant is in possession of the property described in the declaration, he should note such on the return. Enlow, Nov. 15, 2002, A.G. Op. #02-0646.

**§ 11-37-137. Contempt of defendant for concealing or disposing of property.**

If the defendant be found to be in possession of the property in question at the time of the service of process upon him, and if he shall conceal said property or dispose of the same, or fail to have the same within the jurisdiction of the court for such final judgment as may be rendered by the court in said replevin action, upon the return day of process herein, he shall be subject to penalties of contempt, upon motion of the plaintiff or order of the court.

**SOURCES:** Laws, 1975, ch. 508, § 19, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

**§ 11-37-139. Resettlement of action for trial on a future date.**

Where process in any replevin action is by way of a summons in replevin, said cause shall be triable on its merits upon at least five (5) days process upon the defendant, and said cause shall be triable in termtime or in vacation and at such place as the court may direct. In the event it shall appear at the return day that there is secondary service of process, or less than five (5) days process upon the defendant, the court may enter an order resetting said matter for trial on a future date, so as to insure that said cause will not be tried on its merits except upon a resetting on secondary process or except upon at least five (5) days process upon the defendant. In the event of such order resetting said cause for such later date, it shall not be necessary that further process be served upon the defendant.

**SOURCES:** Laws, 1975, ch. 508, § 20, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## ATTORNEY GENERAL OPINIONS

When the judge hears the case, pursuant to the terms of this section, the judgment would be for possession of the prop-

erty, or if the property has not been found, then the judgment shall be for its value or the value of the plaintiff's interest

therein. Mullen, Dec. 10, 2004, A.G. Op. 04-0585.

**§ 11-37-141. Judgment for plaintiff where property not previously seized.**

Upon the trial of any replevin action in which the property has not previously been seized under writ of replevin, if the judgment be for the plaintiff, the court shall enter judgment awarding to the plaintiff the immediate possession of the property and such judgment shall order and direct the sheriff or other lawful officer to immediately seize the property in question, without further process upon the defendant, and deliver said property to the plaintiff, a certified copy of the final judgment rendered in such case being furnished to the sheriff as evidence of his authority to seize such property and deliver it to the plaintiff.

**SOURCES:** Laws, 1975, ch. 508, § 21, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

**ATTORNEY GENERAL OPINIONS**

A constable may enter a dwelling to seize property as commanded by a writ of replevin, but such entering must be done without a breach of the peace; further, obtaining entry into a rented house or

apartment by means of the landlord in order to seize replevied property is a proper action to be taken by the constable. Sherrell, March 10, 1999, A.G. Op. #99-0035.

**RESEARCH REFERENCES**

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 72 et seq.

Judgment for plaintiff where property not previously delivered, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 536.

**§ 11-37-143. Judgment for defendant where property not previously seized.**

In any replevin action in which the property has not been previously seized by writ of replevin, if the defendant be successful in such action, the judgment of the court shall be that the declaration of the plaintiff be dismissed and court costs assessed against the plaintiff.

**SOURCES:** Laws, 1975, ch. 508, § 22, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.



RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 72 et seq.

Judgment for defendant, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 537 et seq.

**§ 11-37-145. Replevin actions to be treated as preference cases.**

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

**SOURCES:** Laws, 1975, ch. 508, § 23, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

**§ 11-37-147. Jury trial.**

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

**SOURCES:** Laws, 1975, ch. 508, § 24, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

**§ 11-37-149. Claim of property by third person.**

If a third person, not a party to the action of replevin, shall claim to be the owner or entitled to the possession of goods or chattels involved in a replevin action, he shall not be allowed to institute another action of replevin while the former is pending, but may intervene in said action and present his claim under oath.

**SOURCES:** Laws, 1975, ch. 508, § 25, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

**1. In general.**

Mississippi Rule Civil Procedure 24 is supplementary to statute (§ 11-37-149) governing intervention in replevin action, rather than inconsistent with statute.

Hall v. Corbin, 478 So. 2d 253 (Miss. 1985).

Party asserting nonpossessory interest in property which is subject of replevin action may assert such interest within



ancillary jurisdiction of circuit court, so long as there is common nucleus of operative fact between party's claim and original complaint in replevin, and such party

may intervene in circuit court replevin action even though claim is of equitable origins. Hall v. Corbin, 478 So. 2d 253 (Miss. 1985).

## RESEARCH REFERENCES

**Am Jur.** 66 Am. Jur. 2d, Replevin § 43.  
Intervention, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 251 et seq.

### § 11-37-151. Claim of property by third person—issue, trial and judgment.

After the trial of the action of replevin, an issue shall be made between the successful party and the claimant as to the validity of his claim, and a trial shall be had to determine the right of possession as between them and judgment entered accordingly.

**SOURCES:** Laws, 1975, ch. 508, § 26, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

### § 11-37-153. Laws applicable in case of death.

All the provisions of law in reference to the death of either party, and the revival of the cause in personal actions, and the death of any of the obligors in a bond given in a replevin action, and the proceedings thereon before and after judgment, shall apply in like case to the action of replevin, and to a claim of property in such action.

**SOURCES:** Laws, 1975, ch. 508, § 27, eff from and after passage (approved April 8, 1975).

**Cross References** — Death of party to action generally, see § 11-7-29.  
Seizure of person or property, see Miss. R. Civ. P. 64.

## JUDICIAL DECISIONS

### 1. In general.

Nonpossessory equitable claim of intervenor in replevin action survives death of

intervenor, whose executor is permitted to revive claim by intervention. Hall v. Corbin, 478 So. 2d 253 (Miss. 1985).

### § 11-37-155. Replevin not maintainable in certain cases.

The action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode prescribed by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin.

**SOURCES:** Laws, 1975, ch. 508, § 28, eff from and after passage (approved April 8, 1975).

**Cross References** — How replevin is commenced, see §§ 11-37-101, 11-37-131.  
Replevy of exempt property levied upon, see § 85-3-9.  
Seizure of person or property, see Miss. R. Civ. P. 64.

**§ 11-37-157. Replevin cumulative and additional to all other actions.**

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

**SOURCES:** Laws, 1975, ch. 508, § 29, eff from and after passage (approved April 8, 1975).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## CHAPTER 38

### Claim and Delivery

SEC.	
11-38-1.	Commencement of action.
11-38-3.	Venue; issuance and return of process; jurisdiction of court; right to jury trial.
11-38-5.	Preliminary hearing.
11-38-7.	Answer; judgment.
11-38-9.	Claim and delivery cumulative and additional to other actions.

#### § 11-38-1. Commencement of action.

Any person with an enforceable lien on any personal property, or right to the immediate possession thereof, or who asserts that such property has been wrongfully taken or detained may bring an action for claim and delivery by filing a complaint in writing, under oath, describing the property, setting forth his claim, share or interest therein, attaching an itemized account, if required, and giving the names of any other persons who have a similar or other claims or interests in such property. Thereupon the clerk or justice shall issue a writ directed to the proper officer to value the property, or so much thereof as may be necessary to satisfy the plaintiff's demand and cost, and to summon the persons named in the affidavit to appear in court, at the time fixed, to answer the complaint.

**SOURCES:** Laws, 1973, ch. 400, § 1, eff from and after passage (approved March 28, 1973).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

Filing and service requirements for pleadings and motions in Circuit Courts, see Miss. U.R.C.C.C. 2.06.

### JUDICIAL DECISIONS

#### 1. In general.

The declaration in an action for claim and delivery brought by a bank against an automobile dealer and an automobile manufacturer credit corporation complied with the requirements of this section,

even though there was no allegation that the value of the property in question exceeded \$200. *Chrysler Credit Corp. v. Bank of Wiggins*, 358 So. 2d 714 (Miss. 1978).

### RESEARCH REFERENCES

**ALR.** Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

Allowance, in replevin action, of loss of profits from deprivation of use of detained

property. 48 A.L.R.2d 1053.

Proper county for bringing replevin, or similar possessory action. 60 A.L.R.2d 487.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other

cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract. 45 A.L.R.3d 1233.

**Am Jur.** 66 Am. Jur. 2d, Replevin §§ 3, 36 et seq.

**CJS.** 77 C.J.S., Replevin §§ 1, 42-45 et seq.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

### § 11-38-3. Venue; issuance and return of process; jurisdiction of court; right to jury trial.

The action for claim and delivery may be instituted in the circuit or county court of a county, or the justice court of a county, in which the defendant, or one (1) of several of them, resides or where the property, or some of it, may be found. Proper process shall issue to other counties and shall be made returnable to the first term of the court held after the issuance of said writ unless it shall be issued more than ten (10) days before the said term of court, when it may be returnable to the judge of the court at the usual place of holding the court at a day to be named, not more than ten (10) days or less than five (5) days after the date of the issuance of the writ, or before the judge in vacation, and the cause will be triable, provided the defendant has been served with process at least five (5) days before the return day of the writ. The judge shall have jurisdiction to hear the cause, or any matter pertaining thereto, in termtime or vacation, at such time and place as he may direct, and to enter such orders and judgment thereon as to adjust the rights of the parties in the subject matter; and all such cases shall be tried by the judge without the intervention of a jury unless a jury is demanded in the complaint or answer.

**SOURCES:** Laws, 1973, ch. 400, § 2; Laws, 1981, ch. 471, § 38; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1992).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.



## RESEARCH REFERENCES

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

## § 11-38-5. Preliminary hearing.

The clerk or justice issuing the writ may also, by a separate summons, require the parties to appear before him for a preliminary hearing to determine the rights of the parties to immediate possession of the property involved, at a time and place fixed in the summons, but shall allow the defendant not less than two (2) days' notice. At the preliminary hearing the clerk or justice shall determine whether the temporary possession of the property is to be delivered to the plaintiff, retained by the defendant, or whether the proper officer shall seize and hold the property until a hearing on the merits to determine what bond, if any, should be required. An appropriate writ shall thereupon be issued for the enforcement of the temporary order. Upon written demand of either party the clerk, when the action is before a clerk of the court, shall refer the action for such preliminary hearing before any justice of the county or the judge of the court from which the process was issued. If temporary possession be granted to the plaintiff, the bond shall be for double the value of the property, and if temporary possession be granted to the defendant and bond be required, it shall be for not less than double the value of the plaintiff's interest therein.

Preliminary hearings may be determined by the justice or judge designated without regard to jurisdictional amount.

**SOURCES:** Laws, 1973, ch. 400, §§ 3, 5, eff from and after passage (approved March 28, 1973).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

## RESEARCH REFERENCES

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

## § 11-38-7. Answer; judgment.

The defendant, or any interested person, may contest the demand of the plaintiff on or before the return day of the writ by filing an answer in writing, under oath, of his claim or defense, itemizing his account, if any, and the case shall be then at issue between the parties, and shall be tried as other cases in the court. The judgment or judgments of the court shall adjudicate and adjust the rights of the several parties as to the subject matter of the suit, and costs may be adjudged accordingly.

**SOURCES:** Laws, 1973, ch. 400, § 4, eff from and after passage (approved March 28, 1973).

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the last sentence. The word “cost” was changed to “costs”. The Joint Committee ratified the correction at its December 3, 1996 meeting.

**Cross References** — Filing and service requirements for pleadings and motions in circuit courts, see Miss. Uniform Rule of Circuit and County Court Practice 4.03.

Seizure of person or property, see Miss. R. Civ. P. 64.

#### RESEARCH REFERENCES

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

### § 11-38-9. Claim and delivery cumulative and additional to other actions.

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

**SOURCES:** Laws, 1973, ch. 400, § 6, eff from and after passage (approved March 28, 1973).

**Cross References** — Seizure of person or property, see Miss. R. Civ. P. 64.

#### RESEARCH REFERENCES

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

## CHAPTER 39

### Quo Warranto

In General .....	11-39-1
Trial of Right to Public Office in Vacation .....	11-39-51

#### IN GENERAL

SEC.	
11-39-1.	To what cases applicable.
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11-39-5.	Trial of right to office.
11-39-7.	Form of complaint against corporation.
11-39-9.	Form of complaint against individuals.
11-39-11.	Repealed.
11-39-13.	Summons.
11-39-15.	Court or judge may make certain orders.
11-39-17.	Repealed.
11-39-19.	Judgments against defendants.
11-39-21.	Disobedience punishable.
11-39-23.	Private person relator, liable for costs.
11-39-25.	Trustees to be appointed.
11-39-27.	Bond of trustees.
11-39-29.	Property surrendered to trustees.
11-39-31.	Trustees to return inventory to chancery court—vacancies filled—new bonds.
11-39-33.	Sales of property—proceedings—trustees not to buy.
11-39-35.	Claims presented and audited—notice.
11-39-37.	Compensation of trustees and others.
11-39-39.	Report of trustees, and order of paying debts.

#### § 11-39-1. To what cases applicable.

The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz.:

**First.** — Whenever any person unlawfully holds or exercises the functions of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office.

**Second.** — Whenever any public officer has done or suffered to be done, or has omitted to do any act, the doing or omission of which works a forfeiture of office.

**Third.** — Whenever any two or more persons shall act as a corporation, or assume so to do without being legally incorporated.

**Fourth.** — Whenever any corporation shall be guilty of a misuser or abuse of its powers, or ceases to discharge the duty for which it was created.

**Fifth.** — Whenever any corporation willfully exercises powers not conferred by law.

**Sixth.** — Whenever any corporation fails to exercise powers conferred by law and essential to its corporate existence, or implied in its duty to the public.

**Seventh.** — Whenever any corporation shall be guilty of doing or neglecting to do any act the doing or neglecting of which is made by law a cause of forfeiture of franchise.

**Eighth.** — Whenever any corporation shall willfully and persistently violate the law made for regulating such corporations, or the criminal law; but acts done in good faith before adjudication of the constitutionality of a doubtful statute shall not be cause of forfeiture.

**Ninth.** — Whenever it is sought to have the right of any corporation, not created by the laws of this state, to do business in this state forfeited because of its persistent refusal to comply with the laws thereof.

**Tenth.** — Whenever any nonresident alien or corporation shall acquire or hold lands contrary to law.

**SOURCES:** Codes, 1857, ch. 35, art. 12; 1871, § 1490; 1880, §§ 2585, 2586, 2587; 1892, § 3520; 1906, § 4017; Hemingway's 1917, § 3012; 1930, § 3053; 1942, § 1120.

**Cross References** — Subject-matter jurisdiction of circuit courts generally, see § 9-7-81.

Quo warranto proceedings against municipal marshal or chief of police, see § 21-21-1.

Vacancy in office due to removal or default of officer, see §§ 25-5-1, 25-1-59.

Filling vacancy in office resulting from failure of official to qualify for office, see § 25-1-7.

Proceedings against motor vehicle manufacturers for cancellation of dealer agency contract, see § 63-17-137.

Proceedings against fraternal society, see § 83-29-45.

Proceedings to forfeit charter of club violating liquor laws, see § 99-27-25.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## JUDICIAL DECISIONS

1. To determine right to office.
2. To corporation or persons assuming to act as such.
3. Miscellaneous.

### 1. To determine right to office.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge from state by either district attorney or attorney general. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Private quo warranto action is required to be brought on behalf of state by person claiming entitlement to office which puts burden on plaintiff to establish entitlement to office. *State ex rel. Holmes v.*

*Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Relator in private writ of quo warranto must stand on strength of his entitlement to office as opposed to weaknesses of person alleged as not properly holding office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when peti-



tioner has been elected to said office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Voter bringing quo warranto action had incorrectly filed private rather than public action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as voter did not claim entitlement to chancellor position. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

As elected chancellor had not yet taken office and was not in possession of or exercising any function of office of chancellor at time of private action of quo warranto challenging his qualifications, claim was not ripe for private action of quo warranto. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

A chancery clerk was entitled to bring an original action in the circuit court, in the nature of quo warranto, under §§ 11-39-1 and 11-39-5 as supplanted by the rules of civil procedure, for reinstatement by the county board of supervisors to the posts of clerk of the board of supervisors and county auditor. *Barlow v. Weathersby*, 597 So. 2d 1288 (Miss. 1992).

A private person may bring a petition, on information in quo warranto, to try the right of an office in the name of the State of Mississippi, and such is the proper remedy to contest the qualifications of a

successful candidate to hold the office. *State ex rel. Muirhead v. State Bd. of Election Comm'rs*, 259 So. 2d 698 (Miss. 1972), cert. denied, 409 U.S. 851, 93 S. Ct. 64, 34 L. Ed. 2d 94 (1972).

Generally, a bill for injunction will not lie to try the right and title to a public office, but the proper remedy is by quo warranto. *Lacey v. Noblin*, 238 Miss. 329, 118 So. 2d 336 (1960).

One of the functions of a writ of quo warranto at common law and under the statute is to serve as an appropriate and adequate means for determination of the right or title to a public office, and to oust an incumbent who was unlawfully holding the office. *State ex rel. Patterson v. Land*, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

Although the writ of quo warranto is not a writ of right, but issues in the sound discretion of the court, where the judgment of the circuit court was not placed upon the discretionary exercise of power in denial of the writ but was based upon the erroneous premise that § 9, chapter 10 of the Laws of 1953 (§ 6271-09) was unconstitutional, and the defendant, who was serving as County Superintendent of Public Education did not comply with the requirements of the statute, the Supreme Court, upon determining that the statute was constitutional, was under the duty to enforce the act and issue the writ of quo warranto, finding that the defendant had been exercising the functions of office without authority and removing him therefrom. *State ex rel. Patterson v. Land*, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

In a quo warranto proceeding filed by the Attorney General of the state against defendant, who was serving as County Superintendent of Public Education, on the ground that he was unlawfully holding and exercising that public office, and for the purpose of trying his right to that office, since the defendant was impelled to show a right *de jure* and not one merely *de facto*, it was incumbent upon him to show a good legal title and not merely a colorable one, and he must rely wholly on the strength of his own title. *State ex rel. Patterson v. Land*, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

A petition in the nature of quo warranto to oust one from office as trustee of a consolidated school which alleged that relator had been duly elected as trustee of the school and showing that there was no vacancy in the trusteeship such as would indicate the necessity of the superintendent of education to appoint the respondent as continuing trustee, stated a good cause of action. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339 (1952).

Petition in the nature of quo warranto to oust one from office as trustee of consolidated school was properly filed in the name of the state on relation of another and not in the name of attorney general or a district attorney. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339 (1952).

In quo warranto proceedings to try title to public office where State is relator, instead of another individual claimant of the office, the burden is on respondent to prove his right or title to the office, hence there was no error by a trial court in refusing an instruction which sought to place burden of proof on relator. *Jones v. State ex rel. McFarland*, 207 Miss. 208, 42 So. 2d 123 (1949).

Town marshal held properly removed from office as result of quo warranto proceedings, where he failed to show resident in town as required by §§ 241, 250 of Constitution, and Code of 1942, § 3762. *Jones v. State ex rel. McFarland*, 207 Miss. 208, 42 So. 2d 123 (1949).

In order to maintain a proceeding in the nature of quo warranto to try the right to a public office, it must appear that the respondent is in actual possession and use of the office in question; it is not sufficient for the information to show that the respondent lay some claim to the office without usurping the functions thereof. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722 (1941).

One legally elected to fill a vacancy in a public office, making the required bond and taking the oath of office required, is not entitled to a judgment of the court awarding him the possession of the office unless there is someone holding the office not entitled so to do. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722 (1941).

Neither of two candidates claiming to have been elected to a public office, which

is vacant, has a right to resort to quo warranto. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722 (1941).

One claiming to be entitled to the office of a member of a county board of supervisors because of the failure of another elected to the office to make bond and take the oath of office and by reason of having received the next highest number of votes at such election could not maintain a proceeding in the nature of quo warranto to establish his right to possession thereof where the respondent was not in possession of such office and the office was vacant. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722 (1941).

A proper remedy to contest the qualifications to hold office of one nominated in a party primary is by quo warranto after the general election. *McKenzie v. Thompson*, 186 Miss. 524, 191 So. 487 (1939).

One who contested the election of another to a municipal office because of his illegal nomination in the primary, who made no claim to have been elected himself, was not entitled to contest the election, the proper remedy in such case being quo warranto, since the question is a public and not a private one. *Omar v. West*, 186 Miss. 136, 188 So. 917 (1939).

An action contesting an election of a candidate for a municipal office by one who himself made no claim to have been elected to a certain office and who was not entitled under Code 1930, § 6258 to bring an action, his remedy being by quo warranto, could not be treated as a quo warranto proceeding because it was not in the name of the state as required. *Omar v. West*, 186 Miss. 136, 188 So. 917 (1939).

Proceeding to try right to office of councilman instituted in name of State on relation of claimant is in the nature of a private action, in which claimant must succeed on strength of his own claim. *State ex rel. Parks v. Tucei*, 175 Miss. 218, 166 So. 370 (1936).

State could not debar city officers from exercising jurisdiction over annexed territory where annexation proceedings were void, but city, as constituted, had functioned nearly seven years and annexed municipality had been abolished by statute. *State ex rel. Jordan v. Mayor & Comm'rs*, 157 Miss. 875, 129 So. 682 (1930).



Quo warranto is proper to test the validity of the formation of a county under a legislative act providing therefor. *State ex rel. Collins v. Jackson*, 119 Miss. 727, 81 So. 1 (1919).

A person unlawfully acting as clerk of the board of trustees of the penitentiary exercises the functions of a public officer, and may be proceeded against by quo warranto. *Yerger v. State*, 91 Miss. 802, 45 So. 849 (1908).

A trusteeship of a public school is an office within this provision [Code 1942, § 1120]. *Ellis v. Greaves*, 82 Miss. 36, 34 So. 81 (1903).

A quo warranto proceeding must fail if it appears that the relator at the time of his election and institution of the suit not being registered was not a qualified elector of the state, and therefore under § 250 Const 1890, not eligible to office. *Andrews v. State*, 69 Miss. 740, 13 So. 853 (1892).

Where an officer fails to qualify under newly imposed conditions, quo warranto is an appropriate remedy to remove him. *Hyde v. State*, 52 Miss. 665 (1876).

## 2. To corporation or persons assuming to act as such.

If trustees could not operate railroad, state's remedy was by quo warranto not anti-trust law proceedings. *State ex rel. Knox v. Edward Hines Lumber Co.*, 150 Miss. 1, 115 So. 598 (1928).

Quo warranto is the proper remedy where a corporation practiced fraud in obtaining its charter and its acts under the charter have been all in violation of law. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258, *Am. Ann. Cas.* 1918B, 953 (1917).

That a corporation has so conducted its affairs as to subject it to a quo warranto by

the state does not prevent its recovery in an action of unlawful detainer against a private person. *Home Mut. Bldg. & Loan Ass'n v. Leonard*, 77 Miss. 39, 25 So. 351 (1899).

Where a charter is repealed, and the performance of its function is made criminal, it is no objection to a prosecution that the franchise was not forfeited by a quo warranto proceeding. *Moore v. State*, 48 Miss. 147, 12 Am. R. 367 (1873), error dismissed, 88 U.S. (21 Wall.) 636, 22 L. Ed. 653 (1875).

## 3. Miscellaneous.

Quo warranto writ under statute, being form of action, was interred with adoption of Mississippi Rules of Civil Procedure. *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987).

Unless and until the state courts of Mississippi have been given the opportunity to pass upon a quo warranto action brought by the State of Mississippi against a non-profit, non-share corporation seeking forfeiture of its corporate franchises and privileges on the ground that it has exceeded its corporate powers, the action was prematurely sought to be removed to the federal courts. *Williams v. Tri-County Community Ctr.*, 323 F. Supp. 286 (S.D. Miss. 1971), *aff'd*, 452 F.2d 221 (5th Cir. 1971).

In proceeding to remove district supervisor, court dismissing case improperly taxed costs against individuals, named as relators, having no interest other than that common to all citizens. *State v. Henderson*, 166 Miss. 530, 146 So. 456 (1933).

Where a demurrer to the petition is sustained and an appeal is taken, the Supreme Court cannot consider matters resting on facts not appearing in the petition. *State ex rel. Baker v. Nichols*, 106 Miss. 419, 63 So. 1025 (1914).

## RESEARCH REFERENCES

**ALR.** Right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of office. 51 A.L.R.2d 1306.

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto §§ 14-45.

**CJS.** 74 C.J.S., Quo Warranto §§ 11-36.

## § 11-39-3. Proceedings.

The proceedings in the cases set forth in Section 11-39-1 shall be by complaint, in the name of the state, by the Attorney General or a district attorney, on his own motion or on relation of another, and, in a case to try the right to an office, on the relation of the claimant thereof. The complaint shall be filed in the circuit court of the county of the residence of the defendant; or, in the case of an officer, where he acts as such; or, in case of a corporation or pretended corporation, where its principal office or place of business may be or where it may transact any business and has an agent; or, in case of an alien or corporation acquiring or holding land contrary to law, where any of the land is situated.

**SOURCES:** Codes, 1857, ch. 35, art. 12; 1871 §§ 1490, 1491; 1880, §§ 2585, 2587; 1892, § 3521; 1906, § 4018; Hemingway's 1917, § 3013; 1930, § 3054; 1942, § 1121; Laws, 1991, ch. 573, § 73, eff from and after July 1, 1991.

**Cross References** — Suits by the attorney general generally, see § 7-5-37.

Subject-matter of circuit courts generally, see § 9-7-81.

Duty of district attorney to appear in court and prosecute generally, see § 25-31-11.

Prohibition against nonresident alien purchasing public land, see § 29-1-75.

Acquisition and holding of land by aliens generally, see § 89-1-23.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Who may institute action.
3. Jurisdiction and venue.

### 1. In general.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge from state by either district attorney or attorney general. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Private quo warranto action is required to be brought on behalf of state by person claiming entitlement to office which puts burden on plaintiff to establish entitlement to office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Relator in private writ of quo warranto must stand on strength of his entitlement

to office as opposed to weaknesses of person alleged as not properly holding office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

The words in this section [Code 1942, § 1121] "on relation of another" refer to a person at whose instance and for whose benefit the proceeding is instituted. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339 (1952).

A petition in the nature of quo warranto to oust one from office as trustee of a consolidated school which alleged that relator had been duly elected as trustee of the school and showing that there was no vacancy in the trusteeship such as would indicate the necessity of the superintendent of education to appoint the respondent as continuing trustee, stated a good cause of action. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339 (1952).

This section [Code 1942, § 1121] should be given that construction, if possible, which will preserve the essentials of har-



mony and consistency in the judicial system. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

Proceeding to try right to office of councilman instituted in name of State on relation of claimant is in the nature of a private action, in which claimant must succeed on strength of his own claim. *State ex rel. Parks v. Tucei*, 175 Miss. 218, 166 So. 370 (1936).

Words "on relation of another," in quo warranto statute, refer to person at whose instance and for whose benefit proceeding is instituted. *State v. Henderson*, 166 Miss. 530, 146 So. 456 (1933).

Demurrer to an information in quo warranto admits all the allegations contained in the information, and the appellate court should assume that the allegations are true as stated. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258, *Am. Ann. Cas.* 1918B,953 (1917).

## 2. Who may institute action.

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when petitioner has been elected to said office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Voter bringing quo warranto action had incorrectly filed private rather than public action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as

voter did not claim entitlement to chancellor position. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Where relators have no claim to the office, the right to which they seek to attack in a quo warranto proceeding, a demurrer was properly sustained to their petition. *State ex rel. Powe v. Pittman*, 253 Miss. 844, 179 So. 2d 563 (1965).

Petition in the nature of quo warranto to oust one from office as trustee of consolidated school was properly filed in the name of the state on relation of another and not in the name of attorney general or a district attorney. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339 (1952).

Attorney general alone has right to institute suit for quo warranto to forfeit corporate charter or corporate right where relief prayed for is to forfeit such charter or right throughout the state; the district attorney may bring such a suit only when the corporation is authorized by its charter to exercise its functions only in certain county or judicial district of the state, or where its charter powers are such that, because of the essential manner of the exercise thereof, or because of exclusive physical conditions or situations or the like, those powers cannot be exercised except in a certain territorial location in the state, so that its ouster in that territory could not be of any real interest to other sections of the state. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

Incapacity of district attorney to institute quo warranto on behalf of the state in matters of state-wide interest is a defect which goes to the very power and jurisdiction of the court to act at all in the premises, and therefore it is immaterial whether the defect is specifically challenged by demurrer. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

It is not within the province of the trial court to limit the scope of its judgment in quo warranto proceedings on account of

the fact that the state had purported to appear through one legal representative (district attorney) rather than another (attorney general). *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

State is not bound by appearance in court on its behalf by an unauthorized official to any greater extent than an individual would be bound by the act of a person assuming to sue on his behalf without authority. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

Quo warranto proceedings brought by an unauthorized officer on behalf of the state should be dismissed without prejudice to right of the state to sue by its proper officer. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

Ousting of a theater corporation, authorized to do business throughout the state, from the exercise of its rights and franchises anywhere in the state is a subject of state-wide interest, for which quo warranto may be brought only by the attorney general and not by a district attorney, although the particular ground of ouster is the violation of the Sunday law by theaters operated by the corporation within the district, and this is true even though this section [Code 1942, § 1121] expressly provides that quo warranto may be "by the attorney general or a district attorney," since this is not to be so construed as to disrupt the natural division of authority between the attorney general and district attorneys, under which the former takes care of state matters and the latter take care of local matters, especially in view of the confusion which would necessarily follow from leaving matters of state interest in the hands of the various district attorneys. *Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y*, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

Under this section [Code 1942, § 1121] a municipality which created the office may be the relator in a quo warranto proceeding instituted by the district attor-

ney to oust an intruder who has usurped the office of policeman. *Beverly v. City of Hattiesburg*, 83 Miss. 621, 36 So. 74 (1904).

### 3. Jurisdiction and venue.

Circuit Court had jurisdiction to decide suit challenging powers being exercised by Lieutenant Governor where there was no exclusive vesting in another court of jurisdiction to hear and decide such claim, and due to nature of relief sought, i.e., that Lieutenant Governor's exercise of certain powers in Senate be declared unconstitutional and he be debarred from exercising such authority, such case was akin to those historically within circuit court jurisdiction, to-wit: quo warranto proceedings. *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987).

Equity court held without jurisdiction to try, by injunction, right to office of county supervisor. *Yates v. Summers*, 177 Miss. 252, 170 So. 827 (1936).

Suit to forfeit charter of domestic corporation must be brought in county of its domicile or in which it has a fixed place of business. *Most Worshipful Cuney Grand Lodge (Colored) A.F. & A.M. v. Knox*, 144 Miss. 628, 109 So. 866 (1926).

Where the board of election commissioners in a county having two judicial districts are in the habit of meeting at the courthouse in the second district for the performance of their duties, quo warranto proceedings may be instituted in that district, though the defendant resides in the other judicial district of the county. *State ex rel. Fontaine v. Anderson*, 133 Miss. 533, 97 So. 884 (1923).

The information in quo warranto against an alleged officer should be filed in the circuit court of the county where the duties of the office are performed. *State ex rel. Fontaine v. Anderson*, 133 Miss. 533, 97 So. 884 (1923).

A quo warranto proceeding instituted by the state on the relation of the attorney-general, under § 4 of the act of March 12, 1900 (Laws 1900 p. 125), to forfeit the charter of a corporation belonging to a trust, is a civil and not a criminal proceeding, and the venue of such a suit is regulated by this section [Code 1942, § 1121]. *State ex rel. Att'y Gen. v. Mississippi Cot-*



ton Oil Co., 79 Miss. 203, 30 So. 609 (1901).

## ATTORNEY GENERAL OPINIONS

The Attorney General, the District Attorney, and the person who claims the right to a particular office are authorized to bring quo warranto against the incumbent. Ops. Atty. Gen. 1931-33, p. 51.

When there are two contestants for an office, and one of them is in possession of such office, then the other contestant can, and should, institute the necessary legal proceedings to try his rights to the office. Ops. Atty. Gen. 1931-33, p. 51.

When it is alleged that a county or county district officer is ineligible, disqualified, or for any reason is holding said office unlawfully, then it is the paramount duty of the District Attorney of the district where the person is located to make the necessary investigation and if in his judgment the facts warrant that proceedings be instituted to oust such officer, then such District Attorney should proceed to do so. Ops. Atty. Gen. 1931-33, p. 51.

In the event such proceeding is taken and an appeal is prosecuted by either

party to the Supreme Court, then the Attorney General would represent the State in the Supreme Court. Ops. Atty. Gen. 1931-33, p. 51.

In the event such allegation is made against a state or state district officer, then it is the paramount duty of the Attorney General to make the necessary investigation and institute the proper proceedings. Ops. Atty. Gen. 1931-33, p. 51.

The law authorizes the Attorney General, as well as the District Attorneys to proceed in all cases. However, it was not contemplated by the Legislature that the Attorney General would institute the proceedings against county or county district officers. This is especially true when ouster is sought on some technical ineligibility to the person in office. Ops. Atty. Gen. 1931-33, p. 51.

It is in exceptional cases only that the Attorney General will interfere in reference to county and county district officers. Ops. Atty. Gen. 1931-33, p. 51.

## RESEARCH REFERENCES

**ALR.** Propriety of default judgment against defendant, without introduction of evidence, in quo warranto proceeding. 92 A.L.R.2d 1121.

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto §§ 47, 68-78.

Complaints and informations, 21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Forms 41 et seq.

Complaints and information, 16 Am. Jur. Pl & Pr Forms, Quo Warranto, Forms 16:1011-16:1031.

**CJS.** 74 C.J.S., Quo Warranto §§ 52-65.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Civil Procedure. 57 Miss. L. J. 443, August, 1987.

## § 11-39-5. Trial of right to office.

In case the proceedings be on the relation of a person claiming to be entitled to an office, the ground of his claim shall be stated by proper averment, and judgment shall be rendered according to the rights of the respective claimants; and, if it be in favor of the relator, he shall be entitled to the office on qualifying according to law, and may recover of the defendant in an action all damages that may have accrued in consequence of withholding the office from him.

**SOURCES:** Codes, 1857, ch. 35, art. 18; 1871, § 1497; 1880, § 2587; 1892, § 3522; 1906, § 4019; Hemingway's 1917, § 3014; 1930, § 3055; 1942, § 1122.

**Cross References** — Trial of right to office in vacation, see §§ 11-39-51 to 11-39-61. Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Who may institute action.

#### 1. In general.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge from state by either district attorney or attorney general. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Private quo warranto action is required to be brought on behalf of state by person claiming entitlement to office which puts burden on plaintiff to establish entitlement to office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Relator in private writ of quo warranto must stand on strength of his entitlement to office as opposed to weaknesses of person alleged as not properly holding office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

#### 2. Who may institute action.

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when petitioner has been elected to said office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Voter bringing quo warranto action had incorrectly filed private rather than public action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as voter did not claim entitlement to chancellor position. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

As elected chancellor had not yet taken office and was not in possession of or exercising any function of office of chancellor at time of private action of quo warranto challenging his qualifications, claim was not ripe for private action of quo warranto. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

A chancery clerk was entitled to bring an original action in the circuit court, in the nature of quo warranto, under §§ 11-39-1 and 11-39-5 as supplanted by the rules of civil procedure, for reinstatement by the county board of supervisors to the posts of clerk of the board of supervisors and county auditor. *Barlow v. Weathersby*, 597 So. 2d 1288 (Miss. 1992).

In quo warranto proceedings to try title to public office where State is relator, instead of another individual claimant of



the office, the burden is on respondent to prove his right or title to the office, hence there was no error by a trial court in refusing an instruction which sought to place burden of proof on relator in the instant case. *Jones v. State ex rel. McFarland*, 207 Miss. 208, 42 So. 2d 123 (1949).

Town marshal held properly removed from office as result of quo warranto proceedings, where he failed to show residence in town as required by §§ 241, 250 of Constitution, and Code of 1942 § 3762. *Jones v. State ex rel. McFarland*, 207 Miss. 208, 42 So. 2d 123 (1949).

Equity court held without jurisdiction to try, by injunction, right to office of county supervisor. *Yates v. Summers*, 177 Miss. 252, 170 So. 827 (1936).

Appointment of the defendants to the offices of aldermen and members of the board of school trustees by the governor, and the performance of the duties, constituted them "de facto officers," and the only remedy for complainants claiming title to the offices is by quo warranto. *Town of Sumner v. Henderson*, 116 Miss. 64, 76 So. 829 (1917).

In an action of quo warranto to decide which of two persons received a majority of the legal votes cast at election after plaintiff's evidence is closed, defendant is

entitled to amend his pleadings and offer evidence to show that votes were cast for the relator by persons who were not qualified electors. *Kelly v. State*, 79 Miss. 168, 30 So. 49 (1901) but see *Wade v. Williams*, 517 So. 2d 573 (Miss. 1987).

A quo warranto proceeding cannot be heard by a special judge under appointment by the governor, as Code 1892, § 922, providing for the appointment of special judges, does not apply. *Kelly v. State*, 79 Miss. 168, 30 So. 49 (1901) but see *Wade v. Williams*, 517 So. 2d 573 (Miss. 1987).

An information which shows that the election officers had declared the defendant elected and that he had qualified and entered upon his duties, but questions his right to the office because of irregularities or illegalities in the election is demurrable if it does not aver the facts; the statement of the pleaders' conclusion is not sufficient. *Conner v. McLaurin ex rel. Jackson*, 77 Miss. 373, 27 So. 594 (1900).

It is unnecessary for a relator to have taken oath and executed bond or have offered to do so on or before the beginning of the term to maintain by quo warranto a contest for a municipal office with one usurping same. *State ex rel. Bourgeois v. Laizer*, 77 Miss. 146, 25 So. 153 (1899).

## RESEARCH REFERENCES

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto § 122.

**CJS.** 74 C.J.S., Quo Warranto §§ 86, 87.

### § 11-39-7. Form of complaint against corporation.

For convenience and certainty, the complaint, if against a corporation, shall set out briefly the causes of forfeiture. It may be in the form following, to-wit:

"State of Mississippi, Circuit Court, \_\_\_\_\_ term,  
County of \_\_\_\_\_. A.D. \_\_\_\_\_,

"The State of Mississippi, by A B, district attorney for the \_\_\_\_\_ judicial district of the state, of his own accord (or on the relation of C D, as the case may be) gives the court here to understand and be informed that the corporation of \_\_\_\_\_ has forfeited all right to exercise any of the franchises and privileges granted it in this, to-wit (set out the causes of forfeiture).

"Wherefore, the State of Mississippi, by said district attorney, prays judgment of forfeiture and ouster against said corporation."

And in all other cases the complaint shall be in form substantially the same as near as may be, conforming to the state of case.

**SOURCES:** Codes, 1857, ch. 35, art. 15; 1871, § 1494; 1880, § 2588; 1892, § 3523; 1906, § 4020; Hemingway's 1917, § 3015; 1930, § 3056; 1942, § 1123; Laws, 1991, ch. 573, § 74, eff from and after July 1, 1991.

## § 11-39-9. Form of complaint against individuals.

If the complaint be filed against persons exercising corporate franchises without authority, the following language may be used after the word "informed," to-wit:

"That certain persons (naming them) have for \_\_\_\_\_ months last past used, and still do use, the following liberties and franchises without lawful authority, to-wit: (set out the franchises), which said franchises and privileges the said \_\_\_\_\_ have usurped, and still do usurp.

"Wherefore the State of Mississippi, by said district attorney, prays that they may be debarred of such rights."

**SOURCES:** Codes, 1857, ch. 35, art. 17; 1871, § 1494; 1880, § 2590; 1892, § 3524; 1906, § 4021; Hemingway's 1917, § 3016; 1930, § 3057; 1942, § 1124; Laws, 1991, ch. 573, § 75, eff from and after July 1, 1991.

## § 11-39-11. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 35, art. 16; 1871, § 1496; 1880, § 2589; 1892, § 3525; 1906, § 4022; Hemingway's 1917, § 3017; 1930, § 3058; 1942, § 1125]

**Editor's Note** — Former § 11-39-11 related to defense to information in nature of quo warranto — how made.

## § 11-39-13. Summons.

After the complaint has been filed, summons shall be issued as required by the Mississippi Rules of Civil Procedure.

**SOURCES:** Codes 1857, ch. 35, art. 13; 1871, § 1495; 1880, § 2591; 1892, § 3526; 1906, § 4023; Hemingway's 1917, § 3018; 1930, § 3059; 1942, § 1126; Laws, 1991, ch. 573, § 76, eff from and after July 1, 1991.

**Cross References** — Duty of sheriff to keep process docket, see § 19-25-59. Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## RESEARCH REFERENCES

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto § 48.

21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Form 30 (summons in quo warranto).

**CJS.** 74 C.J.S., Quo Warranto § 40.

### § 11-39-15. Court or judge may make certain orders.

During the pendency of the action, the court, or judge in vacation, may make all proper orders for preventing damage or injury to the plaintiff before the case is decided.

**SOURCES:** Codes, 1880, § 2598; 1892, § 3527; 1906, § 4024; Hemingway's 1917, § 3019; 1930, § 3060; 1942, § 1127.

**Cross References** — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

### § 11-39-17. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[Codes, 1857, ch. 35, art. 14; 1871, § 1496; 1880, § 2592; 1892, § 3528; 1906, § 4025; Hemingway's 1917, § 3020; 1930, § 3061; 1942, § 1128]

**Editor's Note** — Former § 11-39-17 related to nature of proceedings and trial term.

### § 11-39-19. Judgments against defendants.

If it be found on the trial of an information that a corporation has forfeited its charter, judgment of ouster from the franchises shall be given, and that it be dissolved; and if it be found, on trial, that persons claiming to exercise a franchise are not entitled to the same, the judgment shall be that such persons be debarred and excluded from the use of the franchise; and in both cases the state shall recover costs. If judgment be against the defendant, finding that he has been exercising the functions of an office without authority, he shall be removed from office and debarred therefrom, and shall pay costs.

The court shall order the defendant to deliver over all records, books, and papers in his custody or under his control, belonging to the office, and may make and enforce all orders proper to carry its judgment into effect.

**SOURCES:** Codes, 1857, ch. 35, art. 19; 1871, §§ 1499, 1502; 1880, §§ 2593, 2594; 1892, § 3529; 1906, § 4026; Hemingway's 1917, § 3021; 1930, § 3062; 1942, § 1129.

**Cross References** — Cases in which appeals are returnable at any time, see § 11-3-3.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

In proceeding to remove district supervisor, court dismissing case improperly taxed costs against individuals, named as

relators, having no interest other than that common to all citizens. *State v. Henderson*, 166 Miss. 530, 146 So. 456 (1933).



## RESEARCH REFERENCES

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto §§ 111 et seq.  
 Judgment of ouster, 21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Forms 81-83, 97, 115.

**CJS.** 74 C.J.S., Quo Warranto §§ 84-88.

## § 11-39-21. Disobedience punishable.

Any person who refuses or knowingly neglects to obey any order of the court made as herein provided, shall be guilty of contempt of court, and shall be fined in any sum not exceeding Five Thousand Dollars (\$5,000.00), and imprisoned in the county jail until he comply with the order. He shall be further liable for damages resulting to any person on account of his refusal to obey.

**SOURCES:** Codes, 1871, § 1515; 1880, § 2595; 1892, § 3530; 1906, § 4027; Hemingway's 1917, § 3022; 1930, § 3063; 1942, § 1130.

**Cross References** — Punishment of contempt by courts generally, see § 9-1-17.

## § 11-39-23. Private person relator, liable for costs.

When an information is upon the relation of a private individual, it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs as plaintiffs are responsible in other cases.

**SOURCES:** Codes, 1871, § 1504; 1880, § 2596; 1892, § 3531; 1906, § 4028; Hemingway's 1917, § 3023; 1930, § 3064; 1942, § 1131.

**Cross References** — Costs for trial in vacation, see § 11-39-61.

Liability of person for costs of suit brought in his name, see § 11-53-15.

## RESEARCH REFERENCES

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto § 118.

**CJS.** 74 C.J.S., Quo Warranto § 85.

## § 11-39-25. Trustees to be appointed.

When judgment of forfeiture and ouster shall be rendered against any corporation or against any person pretending to exercise corporate franchises, the debtors to such corporation, or other body, shall not be thereby released from their debts and liabilities, and it shall be the duty of the judge of the court rendering the judgment to appoint one or more trustees to take charge of the books, evidences of debts, assets and property of such corporation or body pretending to exercise corporate franchises. Such trustees are invested with full power and authority to sue, in their own name, for and to collect all debts due to such corporation or body pretending to exercise corporate franchise, and to be sued in any court upon permission to sue being first obtained from the



chancery court, and, generally, to maintain any action, or to revive or have revived against them any suit or judgment for or against such corporation or other body. The proceeds of debts collected and property sold shall be applied by such trustees to the payment of the costs in the quo warranto proceedings and in payment of debts, under the direction of the court.

**SOURCES:** Codes, 1857, ch. 35, art. 22; 1871, §§ 1506, 1609; 1880, § 2599; 1892, § 3532; 1906, § 4029; Hemingway's 1917, § 3024; 1930, § 3065; 1942, § 1132; Laws, 1908, ch. 193.

**Cross References** — Rules for appointment of receivers, see §§ 11-5-151 et seq.  
 Proceedings against trusts and combines for forfeiture of charter and right to do business, see §§ 75-21-19 to 75-21-23.

### RESEARCH REFERENCES

**Am Jur.** 65 Am. Jur. 2d, Quo Warranto  
 § 115.

#### § 11-39-27. Bond of trustees.

Before they enter upon the discharge of their duties, the trustees shall execute bond in such sum as may be prescribed, and with such sureties as may be approved by the judge, payable to the state, and conditioned for the faithful discharge of their duties as trustees, which bond may be put in suit for a breach thereof; and the amount collected thereon shall constitute a fund for the benefit of creditors or stockholders, as other funds of the corporation.

**SOURCES:** Codes, 1857, ch. 35, art. 23; 1871, §§ 1507, 1508; 1880, § 2600; 1892, § 3533; 1906, § 4030; Hemingway's 1917, § 3025; 1930, § 3066; 1942, § 1133.

### RESEARCH REFERENCES

**Am Jur.** Bond or undertaking, 21 Am.  
 Jur. Pl & Pr Forms (Rev), Replevin, Forms  
 13, 14.

#### § 11-39-29. Property surrendered to trustees.

It shall be the duty of all persons having possession of property or evidences of debt belonging to any corporation, or persons pretending to exercise corporate franchises, against which or whom judgment of forfeiture shall have been rendered, to surrender and deliver the same to the trustees so appointed, and, in case of failure to do so, such trustees may maintain an action therefor.

**SOURCES:** Codes, 1857, ch. 35, art. 24; 1871, § 1510; 1880, § 2601; 1892, § 3534; 1906, § 4031; Hemingway's 1917, § 3026; 1930, § 3067; 1942, § 1134.

**§ 11-39-31. Trustees to return inventory to chancery court—vacancies filled—new bonds.**

It shall be the duty of the trustees, at the next succeeding term after their appointment of the chancery court of the county in which the quo warranto judgment was rendered, or at such other time as may be designated by the said chancery court or the chancellor, to return, under oath, to the court, a full and complete inventory of all evidences of debt, and property of every description, which may have come to their possession or knowledge as the property of the corporation or body pretending to exercise corporate franchises, and from time to time such further inventories as may be necessary, in case additional assets or property shall be discovered, which inventories shall be recorded by the clerk. The chancery court, or the chancellor in vacation, may remove trustees and appoint new ones, or fill vacancies in case of death or resignation, and may require new bonds of the trustees.

**SOURCES:** Codes, 1857, ch. 35, art. 25; 1871, § 1512; 1880, § 2602; 1892, § 3535; 1906, § 4032; Hemingway's 1917, § 3027; 1930, § 3068; 1942, § 1135.

**§ 11-39-33. Sales of property—proceedings—trustees not to buy.**

The chancery court, or chancellor in vacation, shall order the sale of the property, real and personal, in the same manner and on the same terms as such property of intestate decedents is sold, and like proceedings shall be had as far as applicable. It shall not be lawful for a trustee to become the purchaser of any property sold by him in that capacity, or by his cotrustees, either directly or indirectly, or to act as agent of any other person in making such purchase; and all purchases in violation of this provision shall be void.

**SOURCES:** Codes, 1857, ch. 35, arts. 22, 26; 1871, § 1511; 1880, §§ 2599, 2603; 1892, § 3536; 1906, § 4033; Hemingway's 1917, § 3028; 1930, § 3069; 1942, § 1136.

**Cross References** — Salability of property and franchise of corporation under judgment, see § 79-1-13.

**§ 11-39-35. Claims presented and audited—notice.**

The chancery court shall require all claims against the funds in the hands of the trustees to be presented and audited in such manner as shall be deemed proper. Notice shall be given to all persons holding such claims to present and have them audited in the same manner as such notice is given in the administration of estates, and all claims not presented and audited within twelve months after the last publication shall be forever barred.

**SOURCES:** Codes, 1880, § 2606; 1892, § 3537; 1906, § 4034; Hemingway's 1917, § 3029; 1930, § 3070; 1942, § 1137.

**Cross References** — Probate of claims, see § 91-7-149.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rules 1 et seq.

### § 11-39-37. Compensation of trustees and others.

The compensation of trustees and others shall be determined by the court, and allowed out of the effects of the corporation or other body, under the control of the court.

**SOURCES:** Codes, 1880, § 2605; 1892, § 3538; 1906, § 4035; Hemingway's 1917, § 3030; 1930, § 3071; 1942, § 1138.

### § 11-39-39. Report of trustees, and order of paying debts.

It shall be the duty of the trustees, at the first term of the court after the time for presenting claims has elapsed, to make a full and complete report of all claims presented and audited, at which time exception may be taken to the allowance or rejection of any claim, and, if sustained, the report may be corrected. When the report is settled, and the amount of indebtedness ascertained, the court shall order the trustees to pay the debts in the following order:

(a) The compensation to the trustees and others, and expenses incurred in settling the affairs of the corporation, including the payment of the costs in the quo warranto proceedings in the circuit court, and the costs in the chancery court.

(b) Debts due to the state or any county, city, town, or village for taxes or otherwise.

(c) A ratable distribution amongst creditors who have proved their claims, and had them allowed.

(d) The surplus, if any, shall be ratably distributed among the stockholders, according to their respective rights.

**SOURCES:** Codes, 1880, § 2606; 1892, § 3539; 1906, § 4036; Hemingway's 1917, § 3031; 1930, § 3072; 1942, § 1139.

## TRIAL OF RIGHT TO PUBLIC OFFICE IN VACATION

SEC.

11-39-51. Right to public office triable in vacation.

11-39-53 through 11-39-57. Repealed.

11-39-59. Fees of officers, jurors, and witnesses.

11-39-61. Costs in such cases.

### § 11-39-51. Right to public office triable in vacation.

A proceeding by quo warranto to try the right to any public office, may be tried and determined in vacation as well as in term time.



**SOURCES:** Codes, 1880, § 2607; 1892, § 3540; 1906, § 4037; Hemingway's 1917, § 3032; 1930, § 3073; 1942, § 1140.

**Cross References** — Trial of right to office generally, see § 11-39-5.

## JUDICIAL DECISIONS

### 1. In general.

A municipal office is a public office within the meaning of this section [Code

1942, § 1140]. Kelly v. State, 79 Miss. 168, 30 So. 49 (1901) but see Wade v. Williams, 517 So. 2d 573 (Miss. 1987).

## §§ 11-39-53 through 11-39-57. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-39-53. [Codes, 1880, § 2608; 1892, § 3541; 1906, § 4038; Hemingway's 1917, § 3033; 1930, § 3074; 1942, § 1141]

§ 11-39-55. [Codes, 1880, § 2609; 1892, § 3542; 1906, § 4039; Hemingway's 1917, § 3034; 1930, § 3075; 1942, § 1142]

§ 11-39-57. [Codes, 1880, § 2610; 1892, § 3543; 1906, § 4040; Hemingway's 1917, § 3035; 1930, § 3076; 1942, § 1143]

**Editor's Note** — Former § 11-39-53 related to how trial in vacation obtained.

Former § 11-39-55 related to record of proceedings — process to enforce judgment.

Former § 11-39-57 related to process for witnesses.

## § 11-39-59. Fees of officers, jurors, and witnesses.

The clerk, sheriff, jurors, and witnesses shall have the same allowance for attendance, to be taxed in the costs, as if their attendance was upon a circuit court, and shall be compellable to attend in like manner.

**SOURCES:** Codes, 1880, § 2611; 1892, § 3544; 1906, § 4041; Hemingway's 1917, § 3036; 1930, § 3077; 1942, § 1144.

**Cross References** — Fees for clerks of court generally, see §§ 25-7-9 to 25-7-13.

Fees for sheriffs and tax collectors generally, see §§ 25-7-19, 25-7-21.

Witnesses' fees generally, see § 25-7-47.

Jurors' fees generally, see § 25-7-61.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## § 11-39-61. Costs in such cases.

The judge, before making the order for trial in vacation or afterward, may impose such terms, and make such requirements as to costs and payment thereof or security therefor, as he thinks proper, and shall tax the costs of the case as he may deem just.

**SOURCES:** Codes, 1871, § 1504; 1880, § 2612; 1892, § 3545; 1906, § 4042; Hemingway's 1917, § 3037; 1930, § 3078; 1942, § 1145.



**Cross References** — Costs where information is upon relation of private individual, see § 11-39-61.

Liability for costs where suit is brought in name of state or person by another, see § 11-53-15.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Where a defendant by filing a crossaction or auxiliary action in the same case assumes the position of a complainant, he

may be required to post security for costs. *Martin v. McGraw*, 249 Miss. 334, 161 So. 2d 784 (1964), motion denied, 249 Miss. 351, 163 So. 2d 231 (1964).

## CHAPTER 41

### Mandamus; Prohibition

#### SEC.

- 11-41-1. In what cases a remedy and how obtained.
- 11-41-3. Filing of complaint.
- 11-41-5 through 11-41-17. Repealed.
- 11-41-19. Mandamus in certain cases triable in vacation.
- 11-41-21. Repealed.

#### § 11-41-1. In what cases a remedy and how obtained.

On the complaint of the state, by its Attorney General or a district attorney, in any matter affecting the public interest, or on the complaint of any private person who is interested, the judgment shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of law. All procedural aspects of this action shall be governed by the Mississippi Rules of Civil Procedure.

**SOURCES:** Codes, 1871, § 1517; 1880, § 2542; 1892, § 2846; 1906, § 3231; Hemingway's 1917, § 2533; 1930, § 2348; 1942, § 1109; Laws, 1991, ch. 573, § 77, eff from and after July 1, 1991.

**Cross References** — Issuance of remedial writs by judges of the supreme and circuit courts and chancellors, see § 9-1-19.

Compliance with provisions as to title to sixteenth section and lien lands, see § 29-3-9.

Enforcing orders of Tennessee river basin water pollution control commission, see § 49-17-71.

Enforcement of rights of bondholders of bridge and park commission, see § 55-7-51.

Mandamus proceedings in regard to agriculture and industry program bonds, see §§ 57-1-29, 57-3-21, 57-3-27.

Enforcement of county road sign provisions, see §§ 65-7-19, 65-7-21.

Enforcement of payment of toll bridge revenue bonds, see § 65-23-5.

Enforcement of rights of bondholders under Gulf of Mexico or Mississippi Sound project, see § 65-23-109.

Compelling county supervisors to comply with tick eradication statute, see § 69-15-315.

Enforcement of meat inspection law by mandamus, see § 75-35-315.

Enforcement of law as to dental service corporations, see § 83-43-31.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Application to supreme court for writ of mandamus to compel trial judge to render decision, see Miss. R. App. P. 15.

Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs, see Miss. R. App. P. 21.

## JUDICIAL DECISIONS

1. In general.
2. Existence of other remedy.
3. Who may petition.
4. Propriety of remedy.
5. —Discretionary matters.
6. —Moot questions.
7. —Election matters.
8. —Payment of claims.
9. —Tax matters.
10. —Bond issues.
11. —School matters.
12. —Miscellaneous cases.
13. Defenses.
14. Judgment.
15. Injunction against issuance.
16. Miscellaneous.

**1. In general.**

Petitions for mandamus requesting that circuit clerk and justice court clerk be directed to accept in forma pauperis filings were not properly before Supreme Court; petitions should have been filed with circuit court. *Ivy v. State*, 688 So. 2d 223 (Miss. 1997).

Writ of prohibition is proper procedural vehicle to vest court with jurisdiction to address and settle question of whether alleged trade secrets were proper matters for discovery. *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 75 A.L.R.4th 997, 2 U.S.P.Q.2d 1866 (Miss. 1987).

The writ of mandamus will not issue in every case even where there is a clear legal right, and where the circumstances make it unwise or inexpedient the court may refuse to issue the writ, especially when it is sought to enforce a private right. *Chatham v. Johnson*, 195 So. 2d 62 (Miss. 1967).

Mandamus is a purely personal action. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

Writ of mandamus is a discretionary writ and even in a case where an absolute legal right is shown, writ will be withheld whenever public interest would be adversely affected. *Board of Supvrs. v. Mississippi State Hwy. Comm'n*, 207 Miss. 839, 42 So. 2d 802 (1949).

Before a writ of mandamus may issue three essentials must exist: (1) a clear right in petitioner to relief sought, (2) a

legal duty on part of defendant to do the thing which petitioner seeks to compel, and (3) there must be an absence of another adequate remedy at law. *Board of Supvrs. v. Mississippi State Hwy. Comm'n*, 207 Miss. 839, 42 So. 2d 802 (1949).

Mandamus is a discretionary writ. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

A writ of mandamus will not be issued whenever public interest will be adversely affected, especially where only public political rights of those for whom petition is filed are asserted. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

The cause of action must exist at date of filing of petition for mandamus. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

The writ is never granted to take effect prospectively. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

A writ of mandamus will not issue unless there has been actual default in performance of duty. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

Demand for performance of act cannot be made before time has expired wherein officer is allowed to do the act. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

Mandamus would not issue, four months in advance of time for performance of duty, to compel secretary of state to disregard, in preparation of sample ballot, designations of candidates for Congress by districts on ground redistricting act was void. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

Writ of mandamus lies only to require performance of official duty which officer has refused to discharge. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476 (1931).

Mandamus is an extraordinary writ, and not to be resorted to where the purpose can otherwise reasonably be accomplished. *McHenry v. State*, 91 Miss. 562, 44 So. 831 (1907).

**2. Existence of other remedy.**

Where, following the entry of an order refusing a building permit for the construction of a building which would in all respects conform to the applicable laws,



ordinances, and regulations, the city authorities failed for some 60 days to sign or file a bill of exceptions, the result was an unreasonable and unwarranted delay in the issuance of the permit, effectively depriving the applicants of a plain, speedy, adequate remedy in the ordinary course of law; and a writ of mandamus was properly granted directing the issuance of the permit. *Thompson v. Mayfield*, 204 So. 2d 878 (Miss. 1967).

A bill for mandatory injunction directing board of veterinary examiners to issue a license to practice veterinary medicine, surgery and dentistry was the proper remedy to obtain review of the board's order denying application for license, since there was no adequate remedy at law either by certiorari or mandamus. *Board of Veterinary Exmrs. v. Sistrunk*, 218 Miss. 342, 67 So. 2d 378 (1953).

Where district attorney was serving three counties, he was not precluded from maintaining mandamus proceedings on behalf of one of such counties to compel motor vehicle comptroller to pay over certain funds to county out of gasoline tax collections in excess of the share which comptroller was willing to concede. *McCullen v. State ex rel. Alexander*, 217 Miss. 256, 63 So. 2d 856 (1953).

Right to appeal under Code 1942, §§ 1195, 1196, from refusal of board of supervisors to levy tax for school district, is not a "speedy remedy" within meaning of this section [Code 1942, § 1109], so as to bar issuance of writ of mandamus. *State ex rel. Chatham v. Board of Supvrs.*, 209 Miss. 79, 46 So. 2d 73 (1950).

Writ of mandamus should not be issued where there is plain, adequate and speedy remedy at law. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938); *State ex rel. Coleman v. Cameron*, 223 Miss. 50, 77 So. 2d 716 (1955); *Grenada County Sch. Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798 (1955), suggestion of error overruled, 224 Miss. 585, 81 So. 2d 694 (1955).

Mandamus will not lie where there is adequate remedy by appeal. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287 (1930).

### 3. Who may petition.

Resident and an association of concerned citizens lacked standing to pursue

the remedy of mandamus because they did not show that they had any interest in a county landfill under the "any-private-person-who-is-interested" provision of Miss. Code Ann. § 11-41-1, separate from or in excess of that of the general population of the county. *Bennett v. Bd. of Supervisors*, 987 So. 2d 984 (Miss. 2008).

Trial court properly granted council members' petition for a writ of mandamus directing a reelected mayor to resubmit department directors for approval to the council pursuant to Miss. Code Ann. § 21-8-23(2) where the council members had standing to seek a writ; the council members demonstrated that, by virtue of their position as the legislative check and balance on the executive power of the mayor, they had a separate interest or an interest in excess of the general public. *DuPree v. Carroll*, 967 So. 2d 27 (Miss. 2007).

Appellate court affirmed the denial of the writ of mandamus sought by the citizens after the trial court dismissed their petition because the citizens clearly did not have standing to pursue a mandamus action under Miss. Code Ann. § 11-41-1, because the citizens admitted that they did not suffer an injury separate and apart from that suffered by other citizens. *Aldridge v. West*, 929 So. 2d 298 (Miss. 2006).

Governor, suing in his capacity as Governor and Administrator of Medicaid Division to preclude attorney general from proceeding with suit, did not meet statutory requirements for seeking mandamus, which may be sought by Attorney General or district attorney. *In re Fordice*, 691 So. 2d 429 (Miss. 1997).

A private person did not have standing to seek a writ of mandamus under § 11-41-1 where he testified that he had no interest separate from or in excess of that of the general public. *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731 (Miss. 1992).

Although the writs of mandamus and prohibition ordinarily may be sought only by the Attorney General or a district attorney, relief may be available to a private citizen if he can show "an interest separate from or in excess of that of the general public". *Fondren v. State Tax Comm'n*, 350 So. 2d 1329 (Miss. 1977).

One state agency cannot obtain a writ of mandamus against another state agency



in its own right. *Board of Educ. v. Sigler*, 208 So. 2d 890 (Miss. 1968).

A petition for a writ of mandamus filed by a county board of education against the board of supervisors of that county to require the payment by the board of supervisors of funds earmarked for the use of the schools will be dismissed because the county board of education had no authority to compel the board of supervisors to act by issuance of a writ of mandamus. *Board of Educ. v. Sigler*, 208 So. 2d 890 (Miss. 1968).

A taxpayer sustaining no injury other than is common to all taxpayers from a failure to back-assess and collect certain income taxes may not sue to compel the state tax commission to do so. *Stietenroth v. Monaghan*, 237 Miss. 305, 114 So. 2d 754 (1959).

Where the statute provides that it shall be the duty of district attorney to appear in circuit court and prosecute for the state in his district all criminal prosecutions and civil cases in which the state or any county within his district may be interested, and where it also provides that if two or more counties are adversely interested, district attorney should not represent either, the statute is general and covers civil cases as a general class, whereas, a statute authorizing district attorney to petition for mandamus any matter affecting public interest is specific and constitutes exception to the general provision. *McCullen v. State ex rel. Alexander*, 217 Miss. 256, 63 So. 2d 856 (1953).

Mandamus is regulated by statute, and, in matters affecting public interest, action must be brought on petition of state by its attorney general or a district attorney. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

Prerequisite to commencement of mandamus suit against commissioner of highway safety patrol to compel him to enforce laws of state applicable to transportation, possession and sale of intoxicating liquor, is petition either of attorney general or district attorney, and private citizen cannot assert that right for himself and general public. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

Right to bring a mandamus action on behalf of Hancock County, to compel the

state highway commission to appraise and reimburse such county for its proportionate value of a bridge, connecting Hancock and Harrison Counties, which had been taken over by the commission, was not in the attorney general exclusively, but the district attorney of the judicial district in which Hancock County is located also had such right, and could maintain the action in Hinds County. *State ex rel. Cowan v. State Hwy. Comm'n*, 195 Miss. 657, 13 So. 2d 614 (1943).

The writ of mandamus is distinct from ordinary suits; it is a prerogative writ issued by the state through such representatives as it may impress with that power, and under this section [Code 1942, § 1109], suits involving the public interest are to be brought on the petition of the attorney general or a district attorney. *Hancock County v. State Hwy. Comm'n*, 188 Miss. 158, 193 So. 808 (1940).

This section [Code 1942, § 1109] does not authorize a county to bring an action of mandamus to compel the state highway commission to allow the county moneys expended in building a bridge, since mandamus affecting public interest can only be brought by the attorney general or by a district attorney under this section. *Hancock County v. State Hwy. Comm'n*, 188 Miss. 158, 193 So. 808 (1940).

#### 4. Propriety of remedy.

Mandamus is proper remedy to compel any inferior tribunal, corporation, board, officer, or person to do or not to do an act, performance or omission of which law specially enjoins as duty resulting from office, trust, or station. *Jacobs v. Bodie*, 208 Miss. 779, 45 So. 2d 587 (1950).

#### 5. —Discretionary matters.

Circuit court erred in issuing the writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary, and appeals from the justice court to the circuit court required a trial de novo, pursuant to Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to

remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error. *In re Chisolm*, 837 So. 2d 183 (Miss. 2003).

Mandamus would not lie with respect to effecting of proper conduct of coroner's inquest proceeding, such proceeding involving more than a merely ministerial act. *Chisolm v. Bozeman*, 336 So. 2d 1313 (Miss. 1976).

A trial judge must have control of his docket and should be accorded reasonable latitude with respect to it and a certain amount of judicial discretion in the setting, disposition, and continuance of cases, so that only in a case of the clearest abuse of such discretion would a circuit judge's actions with respect to the docket settings in his court be subjected to control by mandamus. *Boydston v. Perry*, 249 So. 2d 661 (Miss. 1971).

A writ of mandamus can compel an inferior tribunal to exercise its discretion but it cannot control the same. *Powell v. State Tax Comm'n*, 233 Miss. 185, 101 So. 2d 350 (1958).

Since the commissioner, in denying the applicant a permit to sell beer at retail, was not acting ministerially but in the exercise of discretion, the action of the trial judge in refusing to grant the writ of mandamus was affirmed. *Powell v. State Tax Comm'n*, 233 Miss. 185, 101 So. 2d 350 (1958).

Mandamus was not the proper remedy to obtain relief from the action of the board of disability and relief appeal, in denying benefits to a policeman's widow from a relief fund for firemen and policemen, where such board did not refuse to act but in the exercise of its discretion denied relief. *City of Clarksdale v. Harris*, 188 Miss. 806, 196 So. 647 (1940).

Statute providing that state auditor should issue warrants for fees of county officers in connection with lands sold to state for taxes after receiving land commissioner's calculations as to fees, if auditor should find fees correct, conferred upon auditor exercise of discretion and judgment in passing on fees, so that county officer was not entitled to mandamus to compel auditor to issue warrants

without first bringing suit. *Thomas v. Price*, 171 Miss. 450, 158 So. 206 (1934).

Mandamus will not lie to compel extension of municipal water system for connection to new addition over distance of 700 feet the matter being discretionary with city authorities. *City of Greenwood v. Provine*, 143 Miss. 42, 108 So. 284, 45 A.L.R. 824 (1926).

Act of insurance commission in licensing insurance companies to do business in this state are not reviewable by mandamus on the ground that the company's policy on its face violates statute, nor can mandamus to compel him to revoke such license for subsequent acts be sustained without proof dehors the policy itself. *Cole v. State*, 91 Miss. 628, 45 So. 11 (1907).

In approving or disapproving bonds of county officers, the president of the board of supervisors acts judicially, and however unjust or arbitrary his acts may be, they are not subject to revision by mandamus. *Shotwell v. Covington*, 69 Miss. 735, 12 So. 260 (1892).

Where a discretion is left in an inferior tribunal, the writ of mandamus can only compel it to act, but cannot control the discretion. *Madison County Court v. Alexander*, 1 Miss. (1 Walker) 523 (1832); *Board of Police v. Grant*, 17 Miss. (9 S. & M.) 77 (1847); *Swan v. Gray*, 44 Miss. 393 (1870); *Vicksburg v. Rainwater*, 47 Miss. 547 (1872); *Clayton v. McWilliams*, 49 Miss. 311 (1873); *State Bd. of Educ. v. West Point*, 50 Miss. 638 (1874); *Board of Supvrs. v. State*, 63 Miss. 135 (1885); *Greenwood v. Provine*, 143 Miss. 42, 108 So. 284, 45 A.L.R. 824 (1926); *Alex Loeb, Inc., v. Board of Trustees*, 171 Miss. 467, 158 So. 333 (1934); *Clarksdale v. Harris*, 188 Miss. 806, 196 So. 647 (1940).

## 6. —Moot questions.

Mandamus properly dismissed on question becoming moot. *State ex rel. Horton v. Lawrence*, 121 Miss. 338, 83 So. 532 (1920).

A petition for mandamus against officers for the performance of duties enjoined by the statute will be dismissed when the statute, pending an appeal by the defendants, is repealed in so far as the petitioner can claim any right thereunder. *McClurg v. Wineman*, 80 Miss. 73, 31 So. 537 (1901).



### 7. —Election matters.

The petitioners were not entitled to a writ of mandamus to require a city to call an election under Code 1942, § 7322-23, pursuant to the issuance of bonds for the purpose of carrying out an urban renewal project, where in their petition for the writ they did not allege and claim that they had an interest separate from or in excess of that of the general public or that they would suffer any special legal injury or personal damages apart from the body of citizens of the city as a whole. *Wilson v. City of Laurel*, 249 So. 2d 801 (Miss. 1971).

Mandamus did not lie to require county election commissioners to restore name erased from registration books on ground petitioner had become disqualified as elector. *Calvert v. Crosby*, 163 Miss. 177, 139 So. 608 (1932).

As to mandamus to compel mayor and board of aldermen to order an election. *Mayor of City of Jackson v. State*, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

Where commissioners of election reject an entire ballot box on the ground of illegal votes, mandamus will lie to compel them to reassemble and canvass and return the ballots. *State ex rel. Hudson v. Pigott*, 97 Miss. 599, 54 So. 257, Am. Ann. Cas. 1912C,1254 (1911).

Mandamus not maintainable in primary election contests. *State ex rel. Barbee v. Brown*, 90 Miss. 876, 44 So. 769 (1907).

Where a municipal charter requires the mayor and aldermen to appoint election commissioners, and after the close of the polls to ascertain the results in the presence of the mayor and at least one alderman, who, with the commissioners, shall certify the returns, the duty of the mayor to certify the returns is ministerial, and he may be compelled to do so by mandamus. *Bourgeois v. Fairchild*, 81 Miss. 708, 33 So. 495 (1903).

A writ of mandamus will not lie for the purpose of inquiring into the qualifications of electors, or the legality of an election as affected by matters not apparent on the face of the returns. *State ex rel. Att'y Gen. v. Board of Supvrs.*, 91 Miss. 582, 3 So. 143 (1887).

### 8. —Payment of claims.

Order of board of supervisors allowing claim, not act of clerk issuing warrant, must be foundation of mandamus proceeding against board to compel payment of warrant. *Tullos v. Board of Supvrs.*, 208 Miss. 705, 45 So. 2d 349 (1950).

Petition for mandamus against county board of supervisors to compel payment of warrants is properly dismissed when neither petition nor proof showed steps necessary to make valid contracts had been taken, and orders of board allowing accounts neither showed nor recited jurisdictional facts, there was nothing in orders to show existence of contracts between board and creditor, nothing in records showing call for bids, submission of bids, or making of contracts, and no statement or bills in record showed existence of these accounts. *Tullos v. Board of Supvrs.*, 208 Miss. 705, 45 So. 2d 349 (1950).

Formal written demand upon the state highway commission was not prerequisite to relief in mandamus to compel the commission to appraise and reimburse county for the value of paving on state highway, pursuant to Code 1942, § 8036, where formal written notice would not have availed the county. *State Hwy. Comm'n v. McGowen ex rel. Hinds County*, 198 Miss. 853, 23 So. 2d 893 (1945), error overruled, 198 Miss. 889, 24 So. 2d 330 (1946).

Order of county board of supervisors allowing three claims each for less than \$250 although their total exceeded that amount, was sufficient on its face to constitute a valid and binding judgment, the payment of which the holders thereof were entitled to compel by mandamus, although the order did not recite jurisdictional facts reciting competitive bids. *Clayton v. Paden*, 198 Miss. 163, 21 So. 2d 823 (1945).

The chancery court was without jurisdiction to grant a mandatory writ of injunction to a county to compel the state highway commission to appraise the pavement of sections of state highway built at local expense and to pay the county therefor, as provided by statute, mandamus being the proper remedy for the county to pursue. *Madison County v. Mississippi State Hwy. Comm'n*, 191 Miss. 192, 198 So. 284 (1940).

That governor as chairman of building commission could not be compelled to sign certificate for claimant's warrant held not to deprive claimant of right to have mandamus issued against secretary of commission. *Trotter v. Frank P. Gates & Co.*, 162 Miss. 569, 139 So. 843 (1932).

Mandamus will not lie to compel county to pay salary of prosecuting attorney. *Board of Supvrs. v. State*, 134 Miss. 180, 98 So. 593 (1924).

Mandamus will not lie to compel supervisors to issue warrant in payment of claim for refund of taxes allowed by auditor and attorney-general. *Pearl River County v. Lacey Lumber Co.*, 128 Miss. 885, 91 So. 572 (1922).

County board of supervisors may be compelled by mandamus to pay judgment from its general fund or to levy a tax. *Town of Crenshaw v. Jackson*, 122 Miss. 711, 84 So. 912 (1920).

Mandamus proper remedy to compel clerk of separate district to issue warrant to pay compensation to school superintendent. *Ladner v. Talbert*, 121 Miss. 592, 83 So. 748 (1920).

Constitution 1890 § 212 fixing the rate of interest to be paid by the state upon trust funds held by it for educational purposes and the dates for the distribution of same, is not self-executing, and the courts will not compel the auditor to issue a warrant in payment of the state's obligation thereunder in the absence of legislative appropriation for that purpose. *State ex rel. Barron v. Cole*, 81 Miss. 174, 32 So. 314 (1902).

The board of supervisors is without discretion to reject an allowance by the circuit court to its clerk, under Code 1892, § 1995 (Code 1906, § 2171), and may be compelled by mandamus to provide for its payment. *Chatters v. Coahoma County*, 73 Miss. 351, 19 So. 107 (1896).

The writ should be allowed as to the items of an account that the board has illegally rejected, although the account may contain another item that it has legally rejected, in view of the strongly remedial nature of the statute assimilating mandamus proceedings to ordinary actions at law. *Chatters v. Coahoma County*, 73 Miss. 351, 19 So. 107 (1896).

The equitable assignee of a part of a claim against a county cannot by manda-

mus compel the supervisors to make an allowance and issue a warrant in his favor. *Foote v. Board of Supvrs.*, 67 Miss. 156, 6 So. 612 (1889).

Mandamus is the proper remedy to enforce the payment of valid claims against towns which have been audited and allowed. *Kelly v. Wimberly*, 61 Miss. 548 (1884).

Mandamus is the proper remedy to enforce the payment of valid claims against counties which have been audited and allowed. *Beard v. Board of Supvrs.*, 51 Miss. 542 (1875); *Board of Supvrs. v. Arrghi*, 51 Miss. 667 (1875); *Klein v. Board of Supvrs.*, 54 Miss. 254 (1876); *Honea v. Board of Supvrs.*, 63 Miss. 171 (1885); *Taylor v. Board of Supvrs.*, 70 Miss. 87, 12 So. 210 (1892).

#### 9. —Tax matters.

Mandamus will lie to require drainage commissioners to assemble and act in matter of making additional assessments. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476 (1931).

Drainage commissioners cannot be required by mandamus to make such assessment of benefits as will be sufficient to pay indebtedness due contractor. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476 (1931).

Mandamus proper remedy to compel board of supervisors to increase valuations as ordered by tax commission. *Taylor v. State*, 121 Miss. 771, 83 So. 810 (1920).

Mandamus cannot be issued to compel levy of tax beyond statutory limit. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579 (1910), error overruled, 97 Miss. 89, 52 So. 692 (1910).

Mandamus will lie to compel tax collector to collect assessment on property that has escaped taxation though some of the assessments may be barred. *Adams v. City of Clarksdale*, 95 Miss. 88, 48 So. 242 (1909).

Mandamus will lie to compel the assessor to assess property that has escaped taxation for former years. *State ex rel. Dist. Att'y v. Simmons*, 70 Miss. 485, 12 So. 477 (1893).

#### 10. —Bond issues.

Mandamus will lie to compel board of supervisors to issue bonds for purpose of



acquiring land for constructing and operating a community hospital after election in favor thereof was had pursuant to the provisions of Laws 1944, ch 277, as amended by Laws 1946, ch 412 (Code 1942, §§ 7129-50 et seq.), notwithstanding subsequent order of board rescinding its action, since a validating act eliminated any irregularity in the proceeding with respect to the election. *Board of Supvrs. v. State ex rel. Patterson*, 206 Miss. 443, 40 So. 2d 273 (1949).

Company selling goods to county held not entitled to mandatory order requiring board of supervisors to issue bonds to pay claim, where seller did not show it would be entitled as matter of right to have clerk issue warrant if money were available to pay it. *AMOCO v. Bishop*, 163 Miss. 249, 141 So. 271 (1932).

Mandamus proper remedy to enforce ministerial act of board of supervisors in issuing road district bonds. *Board of Supvrs. v. Dean*, 120 Miss. 334, 82 So. 257 (1919).

Mandamus will not lie to compel supervisors to issue bonds for roads. *Robinson v. Board of Supvrs.*, 105 Miss. 90, 62 So. 3 (1913).

### 11. —School matters.

A petition for a writ of mandamus filed by a county board of education against the board of supervisors of funds earmarked for the use of the schools will be dismissed because the county board of education had no authority to compel the board of supervisors to act by issuance of a writ of mandamus. *Board of Educ. v. Sigler*, 208 So. 2d 890 (Miss. 1968).

A writ of mandamus was properly refused in action by school principal against county superintendent of education, to which county board of education was not a party, to require payment of principal's salary for a period of time during which he was required by order of the board to take a leave of absence, for the board alone has control of school funds, and to have granted writ would have left superintendent in precarious position and subjected him to possible further litigation. *Chatham v. Johnson*, 195 So. 2d 62 (Miss. 1967).

Where the members of a board have exercised their discretion as to whether or

not they should risk incurring court costs and the expenditure of funds for attorneys' fees in connection with a suit to require a contractor to carry out the terms for construction of a high school and to make good on defects therein, their discretion cannot be controlled by a mandamus, nor can they be required to act in a prescribed manner to obtain relief on account of the defects complained of. *State ex rel. Coleman v. Cameron*, 223 Miss. 50, 77 So. 2d 716 (1955).

Mayor could not be compelled to execute and deliver a warrant, upon requisition by board of trustees, on maintenance fund in municipal separate school district for the payment of an installment due on building contract for the construction of a gymnasium and vocational training building instead of against a bond and building fund containing ample funds for that purpose. *Williams v. State ex rel. Att'y Gen.*, 209 Miss. 251, 46 So. 2d 591 (1950).

Order of county school board detaching territory of outlying school district and adding it to another district in adjacent county without concurrent action by school board of other county was ineffectual as ground for refusal of board of supervisors to continue annual tax levy for the school district and to constitute a defense to mandamus proceedings to compel the board of supervisors to levy such tax. *State ex rel. Chatham v. Board of Supvrs.*, 209 Miss. 79, 46 So. 2d 73 (1950).

Where school tax was originally ordered on petition of a majority of the electors of school district, the board of supervisors was under a duty to continue the tax for successive years so long as the school district is maintained unless changed by petition of a majority of the electors of the district, and mandamus will lie at the suit of the district attorney to compel the board to levy such tax upon their neglect or refusal. *State ex rel. Chatham v. Board of Supvrs.*, 209 Miss. 79, 46 So. 2d 73 (1950).

Mandamus will lie against trustees of consolidated school district to issue trustee order for payment of balance due under contract to build auditorium for total cost price set out in accepted bid, since simple mathematical process of subtraction of sum of payments made demon-

strates amount due, and no judicial attributes or exercise of discretion is involved. *Jacobs v. Bodie*, 208 Miss. 779, 45 So. 2d 587 (1950).

Under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district, board of supervisors may issue bonds for such consolidated school district for purposes therein set out, it becomes mere ministerial duty of board of supervisors to issue bonds for consolidated school district as petitioned for, performance of which duty can be compelled by mandamus, when all jurisdictional facts have been affirmatively adjudicated by board, or by circuit court upon appeal from order of board on bill of exceptions, to be present. *Board of Supvrs. v. State ex rel. Crisler*, 205 Miss. 43, 38 So. 2d 314 (1949).

Under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district, board of supervisors may issue bonds for such consolidated school district for purposes therein set out, it is judicial function of board to decide question of whether or not majority of qualified electors of school district have petitioned for issuance of bonds, to determine whether amount petitioned for will exceed any statutory limitation thereon, and to determine whether or not bonds are to be issued for purposes authorized by law and this judicial function of board cannot be controlled by writ of mandamus. *Board of Supvrs. v. State ex rel. Crisler*, 205 Miss. 43, 38 So. 2d 314 (1949).

When board of supervisors, acting under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district, board may issue bonds for such district for purposes therein set out, rejects such petition for reasons it deems sufficient, or for no reason at all, without adjudicating necessary jurisdictional facts to exist, remedy of petitioners is appeal to circuit court under Code 1942, § 1195, and not writ of mandamus under this section [Code 1942, § 1109], on which appeal petitioners can obtain in circuit court adjudication of all jurisdictional facts which are alleged to have existed by having embodied such facts in bill of exceptions. *Board of Supvrs.*

*v. State ex rel. Crisler*, 205 Miss. 43, 38 So. 2d 314 (1949).

Mandamus proper remedy to require superintendent to contract with qualified teacher selected by trustees of district. *State ex rel. Cowan v. Morgan*, 141 Miss. 585, 106 So. 820 (1926).

Mandamus will lie to compel school trustees to receive children wrongfully excluded from school. *Clark v. Board of Trustees*, 117 Miss. 234, 78 So. 145 (1918).

A public schoolteacher duly licensed to teach has a valuable right, the loss of which cannot be compensated in damages, and for the protection of which he is entitled to a mandamus. *Brown v. Owen*, 75 Miss. 319, 23 So. 35 (1898).

## 12. —Miscellaneous cases.

Petition for writ of prohibition was denied where discovery of alleged trade secrets was sought, although issuance of protective order concerning disclosure of alleged trade secrets was found to be appropriate. *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 75 A.L.R.4th 997, 2 U.S.P.Q.2d 1866 (Miss. 1987).

Where the charges made by the game and fish commission to support the discharge of a game warden were not sufficient to comply with the statute, the action of the trial court in a mandamus action in entering judgment reinstating him to his position was not contrary to the overwhelming weight of the law and evidence. *Vinzant v. Poole*, 185 So. 2d 919 (Miss. 1966).

No relief through mandamus can be granted against public officers to compel them to perform their duties generally, but petition for mandamus against public officers must charge them with failure to perform specific duty. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicile, where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).



Mandamus is a proper remedy to enforce stockholder's right to inspect the books of the corporation. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424 (1944).

Stockholder of domestic insurance corporation was entitled to mandamus to compel inspection of books and records of corporations, upon petition alleging that purpose of such request was "in order to ascertain and know how the affairs of the company are conducted and whether or not the capital of which he has contributed a share is being prudently and properly employed, and in order that he may protect the business and interest of said corporation and his interest as such stockholder," unless the executive officers of the corporation plead and prove as an affirmative defense that the stockholder is actuated by bad motives or that the inspection is not desired in order to obtain information germane to his interest as stockholder, but is for speculative purposes or to gratify idle curiosity, or out of spirit of hostility to the welfare of the corporation. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424 (1944).

Action in mandamus by attorney general to compel board of supervisors to repair a bridge on highway No. 7 could not be maintained where there was no allegation that the board had failed to provide and maintain a bridge adequate for travel in lieu of the collapsed bridge, and the court had no power or authority to tell the board of supervisors in specific terms what kind of a bridge it should maintain at the location in question. *State ex rel. Att'y Gen. v. Board of Supvrs.*, 196 Miss. 806, 17 So. 2d 433 (1944).

Mandamus was proper remedy to compel city officials to comply with statute providing for retirement benefits for firemen and policemen. *Mayor & Aldermen of Vicksburg v. Crichlow*, 196 Miss. 259, 16 So. 2d 749 (1944).

A bank was entitled to maintain mandamus action against a corporation to compel it to issue a new certificate of stock in exchange for the original certificate which the original stockholder had indorsed in blank and delivered to the bank, notwithstanding that the pleading showed that the stock was claimed by a third person who held a certificate thereto

pursuant to the request of the administrator of the original stockholder and that the original certificate was lost or destroyed. *Jackson Opera House Co. v. Cox*, 188 Miss. 237, 192 So. 293 (1939).

Mandamus will not lie when act is only done in case another person approves thereof. *Wood v. State*, 169 Miss. 790, 142 So. 747 (1932).

Writ of mandamus will not be issued to direct inferior tribunal to decide issue of fact in particular way, when law has invested tribunal with original jurisdiction to decide question. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287 (1930).

Where ordinance designated property as residential property, and question was doubtful, court would not interfere by mandamus to compel issuance of building permit. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287 (1930).

Mandamus will lie to compel purchaser of property and franchises of electric lighting plant to operate the plant for the benefit of the public. *State ex rel. Howie v. Benson*, 108 Miss. 779, 67 So. 214 (1915).

Mandamus will not lie to compel street railway company to operate cars on a portion of track abandoned and ordered removed by the board of supervisors as a nuisance. *Wright v. Edwards Hotel & City Ry.*, 101 Miss. 470, 58 So. 332 (1912).

Mandamus is maintainable against city officers. *Adams v. City of Clarksdale*, 95 Miss. 88, 48 So. 242 (1909).

Mandamus will lie to compel board of aldermen to expunge void act from its records. *Adams v. City of Clarksdale*, 95 Miss. 88, 48 So. 242 (1909).

A contractor for public work cannot mandamus the board of supervisors to have the work inspected and approved, under Code 1892, § 342, the section being alone for the security of the county. *Young v. Leflore County*, 81 Miss. 466, 33 So. 410 (1903).

Mandamus lies to compel a board of supervisors to perform the duty imposed by Code 1892, § 2061 (Code 1906, § 2240), as to jointly building and maintaining a fence at or near the county line to prevent stock straying from a county in which the stock law has not been adopted into an adjoining county where it is in

force. Board of Supvrs. v. State, 70 Miss. 769, 12 So. 904 (1893); Montgomery County v. State, 71 Miss. 153, 15 So. 28 (1893).

Officers and tribunals have no right to refuse to enforce a statute because it may be thought unwise; and they may be forced by mandamus to act. Board of Supvrs. v. State, 63 Miss. 135 (1885).

The governor cannot be compelled by mandamus to perform any act. Vicksburg & M.R.R. v. Lowry, 61 Miss. 102 (1883); Wood v. State, 169 Miss. 790, 142 So. 747 (1932).

A judge may be compelled by mandamus to sign a bill of exceptions. Williams v. Ramsey, 52 Miss. 851 (1876).

### 13. Defenses.

Where the game and fish commission was in no way adversely affected by the plaintiff's delay of seven months in filing a mandamus action for reinstatement to the position from which he had been unlawfully discharged, and there was no evidence of laches on plaintiff's part, the judgment of the lower court reinstating the plaintiff was affirmed. Cannada v. Marlar, 185 So. 2d 649 (Miss. 1966).

It is no defense in a mandamus suit by stockholder of a domestic insurance corporation to compel inspection of the books and records of the corporation that, if one stockholder is given that right, all the stockholders can demand the same right, thereby interrupting the orderly conduct of the business of the corporation. Sanders v. Neely, 197 Miss. 66, 19 So. 2d 424 (1944).

It was no defense in mandamus suit by stockholder of domestic insurance corporation to compel the officers thereof to permit inspection of the books and records of the corporation, that the officers of the corporation refused to permit such inspection pursuant to interpretation of insurance commissioner, based upon erroneous advice obtained from the state's legal department that the stockholder's common-law right of inspection had been abrogated by the insurance laws. Sanders v. Neely, 197 Miss. 66, 19 So. 2d 424 (1944).

The unconstitutionality of the statute creating the duty the performance of which is sought is an available defense.

Toombs v. Sharkey, 140 Miss. 676, 106 So. 273 (1925).

No defense to mandamus to compel county to pay a valid claim, that officers in charge of funds have illegally used them to pay other claims. Hebron Bank v. Lawrence County, 109 Miss. 397, 69 So. 209 (1915).

It is no defense to a mandamus to compel a county which has not adopted the stock law to build half of a fence between it and an adjoining county in which the law has been declared in force, or to pay half the expense of erecting such fence, to plead the invalidity of the election in the other county. Montgomery County v. State, 71 Miss. 153, 15 So. 28 (1893).

Nor is it an answer that the other county has already built the larger part of the fence, and it is no objection to the form of a judgment that it is in the alternative, commanding defendant to join in defraying the expense, or to erect half the fence. Montgomery County v. State, 71 Miss. 153, 15 So. 28 (1893).

It is no defense to an application for a mandamus to compel the issuance of a patent to state land that there is an outstanding title in a stranger. Myers v. State, 61 Miss. 138 (1883).

### 14. Judgment.

Although mandamus would issue to compel state highway commission to appraise and reimburse county for paving part of final location of state highway under Code 1942, § 8036 where the commission has on hand money for the appraisal and which is at its command for that purpose, the order will not include payment of the appraised amount where the commission does not have on hand, or within prospect without legislative aid, the sums needed to pay the appraisal along with similar demands of other counties. State Hwy. Comm'n v. McGowen ex rel. Hinds County, 198 Miss. 853, 23 So. 2d 893 (1945), error overruled, 198 Miss. 889, 24 So. 2d 330 (1946).

Judgment in mandamus action to compel city to comply with statute creating retirement benefits for firemen and policemen, was too broad in assuming to adjudicate merits of petitioner's claim, in that it included a prejudgment of matters within the discretion of the board, created



by the act, and as applying to duties imposed upon the city which could not be enforced by mandamus. *Mayor & Aldermen of Vicksburg v. Crichlow*, 196 Miss. 259, 16 So. 2d 749 (1944).

Judgment in mandamus to compel payment of prior judgment, not void because against mayor and board of aldermen where suit was against town. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579 (1910), error overruled, 97 Miss. 89, 52 So. 692 (1910).

Judgment in mandamus against town operates on the clerk and other officers thereof. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579 (1910), error overruled, 97 Miss. 89, 52 So. 692 (1910).

The circuit court cannot fix the time and place for the meeting of the eminent domain court, and in awarding mandamus it can only command the justice to reconvene the court and proceed according to law. *Sullivan v. Yazoo & Miss. V. Ry.*, 85 Miss. 649, 38 So. 33 (1905).

#### 15. Injunction against issuance.

Prosecution of mandamus proceedings can be restrained. *Humphreys County v. Cashin*, 136 Miss. 476, 101 So. 571 (1924).

County's suit to enjoin prosecution of mandamus or an alternative for judgment on indemnity bond held within jurisdiction of equity. *Humphreys County v. Cashin*, 136 Miss. 476, 101 So. 571 (1924).

#### 16. Miscellaneous.

A circuit court had jurisdiction to issue a writ of mandamus compelling a city to comply with an order of its civil service commission to reinstate an employee where the city had placed the employee in a different job position from the one she had previously held; placement of the employee in another position at the same salary was not "reinstatement" which entitles an employee to be reinstated in the position from which he or she was removed. *City of Jackson v. Martin*, 623 So. 2d 253 (Miss. 1993).

Equity will not grant a mandatory injunction to a county against the state highway commission on the ground that an adequate remedy by mandamus is unavailable, because the attorney general is

required by law to represent the commission in suits brought against it, and that, therefore, he is not available to represent the county in a proceeding by mandamus against the commission, where the complaint contained no allegation that a request was ever made that either the attorney general or any of the district attorneys of the state permit the use of their names to bring a mandamus proceeding on petition of the state on relation of such an officer, or that such a request would have been of no avail. *Madison County v. Mississippi State Hwy. Comm'n*, 191 Miss. 192, 198 So. 284 (1940).

Where petition for mandamus was sufficient to charge that commissioners of drainage district had failed to make annual assessment as required to do by statute and which was necessary as predicate to action by board of supervisors in making annual tax levy, neither board of supervisors nor tax collectors were necessary parties in mandamus proceeding to compel payment of bonds. *Johnson v. Bruce*, 177 Miss. 581, 171 So. 685 (1937).

Where jurisdiction of law court to remedy official inaction was not wholly of statutory origin, supreme court could not reverse decree in equity enjoining officials to make assessment because equity court was without jurisdiction. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476 (1931).

On appeal from judgment improperly refusing mandamus to compel commissioners of election to reassemble and canvass and return the ballots, the supreme court will not remand case but will render judgment requiring them to do so. *State ex rel. Hudson v. Pigott*, 97 Miss. 599, 54 So. 257, Am. Ann. Cas. 1912C, 1254 (1911).

In mandamus to compel supervisors to meet and declare the result of an election, no evidence is admissible except the report of the election commissioners. *McHenry v. State*, 91 Miss. 562, 44 So. 831 (1907).

In mandamus by a teacher to enforce her rights under contract, it is competent to show that a trustee, notwithstanding the irregularity in his election, had been recognized as trustee by the county superintendent and others. *Whitman v. Owen*, 76 Miss. 783, 25 So. 669 (1899).

## ATTORNEY GENERAL OPINIONS

If the Clerk of the Board of Supervisors believes the Board of Supervisors has issued an order directing the Clerk to act, when in good faith such action is believed by the Clerk to be improper or illegal, the appropriate action in such a case would be for the Clerk to seek judicial review of the board's order. Blackwell, April 27, 1995, A.G. Op. #95-0193.

Miss. Code Ann. § 21-8-19 requires a mayor who is unable to serve due to absence, disability or other causes to appoint a member of the city council to assume the

duties of the mayor. The appointee cannot be a city employee or a group of city employees, however a mayor may delegate certain powers to city employees in the ordinary course of business. When a mayor is unable to serve for sixty consecutive days, the city council is required to appoint one of its members as acting mayor and may be forced to do so by a writ of mandamus. McLemore, February 23, 2007, A.G. Op. #07-00087, 2007 Miss. AG LEXIS 32.

## RESEARCH REFERENCES

**ALR.** Mandamus as remedy to compel assertedly disqualified judge to rescue self or to certify his disqualification. 45 A.L.R.2d 937.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person. 92 A.L.R.2d 247.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case. 92 A.L.R.2d 306.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings. 95 A.L.R.2d 1229.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 A.L.R.3d 1360.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 A.L.R.3d 1656.

Mandamus, under 28 USCS § 1361, to compel prompt hearing in appeal from denial of Social Security disability benefits. 47 A.L.R. Fed. 929.

Mandamus as remedy to compel disqualification of federal judge. 56 A.L.R. Fed. 494.

**Am Jur.** 52 Am. Jur. 2d (Rev), Mandamus §§ 30 et seq., 40 et seq., 45 et seq., 58 et seq., 379 et seq.

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Forms 21 et seq. (application for writ).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 172.1 (Demurrer — To petition or application for writ of mandamus).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 191.1 (Order — Dismissing application for writ of mandamus — Multiple bases).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 205.1 (Alternative writ of mandamus — To prevent destruction of animals).

20 Am. Jur. Pl & Pr Forms (Rev), Prohibition, Forms 21 et seq. (petition or application for writ).

**CJS.** 55 C.J.S., Mandamus §§ 22 et seq., 59 et seq., 75 et seq., 124 et seq., 142 et seq., 171 et seq., 300-307.

## § 11-41-3. Filing of complaint.

The complaint shall be filed in the circuit court of the county in which the tribunal, corporation, board, officer, or person made defendant, or some one or more of them, shall reside or be found; but if the judge of that court be interested, the complaint may be filed in an adjoining circuit court district.

**SOURCES:** Codes, 1871, § 1518; 1880, § 2543; 1892, § 2847; 1906, § 3232; Hemingway's 1917, § 2534; 1930, § 2349; 1942, § 1110; Laws, 1991, ch. 573, § 78, eff from and after July 1, 1991.

**Cross References** — Jurisdiction of circuit court generally, see § 9-7-81.  
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Petitions for mandamus requesting that circuit clerk and justice court clerk be directed to accept in forma pauperis filings were not properly before Supreme Court; petitions should have been filed with circuit court. *Ivy v. State*, 688 So. 2d 223 (Miss. 1997).

In an action by a forensic psychiatric aide for reinstatement to his former position at a state hospital, the trial court erred in overruling defendant hospital's motion for a change of venue to the county in which it was domiciled and in which its director was a resident. *Mississippi State Hosp. v. Crawford*, 372 So. 2d 297 (Miss. 1979).

Where there were two suits pending against the superintendent of education for mandamus in connection with proposed lease of certain sixteenth section lands, one in the circuit court brought by the prospective lessees and the other in the Supreme Court brought by the county board of supervisors, the petition filed in the Supreme Court as an original suit would be dismissed because the appeal by the superintendent of education from the order of the board of supervisors directing the execution of the lease, pending before the Supreme Court, could not be cut off in this manner and, secondly, statutory jurisdiction of a mandamus suit against an official such as the superintendent of education was vested in the circuit court whose jurisdiction could not be circumvented by the filing of an independent and original case in the Supreme Court. *State ex rel. Herring v. Cox*, 285 So. 2d 462 (Miss. 1973).

In a case showing the clearest abuse of judicial discretion in a circuit judge's ac-

tions with respect to the docket headings in his court, original jurisdiction of the proceedings must necessarily rest with the Supreme Court, although factual questions might be heard by a specially designated trial judge appointed by the Supreme Court to act as the trier of fact. *Boydston v. Perry*, 249 So. 2d 661 (Miss. 1971).

Proper venue of mandamus proceeding against commissioner of Mississippi highway safety patrol is public officer's official domicile; that is, the City of Jackson in the First Judicial District of Hinds County. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicile where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

Venue of a mandamus action by Hancock County to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison Counties, which had been taken over by the highway commission and had become a part of United States Highway 90, was in Hinds County, where the state highway commission had its permanent office. *State ex rel. Cowan v. State Hwy. Comm'n*, 195 Miss. 657, 13 So. 2d 614 (1943).



## RESEARCH REFERENCES

**ALR.** Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

**Am Jur.** 52 Am. Jur. 2d, Mandamus § 370.

**CJS.** 55 C.J.S., Mandamus § 332-334.

### §§ 11-41-5 through 11-41-17. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-41-5. [Codes, 1871, § 1519; 1880, § 2544; 1892, § 2848; 1906, § 3233; Hemingway's 1917, § 2535; 1930, § 2350; 1942, § 1111]

§ 11-41-7. [Codes, 1871, § 1520; 1880, § 2545; 1892, § 2849; 1906, § 3234; Hemingway's 1917, § 2536; 1930, § 2351; 1942, § 1112; Am Laws, 1980, ch. 383, § 1]

§ 11-41-9. [Codes, 1871, § 1523; 1880, § 2546; 1892, § 2850; 1906, § 3235; Hemingway's 1917, § 2537; 1930, § 2352; 1942, § 1113]

§ 11-41-11. [Codes, 1871, § 1524; 1880, § 2547; 1892, § 2851; 1906, § 3236; Hemingway's 1917, § 2538; 1930, § 2353; 1942, § 1114]

§ 11-41-13. [Codes, 1880, § 2548; 1892, § 2852; 1906, § 3237; Hemingway's 1917, § 2539; 1930, § 2354; 1942, § 1115]

§ 11-41-15. [Codes 1871, § 1525; 1880, § 2549; 1892, § 2853; 1906, § 3238; Hemingway's 1917, § 2540; 1930, § 2355; 1942, § 1116]

§ 11-41-17. [Codes, 1871, § 1526; 1880, § 2550; 1892, § 2854; 1906, § 3239; Hemingway's 1917, § 2541; 1930, § 2356; 1942, § 1117]

**Editor's Note** — Former § 11-41-5 related to what petition shall contain and summons.

Former § 11-41-7 related to the pleadings and proceedings.

Former § 11-41-9 related to the writ — how served.

Former § 11-41-11 related to obedience to the writ enforced.

Former § 11-41-13 related to orders in vacation — appeal and supersedeas.

Former § 11-41-15 related to an act order done by another in certain cases.

Former § 11-41-17 related to temporary orders.

### § 11-41-19. Mandamus in certain cases triable in vacation.

A proceeding by mandamus may be tried and determined in termtime or in vacation; and, if tried in vacation, all the provisions of law relating to the trial and proceedings in vacation of information in the nature of quo warranto shall apply.

**SOURCES:** Codes, 1880, § 2551; 1892, § 2855; 1906, § 3240; Hemingway's 1917, § 2542; 1930, § 2357; 1942, § 1118; Laws, 1980, ch. 383, § 2, eff from and after July 1, 1980.

**Cross References** — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.



## JUDICIAL DECISIONS

**1. In general.**

In a mandamus proceeding, the supreme court on appeal may issue the writ. State ex rel. Patterson v. Board of Supvrs., 234 Miss. 26, 105 So. 2d 154 (1958).

Where a case was begun as a vacation matter under this section [Code 1942, § 1118], the petitioner had complied with the provisions of Code 1942, § 1141, and the supreme court had reversed the case with direction that the lower court issue a writ of mandamus as prayed for in the petition, the circuit judge, after the mandate went down, had power to issue the writ of mandamus in vacation. State ex rel. Patterson v. Board of Supvrs., 234 Miss. 26, 105 So. 2d 154 (1958).

Where the unsuccessful candidate brought mandamus proceeding against the circuit clerk for an order permitting the examination of ballot boxes and where the clerk filed a written agreement for a hearing during vacation, the holding of the hearing during vacation was not in error even though consent was not given by the successful candidate who intervened later in the hearing. Lopez v. Holleman, 219 Miss. 822, 69 So. 2d 903

(1954), overruled on other grounds, O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977).

A bill for mandatory injunction directing board of veterinary examiners to issue a license to practice veterinary medicine, surgery and dentistry was the proper remedy to obtain review of the board's order denying application for license, since there was no adequate remedy at law either by certiorari or mandamus. Board of Veterinary Exmrs. v. Sistrunk, 218 Miss. 342, 67 So. 2d 378 (1953).

Candidate is entitled to enforce right of examination of ballot boxes, conferred by Corrupt Practices Act, by mandamus to be heard and determined in vacation, since such right is one affecting public interest and not merely personal to the candidate seeking to exercise it. Sartin v. Barlow ex rel. Smith, 196 Miss. 159, 16 So. 2d 372 (1944).

Writ of prohibition issued in vacation without notice by clerk of circuit court, on order of circuit judge of another district, forbidding supervisors to conduct election, held void and not to affect election. Hamilton v. Long, 181 Miss. 627, 180 So. 615 (1938).

## RESEARCH REFERENCES

**Am Jur.** 52 Am. Jur. 2d, Mandamus § 476.

**CJS.** 55 C.J.S., Mandamus § 296.

**§ 11-41-21. Repealed.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 2856; 1906, § 3241; Hemingway's 1917, § 2543; 1930, § 2358; 1942, § 1119]

**Editor's Note** — Former § 11-41-21 related to the applicability of mandamus to writs of prohibition.

## CHAPTER 43

### Habeas Corpus

SEC.

- 11-43-1. To what cases the writ extends.
- 11-43-3. Chapter not to apply in certain cases — service of petition and writ on Attorney General in extradition cases.
- 11-43-5. Relator not discharged on account of defective proceedings.
- 11-43-7. By whom granted.
- 11-43-9. How obtained.
- 11-43-11. Refusal to grant writ.
- 11-43-13. Bail by the way may be required.
- 11-43-15. Writ issued by judge or clerk.
- 11-43-17. Form and service of writ.
- 11-43-19. Taking of person in certain cases.
- 11-43-21. May be served on Sunday.
- 11-43-23. Where and when returnable.
- 11-43-25. When person detaining another guilty of crime.
- 11-43-27. Production of the body.
- 11-43-29. What the return or answer shall contain.
- 11-43-31. Penalty for disobedience of the writ.
- 11-43-33. The trial.
- 11-43-35. Temporary orders.
- 11-43-37. Return not conclusive.
- 11-43-39. Witnesses subpoenaed—affidavits of.
- 11-43-41. Record of proceedings.
- 11-43-43. Conclusiveness of judgment.
- 11-43-45. Sheriff to attend trial.
- 11-43-47. Costs in certain cases, and security for.
- 11-43-49. Defaulting witness dealt with.
- 11-43-51. Liabilities and rights of witnesses.
- 11-43-53. Appeal in habeas corpus.
- 11-43-55. Procedure on appeal from judgment on habeas corpus.

#### § 11-43-1. To what cases the writ extends.

The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto, except in the cases expressly excepted.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (1, 18); 1857, ch. 48, art. 2; 1871, § 1396; 1880, § 2519; 1892, § 2226; 1906, § 2445; Hemingway's 1917, § 2011; 1930, § 1914; 1942, § 2815.

**Cross References** — Constitutional provision on habeas corpus, see Miss. Const. Art. 3, § 21.

Remedial writs grantable by supreme and circuit judges and chancellors, see § 9-1-19.

Mississippi Capital Defense Litigation Act, see §§ 19-18-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. Nature and function of writ.
2. Restraint or confinement, necessity of.
3. Persons entitled to maintain writ.
4. Custody of minors.
5. Custody of lunatics and other incompetents.
6. To obtain bail.
7. Grounds for habeas corpus.
8. Scope of inquiry.
9. Right of appeal.
10. Review.

### 1. Nature and function of writ.

The function of the habeas corpus court in Mississippi in criminal cases is to release a prisoner who is being unlawfully held or to grant him a bail bond which he can make; a habeas corpus writ cannot be used as a collateral method to prevent a trial on an indictment in this state, nor can the writ be used as a post-conviction remedy, or a method of appeal out of time. *Keller v. Romero*, 303 So. 2d 481 (Miss. 1974).

A habeas corpus proceeding has but one purpose, that is to set at liberty persons illegally held, by entering an order discharging the prisoner, granting bail, or for the purpose of delivering a child to the rightful custody of persons who are properly entitled to the care and custody of the child. *State v. Ridinger*, 279 So. 2d 618 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

A habeas corpus proceeding may not perform the function of an appeal unless the original judgment sentence was void. *State v. Ridinger*, 279 So. 2d 618 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

A habeas corpus proceeding cannot be used to effect an appeal to the Supreme Court. *State v. Ridinger*, 279 So. 2d 618 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

Where a petitioner had been convicted upon a plea of guilty, his remedy, if any, for the alleged violation of his constitutional rights by questioning him without prior advice as to the right of counsel and the right to remain silent, and failure to offer the services of an attorney at his preliminary hearing, was not by habeas corpus but rather by writ of error coram nobis. *Clayton v. State*, 254 So. 2d 874 (Miss. 1971).

The Mississippi habeas corpus statutes strictly limit the application of that remedy to cases only involving such defects as may appear on the face of the judgment. *King v. Cook*, 287 F. Supp. 269 (N.D. Miss. 1968).

Habeas corpus proceedings cannot be made to perform the function of a writ of error. *Jackson v. Waller*, 248 Miss. 166, 156 So. 2d 594 (1963), error overruled, 248 Miss. 172, 160 So. 2d 184 (1964).

Coram nobis, not habeas corpus, is the proper mode of examination of the legality of a conviction of crime. *Smith v. State*, 155 So. 2d 494 (Miss. 1963).

The only function of a writ of habeas corpus after a conviction of crime is to inquire into the jurisdiction of the convicting tribunal. *Smith v. State*, 155 So. 2d 494 (Miss. 1963).

The Mississippi statutes relating to habeas corpus, and those relating to interstate rendition, are "not applicable to interstate extradition except to the extent that they may be in aid of, and not inconsistent with, the Constitution and laws of the United States on the question." *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718 (1951).

In habeas corpus proceedings questioning the sufficiency of a requisition for extradition, the admission by appellant of his indictment and conviction for rape in a sister state cures the defect of the omis-



sion of indictment or judgment of conviction being attached to the demanding papers from the governor of sister state. *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718 (1951).

A telegram from another state is an adequate basis for a provisional arrest and detention of a fugitive from justice from that state and the provisional detention pending the obtaining of extradition papers is reasonable and proper. *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718 (1951).

Habeas corpus cannot perform function of an appeal from criminal prosecution which is not absolutely void. *McLemore v. Love*, 197 Miss. 273, 19 So. 2d 828 (1944).

Habeas corpus cannot perform functions of writ of error or appeal. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237 (1932).

Adverse judgment of county court, on motion in arrest of judgment, in criminal case, on ground verdict, judgment, and sentence were void for uncertainty, could be reviewed only on appeal, and not by habeas corpus. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237 (1932).

A proceeding to enforce the right of personal liberty by means of a writ of habeas corpus is civil and not criminal. *State v. Gordon*, 105 Miss. 454, 62 So. 431 (1913).

## **2. Restraint or confinement, necessity of.**

A habeas corpus petition which was filed by a work-releasee who was reincarcerated would be dismissed where the prisoner had been discharged from prison during the pendency of the appeal; nor were the prisoner's wife or employer entitled to relief under this section. *Bradley v. State*, 355 So. 2d 675 (Miss. 1978).

A petitioner is not entitled to a writ of habeas corpus while released on bond. *Keller v. Romero*, 303 So. 2d 481 (Miss. 1974).

The foundation of the writ of habeas corpus in any court is the allegation that the relator is detained in custody; accordingly, one released on bail is not considered to be restrained of his liberty so as to entitle him to a writ of habeas corpus. *Ex parte Walker*, 53 Miss. 366 (1876).

## **3. Persons entitled to maintain writ.**

Inmate did not argue that he was being illegally confined, detained, or deprived of his liberty; he merely argued that the parole board failed to give him a meaningful parole hearing. However, in Mississippi, prisoners had no constitutionally recognized liberty interest in parole, and because the inmate's petition was merely a request for parole, his petition was not a writ of habeas corpus and he was not entitled to a hearing. *Johnson v. Miller*, 919 So. 2d 273 (Miss. Ct. App. 2005).

A habeas corpus petition which was filed by a work-releasee who was reincarcerated would be dismissed where the prisoner had been discharged from prison during the pendency of the appeal; nor were the prisoner's wife or employer entitled to relief under this section. *Bradley v. State*, 355 So. 2d 675 (Miss. 1978).

A defendant having failed to take an appeal from the judgment and sentence under which he stands committed, the habeas corpus court could not, in Mississippi, consider his complaint attacking the irregularities allegedly amounting to want of due process in the proceedings by which he was convicted and sentenced. *Harvey v. State*, 340 F.2d 263 (5th Cir. 1965).

Where the jail sentence of accused, who had been convicted of two separate charges of trespass and one of assault and battery, was suspended during good behavior, an appeal would not lie from the trial judge's action revoking the suspension and committing the accused to jail following a finding that accused, without justification, had assaulted another person; neither was the accused entitled to relief by invoking habeas corpus. *Blount v. Blount*, 231 Miss. 398, 95 So. 2d 545 (1957).

A sheriff can maintain habeas corpus to recover custody of a prisoner under an order of the court having jurisdiction of the offense. *Wray v. Kelly*, 98 Miss. 172, 53 So. 492 (1910).

A defendant charged with a misdemeanor who has been bound over to the circuit court by a committing magistrate and imprisoned for default in making the required bond cannot maintain a writ of habeas corpus to secure a remand of his



case to the magistrate for trial. *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901).

Where a convict sues out a writ and escapes before the hearing, the writ should be dismissed. *Hamilton v. Flowers*, 57 Miss. 14 (1879).

Persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to a writ of habeas corpus. *Ex parte Walker*, 53 Miss. 366 (1876).

#### 4. Custody of minors.

In a child custody proceeding brought by the mother pursuant to § 93-11-65, the trial court's error in dismissing the mother's action was harmless where the court immediately held a full hearing on the father's petition for a writ of habeas corpus, which hearing was the same as would have been held under the mother's original suit; the trial court had jurisdiction to hear the mother's suit alleging a change of circumstances, where the Alabama court that had granted custody to the father had the right to modify the terms of the decree. Further, the trial court had complete jurisdiction to hear a child custody matter in a habeas corpus proceeding under this section. *Brashers v. Green*, 377 So. 2d 597 (Miss. 1979).

Where a mother of a child filed a sworn consent to the adoption of her child but her husband was not made a party to the adoption proceedings nor summoned because he told the attorneys that he was not the father of the child, in view of the presumption the a child born in wedlock is a legitimate child, the husband was a necessary party to the adoption proceedings in order for the court to decree an adoption of the child, and therefore, the decree of adoption was a nullity and could be attacked collaterally in a habeas corpus proceeding. *Krohn v. Miguez*, 274 So. 2d 654 (Miss. 1973).

A father, awarded custody of minor children in a divorce action, who subsequently made an arrangement with his former wife to care for the children during the time he was employed in another state, could not thereafter successfully contend in a habeas corpus proceeding that the children were wrongfully withheld from him. *Fulton v. Fulton*, 218 So. 2d 866 (Miss. 1969).

A habeas corpus proceeding is brought in a special court convened to try a single cause, whose powers wholly cease upon rendition of a final judgment. Such court, therefore, may not make a child custody order. *Talley v. Womack*, 249 Miss. 773, 163 So. 2d 742 (1964).

On rendition of a final judgment the functions and powers of a habeas corpus court wholly cease, and it may not thereafter modify a judgment of a court of a sister state so as to divide the custody of a child between contending parents. *Talley v. Womack*, 249 Miss. 773, 163 So. 2d 742 (1964).

In a habeas corpus proceeding instituted by a mother in a court other than one which had granted her custody of the children in a divorce proceeding, to obtain custody of the children from a paternal aunt and paternal grandparents, who were not parties to the divorce action, the prior decree of custody was not binding upon proof of circumstances and conditions arising since the date of its rendition, showing that the mother was unfit to exercise such right or had forfeited it. *Neal v. Neal*, 238 Miss. 572, 119 So. 2d 273 (1960).

The venue of a habeas corpus proceeding by a mother seeking custody of her children is necessarily in the county where the children are being allegedly unlawfully detained, by the persons not parties to the earlier divorce action, and who were defending against the mother's petition. *Neal v. Neal*, 238 Miss. 572, 119 So. 2d 273 (1960).

In a contest between the paternal and maternal grandmothers over the custody of two children of the ages of 12 and 13 years, where it was shown that the paternal grandmother had made a good mother during the time she had had the care and custody of the children for approximately ten years, and that neither the maternal grandmother nor the mother had contributed anything to the support of the children during this period, and the children testified that they wanted to live with the paternal grandmother, the paternal grandmother was entitled to their custody. *Gladney v. Hopkins*, 233 Miss. 342, 102 So. 2d 181 (1958).

Where paternal grandparents in whose custody the mother had placed child when

mother was required to work to support herself and children, conceded in trial court that father was not necessary party to habeas corpus proceedings brought against them by the mother, the paternal grandparents on appeal could not contend that the father was a necessary party. *Newman v. Young*, 215 Miss. 467, 61 So. 2d 296 (1952).

The chancery court in granting a divorce is authorized to make such orders touching the care, custody and maintenance of the children of the marriage as may seem equitable and just and where the chancery court makes no order of custody, the county court has jurisdiction to issue writ of habeas corpus and to determine the rightful custody of the minor. *Payne v. Payne*, 58 So. 2d 377 (Miss. 1952).

Natural parents of adopted child are not in position to make collateral attack by habeas corpus proceedings on adoption decree on ground of fraud when they were parties to petition of adoption and were fully advised of all facts relied upon by adopting parents to obtain decree. *Welch v. Welch*, 208 Miss. 726, 45 So. 2d 353 (1950).

In habeas corpus suit brought by mother to obtain custody of two children from father, custody having previously been granted mother by decree of different chancery court, habeas corpus proceeding is not available to father as a device to amend existing decree. *Hinman v. Craft*, 204 Miss. 568, 37 So. 2d 770 (1948).

Maternal grandparents were entitled to retain custody, until further order of court, of eleven months' old child whose mother had died and whose father was in the army, as against the paternal grandparents on father's application, where the child was sick and had lived all his life with the maternal grandparents who had done everything in their power to conserve his well-being. *Clark v. Davis*, 197 Miss. 135, 19 So. 2d 500 (1944).

On death of father, mother has right to custody of her child as against any other person unless she has forfeited her right by abandonment or immoral conduct. *Stegall v. Stegall*, 151 Miss. 875, 119 So. 802 (1929).

In a contest between mother and father as to the custody of a child, the welfare of

the child is the paramount consideration of the court. *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99 (1920).

An instance where the mother is entitled to custody of her child in preference to the child's grandmother. *Kinnaid v. Lowry*, 102 Miss. 557, 59 So. 843 (1912).

Where neither parent was shown fit to have custody of two-year-old child after divorce the court properly awarded temporary custody to the mother. *O'Neal v. O'Neal*, 95 Miss. 415, 48 So. 623 (1909).

On habeas corpus by a father for his child in the custody of collateral relatives, it will be presumed to be for the best interest of the child to be with the father unless his unfitness or abandonment of the child be shown. *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80 (1900).

Where the petition alleges that the rightful custody of certain children is withheld by the defendant from petitioner and the sheriff's return on the writ of habeas corpus shows that they are not found, the court should not, in their absence, entertain objections to the petition or proceed further with the hearing of the case. A writ should be issued requiring the defendant to produce the children or show that he cannot do so. *Board of Supvrs. v. Leigh*, 69 Miss. 754, 13 So. 854 (1892).

Where the board of supervisors makes an order authorizing one of its members to procure a home for certain poor orphans in the county and their custody is withheld from him, he may by habeas corpus obtain the custody of the children that they may be dealt with according to law. *Board of Supvrs. v. Leigh*, 69 Miss. 754, 13 So. 854 (1892).

Though the father by abstract right be entitled to the custody of his children, yet such right is modified by the circumstances of each case and the court will be guided by the children's best interest. *McShan v. McShan*, 56 Miss. 413 (1879).

A widowed mother is entitled to the custody of her thirteen-year-old son, notwithstanding he prefers remaining with a man of good character to whom his deceased father had contracted him. *Moore v. Christian*, 56 Miss. 408, 31 Am. R. 375 (1879).

In such case if the infant's condition would not be materially improved by the



change sought for in the writ, it should be refused. *Cocke v. Hannum*, 39 Miss. 423 (1860); *Maples v. Maples*, 49 Miss. 393 (1873).

On a writ by a guardian for the ward who has been forcibly taken from him by the mother if it appear that the ward's interest and inclinations would be consulted by remaining with the mother, the court can rightfully refuse to restore the ward though the guardian have not abused the trust and be competent. *Foster v. Alston*, 7 Miss. (6 Howard) 406 (1842).

### 5. Custody of lunatics and other incompetents.

Sheriff of the county could not recover custody of one adjudged to be insane and committed to the care of the superintendent of the state insane hospital upon a *capias* for the arrest of such lunatic who was indicted for murder after his commitment to the insane hospital. *Mabry v. Hoye*, 124 Miss. 144, 87 So. 4 (1921).

### 6. To obtain bail.

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, Miss. Sup. Ct. R. 9 or Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in

either situation. *Walker v. State*, 555 So. 2d 738 (Miss. 1990).

In habeas corpus to obtain bail of relator the state is a real party in interest and can appeal. *State v. Gordon*, 105 Miss. 454, 62 So. 431 (1913).

In capital offenses where the proof leaves no reasonable doubt as to the guilt of the prisoner, bail as a matter of right is denied by law and can be rightfully granted only in exceptional and extraordinary circumstances such as protracted or unusual delay on the part of the state in bringing the prisoner to trial, or such as are likely to seriously or fatally affect the health of the prisoner by reason of imprisonment and the denial of bail. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241 (1887).

Where there is a well-founded doubt of the guilt of a prisoner it cannot be said that the "proof is evident or that the presumption great" of his guilt, and where upon the evidence there is a probability of the prisoner's innocence there must be a reasonable doubt of his guilt. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241 (1887).

### 7. Grounds for habeas corpus.

Trial court did not err by treating an inmate's writ of habeas corpus as a petition for post-conviction relief, as a habeas corpus writ was available only to protest a constitutionally-recognized liberty interest, and the interests of a person in the intensive supervision program did not rise to the level of constitutionally-cognized liberty interests. *Moore v. Miss. Dep't of Corr.*, 936 So. 2d 941 (Miss. Ct. App. 2005), writ of certiorari denied by 2006 Miss. LEXIS 560 (Miss. Aug. 24, 2006).

Inmate's complaint filed with the circuit court for a review of the parole board's determinations was properly dismissed because the circuit court did not have the jurisdiction to grant or deny parole. Further, while the inmate had entitled his petition a habeas corpus action, because the parole board had complete discretion to grant or deny parole, the inmate failed to state a claim that would have required an evidentiary hearing. *Johnson v. Miller*, 919 So. 2d 273 (Miss. Ct. App. 2005).

Issuance of writ in habeas corpus proceeding on grounds that defendant-petitioner had been denied right to appeal, was erroneous. *State v. Ridinger*, 279 So.



2d 618 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

A writ of habeas corpus is not a proper proceeding to test the sufficiency of the evidence to support an otherwise valid order revoking a suspension of sentence. *State v. Nicholson*, 286 So. 2d 820 (Miss. 1973).

Habeas corpus proceedings cannot be used as a vehicle to appeal a case to the Supreme Court after time for an appeal has expired, unless the sentence is void on its face. *Royalty v. McAdory*, 278 So. 2d 464 (Miss. 1973).

Where the judgment by which a person is confined is void, a writ of habeas corpus will issue to release such person. *Krohn v. Migués*, 274 So. 2d 654 (Miss. 1973).

Only such defects as may appear on the face of the judgment may be made the basis of an attack by habeas corpus under the laws of Mississippi. *Harvey v. State*, 340 F.2d 263 (5th Cir. 1965).

The writ may be invoked for the purpose of determining the legality of a revocation of a suspension of sentence. *Jackson v. Waller*, 248 Miss. 166, 156 So. 2d 594 (1963), error overruled, 248 Miss. 172, 160 So. 2d 184 (1964).

Persons arrested for violating ordinances by parading without a permit, in an anti-segregation demonstration, held not entitled to habeas corpus in federal court on ground that mass arrests had so loaded state courts as to deprive them of an adequate remedy under state law. *Brown v. Rayfield*, 320 F.2d 96 (5th Cir. 1963), cert. denied, 375 U.S. 902, 84 S. Ct. 191, 11 L. Ed. 2d 143 (1963).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of *coram nobis*. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547 (1961).

Aggrieved party may resort to habeas corpus to review judgment or proceedings void on their face and subject to collateral attack. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237 (1932).

Order of the court setting aside verdict of acquittal and remanding accused into custody was beyond its jurisdiction, depriving person of liberty, and relief by

habeas corpus was proper. *State v. Chambliss*, 142 Miss. 256, 107 So. 200 (1926).

An erroneous judgment of the court will not entitle the defendant to discharge under habeas corpus. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 131 Am. St. R. 511 (1907).

Accused, convicted on affidavit charging no crime, is entitled to be discharged on a writ of habeas corpus. *Ex parte Weems*, 96 Miss. 635, 51 So. 2 (1910); *Ex parte Harris*, 85 Miss. 4, 37 So. 505 (1904).

A defendant who has been convicted of a misdemeanor before a justice of the peace will not be released from custody on a writ of habeas corpus because of defects in the affidavit upon which the conviction was based. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708 (1901).

Although mere irregularities or reversible errors in the proceedings before the conviction cannot be availed of by habeas corpus, it is otherwise if it be plainly manifest of record that because of radical and incurable defects, the verdict and judgment are nullities. *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 35 Am. St. R. 649 (1892).

While the accused is entitled to relief by habeas corpus as against such a judgment, he will not be discharged, but will be held for another trial on the same indictment. *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 35 Am. St. R. 649 (1892).

The judgment of the circuit court adjudging an indictment sufficient constitutes the law of the case until reversed on appeal. *Emanuel v. State*, 36 Miss. 627 (1859).

## 8. Scope of inquiry.

A habeas corpus proceeding is neither a method of appeal, a method of deciding the sufficiency of evidence introduced before a trial court, a postconviction remedy nor a means of obtaining a new trial; and so long as the trial court had jurisdiction under a valid law and rendered a valid judgment, a petitioner is not entitled to release on a writ of habeas corpus. *Ray v. State*, 229 So. 2d 579 (Miss. 1969).

In habeas corpus proceedings to determine the validity to revoke suspension of sentence, where evidence showed a breach of condition of good behavior under which

the sentences were suspended, it was not necessary to show guilt beyond a reasonable doubt. *Crabb v. State*, 55 So. 2d 485 (Miss. 1951).

A writ of habeas corpus cannot be made to perform the functions of a writ of error or an appeal, and a person in custody under a judgment or order of a court of competent jurisdiction cannot obtain his discharge on habeas corpus on account of errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded. *Ex parte Chain*, 210 Miss. 415, 49 So. 2d 722 (1951).

In reviewing conviction of crime by habeas corpus proceeding, all doubts must be resolved in favor of integrity, competence, and proper performance of their official duties by judge and state attorney. *Miller v. State*, 207 Miss. 156, 41 So. 2d 375 (1949), appeal dismissed, cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

Where child was brought into this state and was in the custody of its father, who asserted that the mother had abandoned the child and that although the mother was awarded custody by a foreign decree of divorce, she had become unfit to have custody, court had jurisdiction to inquire into the merits of the controversy. *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99 (1920).

On appeal from requirement of an excessive bail bond, health of defendant and ability to give bond are to be considered. *Ex parte Goldsby*, 121 Miss. 479, 83 So. 673 (1920).

Guilt or innocence not inquired into. *State v. Morgan*, 114 Miss. 634, 75 So. 441 (1917).

If it be claimed that the prisoner is detained under a sentence by a justice of the peace, he may deny the existence of the sentence, the jurisdiction of the justice

or the constitutionality of the law under which he was prosecuted, but he cannot go into the evidence upon which he was convicted. *Donnell v. State*, 48 Miss. 661, 12 Am. R. 375 (1873).

### 9. Right of appeal.

The state, though not formally designated as such, is always a real party to the record in habeas corpus proceedings, where the petitioner is being held to await trial for an alleged violation of the criminal law, and is therefore entitled to an appeal from a judgment adverse to its interest. *State v. Gordon*, 105 Miss. 454, 62 So. 431 (1913).

If on the hearing of the writ the relator be awarded his liberty upon the execution of the bond and he give the bond, he is not restrained of his liberty and he cannot appeal. *Ex parte Walker*, 53 Miss. 366 (1876).

### 10. Review.

There must be evidence to support the finding of a chancellor on habeas corpus. *Ex parte Jackson*, 63 So. 571 (Miss. 1913).

A chancellor's finding on facts in a habeas corpus trial is conclusive on appeal. *Robinson v. Yazoo & Miss. V. Ry.*, 58 So. 539 (Miss. 1912); *Ex parte Semmes*, 60 So. 1016 (Miss. 1913).

The judicial officer who hears an application for bail is the trier of the facts and must determine on his own judgment and conscience whether the evidence under the law warrants bail or not, but in doing so he is governed by the established rules of law and the supreme court, when called upon to review a judgment denying bail, is governed by the same rules of law which control the action of the officer below, giving to his judgment however the prima facie presumption of correctness which attaches to the judgments of all courts of competent jurisdiction. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241 (1887).

## RESEARCH REFERENCES

**ALR.** Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

Habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime. 21 A.L.R.2d 1004.

Habeas corpus to test validity of confinement under statutes relating to sexual psychopaths. 24 A.L.R.2d 376.

Insanity of accused at time of commission of offense [not raised at trial] as ground for habeas corpus after conviction. 29 A.L.R.2d 703.

Waiver or loss of accused's right to speedy trial as affecting right to habeas corpus. 57 A.L.R.2d 339.

Right of one at large on bail to writ of habeas corpus. 77 A.L.R.2d 1307.

Parolee's right to habeas corpus. 92 A.L.R.2d 682.

Right of prisoner held under extradition warrant to raise question of identity in habeas corpus proceeding. 93 A.L.R.2d 916.

Attack, by petition for writ of habeas corpus, on personal service as having been obtained by fraud or trickery. 98 A.L.R.2d 600.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus. 4 A.L.R.3d 1277.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 A.L.R.3d 1360.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities. 8 A.L.R.3d 301.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 A.L.R.3d 764.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 A.L.R.3d 16.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases. 26 A.L.R.4th 455.

Availability of federal habeas corpus relief, under 28 USCS §§ 2241 and 2254, in child custody cases. 49 A.L.R. Fed. 674.

Availability of postconviction relief under 28 USCS § 2254 based on alleged governmental violation of Interstate Agreement on Detainers Act (18 USCS Appx). 63 A.L.R. Fed. 155.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 12 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Habeas Corpus, Form 113.4 (Petition or application — By state prisoner — Denial of assistance of counsel).

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

41 Am. Jur. Trials 349, Habeas Corpus: Pretrial Motions.

**CJS.** 39 C.J.S., Habeas Corpus §§ 6-9, 28, 29, 33-38 et seq.

**Lawyers' Edition.** When is person "in custody" in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation — Supreme Court cases. 104 L. Ed. 2d 1122.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-3. Chapter not to apply in certain cases — service of petition and writ on Attorney General in extradition cases.

Nothing in this chapter shall authorize the discharge of any person convicted of an offense, or charged with an offense committed in any other part of the United States, and who, agreeably to the Constitution of the United States or the laws of the state, ought to be delivered up to the executive power of the state or territory where the offense is charged to have been committed; nor of any person suffering imprisonment under lawful judgment.

This chapter shall not apply to any collateral relief sought by any person following his conviction of a crime. Such relief shall be governed by the procedures prescribed in the Mississippi Uniform Post-Conviction Collateral Relief Act.



Provided, in any suit filed seeking the release of any person being held for extradition to any other part of the United States, its territories or foreign countries or any suit filed hereunder seeking the release of any person ordered extradicted, a copy of the petition and writ shall be served upon the Attorney General not less than three (3) days before the date and time set for hearing thereon.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (15); 1857, ch. 48, art. 3; 1871, § 1397; 1880, § 2520; 1892, § 2227; 1906, § 2446; Hemingway's 1917, § 2012; 1930, § 1915; 1942, § 2816; Laws, 1966, ch. 365, § 1; Laws, 1984, ch. 378, § 16, eff from and after passage (approved April 17, 1984).

**Cross References** — Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Validity of judgment.
3. Contempt cases.
4. Extradition proceedings.
5. —Scope of inquiry.
6. Service of notice on attorney general.

### 1. In general.

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, Miss. Sup. Ct. R. 9 or Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty

following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738 (Miss. 1990).

Habeas corpus will not lie to release a prisoner held under a lawful sentence. *Allred v. State*, 187 So. 2d 28 (Miss. 1966).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of *coram nobis*. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547 (1961).

A writ of habeas corpus cannot be made to perform the functions of a writ of error or an appeal, and a person in custody under a judgment or order of a court of competent jurisdiction cannot obtain his discharge on habeas corpus on account of errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded. *Ex parte Chain*, 210 Miss. 415, 49 So. 2d 722 (1951).

A defendant charged with a misdemeanor who has been bound over to the circuit court by a committing magistrate and imprisoned for default in making the required bond cannot maintain a writ of

habeas corpus to secure a remand of his case to the magistrate for trial. *Ex parte Smith*, 79 Miss. 373, 30 So. 710 (1901).

A convict held after serving out his term for the cost of his prosecution can be discharged on habeas corpus. *Ex parte Meyer*, 57 Miss. 85 (1879).

The statute, however, does not contemplate detention of a convict to serve out the costs of his defense. *Ex parte Meyer*, 57 Miss. 85 (1879).

## 2. Validity of judgment.

In this state a writ of habeas corpus has the principal function of testing the legality of a petitioner's detention prior to his conviction, and may be utilized as a post-conviction remedy to release a petitioner from imprisonment only where the petitioner was convicted under an invalid statute or by a court lacking jurisdiction. However, where a petition is filed seeking post-conviction relief, the court should look through the form and to the substance of the petition, and where a case for relief under a writ of error coram nobis is stated, the court should treat it accordingly. *Nelson v. Tullos*, 323 So. 2d 539 (Miss. 1975).

A petitioner is not entitled to be released on a writ of habeas corpus so long as the trial court has jurisdiction under a valid law and renders a valid judgment, and this is true even when the defendant is innocent. *Ledbetter v. Bishop*, 210 So. 2d 880 (Miss. 1968).

Habeas corpus was not available to procure petitioner's release from penitentiary on ground that his conviction of grand larceny for theft of automobile tires was void because the indictment did not state the value of the property alleged to have been stolen or that it constituted personal property, where these questions were raised for the first time on motion for new trial, and the appeal from conviction was dismissed for lack of prosecution, since the alleged errors, even if sustainable, did not render the conviction void. *McLemore v. Love*, 197 Miss. 273, 19 So. 2d 828 (1944).

Conviction before a justice, disqualified by interest, held not void and not ground for habeas corpus. *Hays v. Barnes*, 148 Miss. 599, 114 So. 395 (1927).

A defendant who has been convicted before a justice of the peace will not be released from custody on a writ of habeas corpus because of defects in the affidavit upon which he was convicted. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708 (1901).

A convict is entitled to be discharged from the judgment if the record of his conviction be so defective as to render his sentence a nullity. *Ex parte Phillips*, 57 Miss. 357 (1879).

## 3. Contempt cases.

A judge cannot, on habeas corpus, discharge a prisoner who is in custody for contempt of another court. *Ex parte Adams*, 25 Miss. 883 (1852); *Shattuck v. State*, 51 Miss. 50, 24 Am. R. 624 (1875).

## 4. Extradition proceedings.

State statutes and decisions relating to habeas corpus and extradition are not applicable to interstate extradition except to extent that they may be in aid of, and not inconsistent with, the constitution and laws of United States on the question. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

Conclusion of governor of asylum state as to existence of jurisdictional prerequisites to surrender of an alleged offender to the authorities of the demanding state, that he has been furnished with a copy of an indictment found by a grand jury or an affidavit made before a magistrate of the demanding state or territory, charging the person demanded with the commission of the alleged crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, and that he is satisfied that such alleged offender is a fugitive from justice of the demanding state, is subject to judicial review on habeas corpus. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

Decree of court in habeas corpus proceedings adjudging extradition proceedings to be insufficient both in form and substance but providing for discharge of relator unless within a stated period of time the sheriff should be served with a proper, legal and sufficient extradition warrant based upon proper, legal and sufficient papers and proceedings, violated accused's constitutional right to have the



trial judge as a judicial officer not only to pass upon the sufficiency of the extradition proceedings then before the court but also the sufficiency of any such papers that were to be thereafter supplied in their stead. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

The issuance of a warrant makes a prima facie case in an extradition proceeding under habeas corpus. *Ex parte Walters*, 106 Miss. 439, 64 So. 2 (1914).

On habeas corpus to test the validity of an arrest and imprisonment under extradition proceedings, petitioner is not entitled to be liberated on bail, although the offense charged is bailable in the jurisdiction where it was committed. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827 (1907).

A person indicted for murder in another state, in which such offense is not bailable, and who has been arrested in this state on a warrant issued by the governor upon requisition from the chief executive of such other state, is not entitled to bail pending his appeal to the supreme court from a judgment remanding him to custody in a habeas corpus proceeding based upon the ground that he is not a fugitive from justice and was not in such other state when the crime was committed. *Ex parte Wall*, 84 Miss. 783, 38 So. 628 (1904).

On question of right to bail, distinction pointed out between cases of arrest and examination for commitment to await extradition, demand and warrant on the one hand, and cases arising on habeas corpus after arrest on execution warrant for extradition on the other. *Ex parte Wall*, 84 Miss. 783, 38 So. 628 (1904).

Upon habeas corpus, it is not cause of exception to the officer's return showing that the relator is held upon the warrant of the governor of this state for extradition for crime committed in another state, that it does not show an affidavit or indictment emanating from the authorities of the other state. The warrant of the governor is prima facie correctly issued and the return to be prima facie sufficient need not show anything more. *Ex parte Devine*, 74 Miss. 715, 22 So. 3 (1897); *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 35 Am. St. R. 649 (1892).

## 5. —Scope of inquiry.

Upon judicial review on habeas corpus with respect to extradition of an alleged fugitive from justice of the demanding state, relator may introduce proof to show that he was not in the demanding state at the time of the commission of the alleged crime, and that he could not therefore be a fugitive from the justice of such state. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

If the governor's warrant of extradition and all of the requisition papers are sufficient in form and substance they may be introduced at the hearing on habeas corpus to constitute a prima facie right on the part of the respondent to surrender the alleged defendant to the demanding state, but relator may nevertheless introduce proof before the court where the habeas corpus petition is being heard to show that he was not in the demanding state at the time of the commission of the alleged crime. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

A defense on the merits of the case is not available under extradition proceedings. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827 (1907).

Where relator is arrested for crime committed in another state upon the warrant of the governor of this state authorizing extradition, the guilt or innocence of the relator cannot be inquired into on habeas corpus in this state. *Ex parte Devine*, 74 Miss. 715, 22 So. 3 (1897).

## 6. Service of notice on attorney general.

When it is brought to the attention of the judge in a habeas corpus court that the attorney general has not been served with notice in accordance with Code 1942, § 2816, he may issue a temporary order continuing the hearing until the attorney general of Mississippi has been given the notice required by this section. *Corkern v. State*, 269 So. 2d 630 (Miss. 1972).

Noncompliance with the requirement that the attorney general be given notice as required by Code 1942, § 2816 does not deprive the judges named in Code 1942, § 2818 of jurisdiction to issue writs and hear habeas corpus proceedings, for the only jurisdictional requirements are that a proper petition be presented to a quali-



fied judge, and when the judge issues a habeas corpus writ it must be served upon the party defendant who is said to be

unlawfully holding a prisoner, or depriving a person of his liberty. *Corkern v. State*, 269 So. 2d 630 (Miss. 1972).

### RESEARCH REFERENCES

**ALR.** Right of one at large on bail to writ of habeas corpus. 77 A.L.R.2d 1307.

Parolee's right to habeas corpus. 92 A.L.R.2d 682.

Right of prisoner held under extradition warrant to raise question of identity in habeas corpus proceeding. 93 A.L.R.2d 916.

When is a person in custody of governmental authorities for purposes of exer-

cise of state remedy of habeas corpus — modern cases. 26 A.L.R.4th 455.

**Am Jur.** 41 Am. Jur. Trials 349, Habeas Corpus: Pretrial Motions.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-5. Relator not discharged on account of defective proceedings.

If it appear on the trial of any habeas corpus that the relator is held by virtue of proceedings against him for crime which are invalid, the judge shall not discharge the relator because thereof, but shall investigate the facts; and if it be found that he ought to be held for any crime alleged against him, the judge shall not discharge him, but shall commit him or require bail, according to the nature of the case.

**SOURCES:** Codes, 1892, § 2228; 1906, § 2447; Hemingway's 1917, § 2013; 1930, § 1916; 1942, § 2817.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### JUDICIAL DECISIONS

#### 1. In general.

Regardless of any constitutional rights that may have been violated, the habeas corpus court could not release the prisoner from his bond to appear in the circuit court and could not enjoin the district attorney from prosecuting the petitioner for the charged offense. *Keller v. Romero*, 303 So. 2d 481 (Miss. 1974).

Executing warrant for extradition prima facie evidence of facts recited. *Grace v. Dogan*, 151 Miss. 267, 117 So. 596, 61 A.L.R. 709 (1928).

In such case, evidence by alleged fugitive from justice of an alibi is not advisable. *Grace v. Dogan*, 151 Miss. 267, 117 So. 596, 61 A.L.R. 709 (1928).

The finding of a justice of the peace acting as conservator of the peace is not conclusive in a habeas corpus proceeding. *Ex parte Oliver*, 127 Miss. 208, 89 So. 915 (1921).

Notwithstanding the provisions of this section [Code 1942, § 2817], the party having custody of the prisoner must produce a detention warrant showing his

authority to detain the prisoner before the court can inquire into whether or not there is a valid and unexecuted sentence outstanding against the prisoner. *Ex parte Moody*, 104 Miss. 836, 61 So. 741 (1913).

Where the trial court pronounced improper sentence under a lawful conviction on habeas corpus the relator should be remanded for proper sentence. *Ex parte*

*Burden*, 92 Miss. 14, 45 So. 1, 131 Am. St. R. 511 (1907).

The section [Code 1942, § 2817] does not prevent a discharge on habeas corpus of a person in custody where the affidavit under which he is held charges no offense and it does not appear that he has been guilty of any crime. *Ex parte Harris*, 85 Miss. 4, 37 So. 505 (1904); *Ex parte Weems*, 96 Miss. 635, 51 So. 2 (1910).

## RESEARCH REFERENCES

**ALR.** Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Determination of sufficiency of charge of crime. 40 A.L.R.2d 1151.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies § 35.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-7. By whom granted.

The writ of habeas corpus may be granted by a judge of the Supreme Court, or a judge of the circuit or chancery court, in term time or in vacation, returnable before himself or another judge.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 65, art. 1 (1); 1857, ch. 48, art. 1; 1871, § 1398; 1880, § 2521; 1892, § 2229; 1906, § 2448; *Hemingway's* 1917, § 2014; 1930, § 1917; 1942, § 2818.

**Cross References** — Granting of remedial writs by supreme and circuit judges and chancellors, see § 9-1-19.

Jurisdiction of Mississippi Supreme Court, see § 9-3-9.

Jurisdiction of chancery court in general, see § 9-5-81.

General enumeration of subjects of circuit court jurisdiction, see § 9-7-81.

Power of county court, see § 9-9-19.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of

habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Missis-

issippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Noncompliance with the requirement that the attorney general be given notice as required by Code 1942, § 2816 does not deprive the judges named in Code 1942, § 2818 of jurisdiction to issue writs and hear habeas corpus proceedings, for the only jurisdictional requirements are that a proper petition be presented to a qualified judge, and when the judge issues a habeas corpus writ it must be served upon the party defendant who is said to be unlawfully holding a prisoner, or depriving a person of his liberty. *Corkern v. State*, 269 So. 2d 630 (Miss. 1972).

A petition seeking a writ of habeas corpus for the recovery of custody of minor children awarded to petitioner in a divorce action is not a chancery court proceeding and should not be filed in the original divorce case; for a habeas corpus court is a separate court and is to be distinguished from the chancery court or the circuit court; and it is organized when a judge issues an order for a hearing on a writ of habeas corpus, returnable before himself or another judge. *Fulton v. Fulton*, 218 So. 2d 866 (Miss. 1969).

The proper venue for an habeas corpus proceeding by a mother to obtain custody

of her children from the father was in the county where the children resided in the custody of the father, rather than in the county where the decree, largely giving custody to the mother, was entered. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330 (1957).

In habeas corpus proceedings by grandmother who had obtained appointment as guardian of orphaned child without notice, evidence sustained award of custody to persons who, having lawfully taken child into their custody and assumed the obligations to her incident to the parental relation, stood in loco parentis to her. *Britt v. Allred*, 199 Miss. 786, 25 So. 2d 711 (1946).

A county judge, passing upon an application in habeas corpus, acts not as a county court, but with all the power and authority of a circuit judge or chancellor, and an appeal may be taken direct to the supreme court under Code 1942, § 1149. *Cole v. Cole*, 194 Miss. 292, 12 So. 2d 425 (1943).

Chancellor without authority in habeas corpus proceeding to admit person convicted of felony to bail pending appeal; this power being lodged in circuit and supreme courts and judges thereof. *Leggett v. Vannison*, 133 Miss. 22, 96 So. 518 (1923).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 85-91.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-9. How obtained.

Application for a writ of habeas corpus shall be by petition, in writing, sworn to by the person for whose relief it is intended, or by someone in his behalf, describing where and by whom he is deprived of liberty, and the facts and circumstances of the restraint, with the ground relied on for relief; and the application shall be made to the judge or chancellor of the district in which the relator is imprisoned, unless good cause be shown in the petition to the contrary. However, any petition filed by an inmate of any training school or hospital attacking his commitment for a claimed denial of a fundamental



constitutional right under the Constitution of the State of Mississippi or of the United States which would affect his commitment shall be filed in a court of the county from which he was committed. And, if filed in any other court, the judge of that court shall, if he grants the writ, make it returnable to a court of the county from which the relator was committed; and in the case of a person committed by a youth court, not less than five (5) days' notice prior to hearing shall be given to the county attorney or district attorney of the county of commitment.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (1); 1857, ch. 48, art. 1; 1871, § 1400; 1880, § 2522; 1892, § 2230; 1906, § 2449; Hemingway's 1917, § 2015; 1930, § 1918; 1942, § 2819; Laws, 1966, ch. 366, § 1; Laws, 1972, ch. 453, § 1; Laws, 1984, ch. 378, § 17, eff from and after passage (approved April 17, 1984).

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

Trial court did not err by treating an inmate's writ of habeas corpus as a petition for post-conviction relief as the writ was not filed in the county where the inmate was detained as required by Miss. Code Ann. § 11-43-9. *Moore v. Miss. Dep't of Corr.*, 936 So. 2d 941 (Miss. Ct. App. 2005), writ of certiorari denied by 2006 Miss. LEXIS 560 (Miss. Aug. 24, 2006).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v.*

*State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

An application for a writ of habeas corpus must be verified. *Corkern v. State*, 269 So. 2d 630 (Miss. 1972).

Where the answer of the attorney general to a letter in the form of a petition for habeas corpus, filed by one who pleaded guilty to a criminal charge in Sharkey County and was being then held in the state penitentiary in Sunflower County, revealed that no petition for habeas corpus had been filed in either Sunflower County or Sharkey County, and where the petition was not verified by oath as required under the section [Code 1942, § 2819], the petition would be dismissed without prejudice. *Tucker v. Sneed*, 246 So. 2d 736 (Miss. 1971).

The proper venue for an habeas corpus proceeding by a mother to obtain custody of her children from the father was in the county where the children resided in the custody of the father, rather than in the county where the decree, largely giving custody to the mother, was entered. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330 (1957).

A petition to the supreme court for a writ of habeas corpus on grounds of illegal confinement is insufficient, in absence of attached affidavit and showing in petition of good cause for failure to apply to a judge or chancellor of district where the petitioner is imprisoned. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

The function of supreme court is to review the lower court's action in dispos-

ing of an application for writ of habeas corpus and the issuance of writ should not be first requested of the supreme court. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

Granting of writ of habeas corpus on application therefor is not mandatory. *Lewis v. State*, 153 Miss. 759, 121 So. 493 (1929).

## RESEARCH REFERENCES

**ALR.** Parolee's right to habeas corpus. 92 A.L.R.2d 682.

When is a person in custody of governmental authorities for purposes of exercise of state remedy of habeas corpus—modern cases. 26 A.L.R.4th 455.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 98, 99, 142 et seq.

Application for writ, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 21-190.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**CJS.** 39 C.J.S., Habeas Corpus §§ 280-282 et seq.

**Lawyers' Edition.** When is person "in custody" in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation — Supreme Court cases. 104 L. Ed. 2d 1122.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-11. Refusal to grant writ.

If from the showing made by the petition for habeas corpus it be manifest that the person by whom, or on whose behalf, it is presented is not entitled to any relief thereby, the judge or chancellor may refuse to grant the writ, indorsing on the application his reason therefor.

**SOURCES:** Codes, 1880, § 2536; 1892, § 2231; 1906, § 2450; Hemingway's 1917, § 2016; 1930, § 1919; 1942, § 2820.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

**1. In general.**

Habeas corpus is one of the procedures available to test and decide the rightful custody of minors and a Mississippi court on such a petition may conduct a full hearing to determine whether there has been a material change of circumstances and whether for the best interests of a minor child another state's decree of divorce and custody should be modified. Thus, in a habeas corpus proceeding instituted by a mother who had legal custody of her minor son pursuant to a Louisiana decree, where the son was being held by the father, the chancery court properly conducted a full hearing to determine whether there had been a material change of circumstances affecting the welfare and best interests of the child and properly

concluded that conditions in the mother's home warranted a change of custody from mother to father, thereby in effect modifying the Louisiana decree. *Garza v. Shoffner*, 386 So. 2d 397 (Miss. 1980).

The function of supreme court is to review the lower court's action in disposing of an application for writ of habeas corpus and the issuance of writ should not be first requested of the supreme court. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

Granting of writ of habeas corpus on application therefor is not mandatory. *Lewis v. State*, 153 Miss. 759, 121 So. 493 (1929).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 28, 29 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

**§ 11-43-13. Bail by the way may be required.**

Where the application is by or on behalf of one detained on a criminal charge, the judge or chancellor, on granting the writ, may, in his discretion, require a bail bond by or on behalf of the person detained, conditioned that he shall not escape by the way. The judge or chancellor may fix the amount of such bail, and direct who shall approve the bond; but such bail bond shall not operate to discharge the relator from custody. Such bond shall be deposited by the judge or chancellor in the clerk's office of the court in which the case is triable. If the condition of the bond be broken, the proceedings thereon shall be as in case of other forfeited bonds or recognizances.

**SOURCES:** Codes, 1880, § 2537; 1892, § 2232; 1906, § 2451; Hemingway's 1917, § 2017; 1930, § 1920; 1942, § 2821.

**Cross References** — Appeal from judgment on habeas corpus, see § 11-43-55.

Question of bail, see §§ 99-5-31 to 99-5-35.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.



Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### RESEARCH REFERENCES

**ALR.** Admission of petitioner to bail pending determination of habeas corpus on merits. 56 A.L.R.2d 668.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-Conviction Remedies § 160.

**CJS.** 39 C.J.S., Habeas Corpus §§ 193, 195, 205, 11 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-15. Writ issued by judge or clerk.

The judge granting the writ may order it to be issued by the Clerk of the Supreme Court, or of any circuit or chancery court, who shall immediately issue it on receiving the order; or, when not convenient to a clerk, the judge himself shall issue the writ. Any judge or chancellor who shall wilfully refuse or neglect to grant, or to issue and try, the writ of habeas corpus, when required by law to do so, shall be guilty of a high misdemeanor in office, and any clerk who shall not, when ordered, immediately issue the writ, and other process, shall be liable, on conviction thereof, to be removed from office; and the judge or clerk shall, in case of such neglect or refusal, be liable, civilly, to the party aggrieved.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (1, 13); 1857, ch. 48, arts. 4, 6; 1871, § 1401; 1880, § 2523; 1892, § 2233; 1906, § 2452; Hemingway's 1917, § 2018; 1930, § 1921; 1942, § 2822.

**Cross References** — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 101, 151 et seq.

**CJS.** 39 C.J.S., Habeas Corpus §§ 3, 6-9, 28, 29, 33-38 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-17. Form and service of writ.

The writ may be in substance, as follows, to wit:

"The State of Mississippi, to \_\_\_\_\_ :

"We command you to have the body of \_\_\_\_\_, by you detained, as it is said, before \_\_\_\_\_, a judge of our \_\_\_\_\_ court, at \_\_\_\_\_, forthwith (or

on a given day), to do and receive what may be then and there considered concerning him. Witness my hand," etc.

And it may be served by such person as the judge granting it may direct, or by the sheriff or any constable, and it shall be served by the delivery of a true copy thereof to the person to whom it is directed, if to be found. And if it be directed to a sheriff or other officer who cannot be found, it may be served by leaving a copy with any deputy or servant of the officer to whom it is directed, at the place where the prisoner or other person is detained; and it shall be returned with an indorsement of service as in other cases.

**SOURCES:** Codes, 1871, § 1402; 1880, § 2524; 1892, § 2234; 1906, § 2453; Hemingway's 1917, § 2019; 1930, § 1922; 1942, § 2823.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Am Jur.** Writ, notice, and service, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 201-223.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-19. Taking of person in certain cases.

When it shall be shown to the judge to whom application is made for the writ, that there is reasonable ground to apprehend that the person in whose behalf the writ is applied for will be concealed or removed so as not to be brought up with the writ, it shall be the duty of the judge to order or issue the writ directed to the sheriff or other officer or person designated to execute it, commanding him to take the body of the person to be relieved by the writ, and bring him forthwith before the judge, and to summon the person alleged to have illegally detained him; in which case the form of the writ shall be, in substance, as follows, to wit:

"The State of Mississippi.

"To the sheriff or any lawful officer of \_\_\_\_\_ county:

"We command you to take and have the body of \_\_\_\_\_ restrained of his liberty, it is said, by \_\_\_\_\_, before \_\_\_\_\_, a judge of our \_\_\_\_\_ court, at \_\_\_\_\_, forthwith, to do and receive what shall then be considered; and do you summon the said \_\_\_\_\_ to appear, then and there to show the cause of detaining said \_\_\_\_\_; and have you then and there this writ, with your proceedings indorsed thereon. Witness my hand," etc.

The writ shall be executed according to its tenor and effect, and returned as other writs.

**SOURCES:** Codes, 1871, § 1403; 1880, § 2525; 1892, § 2235; 1906, § 2454; Hemingway's 1917, § 2020; 1930, § 1923; 1942, § 2824.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-21. May be served on Sunday.

All writs of habeas corpus may be issued or served on Sunday in case of emergency.

**SOURCES:** Codes, 1892, § 2236; 1906, § 2455; Hemingway's 1917, § 2021; 1930, § 1924; 1942, § 2825.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

### RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-23. Where and when returnable.

The writ of habeas corpus shall be returnable forthwith, or on a particular day within a reasonable time, and at a place to be named by the judge granting the writ. But when granted by a circuit judge or chancellor, on the application of any person in custody, before conviction upon a criminal charge under the laws of this state, the judge or chancellor shall cause the writ to be made returnable at a convenient place in the county in which the offense is alleged to have been committed, unless so doing will interfere with his holding of a term of court.

**SOURCES:** Codes, 1871, § 1404; 1880, § 2526; 1892, § 2237; 1906, § 2456; Hemingway's 1917, § 2022; 1930, § 1925; 1942, § 2826.



**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

This section [Code 1942, § 2826] providing that the writ be returnable within the county where the crime was committed unless it interferes with the holding of a term of court by the judge or chancellor granting it, is directory and not jurisdictional and is to be confined to causes in which the merits are to be gone into and witnesses examined as to the legality of

the detention. Ex parte Patterson, 71 Miss. 675, 15 So. 794 (1894).

Where one charged with murder is confined in the jail of a different county from that in which the homicide occurred and he resorts to habeas corpus to obtain bail because of ill health, the hearing may, and in case of his dangerous illness should, be in the county of his confinement. Ex parte Patterson, 71 Miss. 675, 15 So. 794 (1894).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 102, 154 et seq.

**CJS.** 39 C.J.S., Habeas Corpus §§ 269, 310, 311 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-25. When person detaining another guilty of crime.

Whenever the judge or chancellor, on issuing a writ of habeas corpus, shall be satisfied, by affidavit or otherwise, that the person unlawfully depriving another of his liberty has committed a crime in connection with such unlawful act, he may embody in the writ a warrant for the arrest of such person and have him brought up for examination at the hearing of the habeas corpus; and being satisfied, on the trial and examination, of the guilt of such person, the judge or chancellor shall commit him, or order his release on bail, to appear before the proper court to answer the charge.

**SOURCES:** Codes, 1892, § 2238; 1906, § 2457; Hemingway's 1917, § 2023; 1930, § 1926; 1942, § 2827.

**Cross References** — Liability for arrest of innocent person made legally, see § 99-3-23.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-27. Production of the body.

Whenever any writ of habeas corpus shall be served upon the sheriff or any other person to whom the same may be directed, or who may be ordered summoned thereby, he shall bring, or permit the officer executing the writ to bring, the body of the prisoner or person detained in custody before the judge who is to try the same, at the time and place designated in the writ, or, in case of the absence of such judge, then before any other judge, and to make return or answer to said writ.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (2); 1857, ch. 48, art. 7; 1871, § 1406; 1880, § 2528; 1892, § 2239; 1906, § 2458; Hemingway's 1917, § 2024; 1930, § 1927; 1942, § 2828.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Post-Conviction Remedies § 106, 159.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-29. What the return or answer shall contain.

The officer or other person upon whom a writ of habeas corpus shall be served shall state in his return or answer:

First.—Whether he have or have not the party in his custody or under his power or restraint.

Second.—If he have the party in his custody or power, or under his restraint, he shall state the authority and cause of imprisonment or restraint, setting forth the same at large.

Third.—If the party be restrained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return or answer, and the original shall be produced on the hearing.

Fourth.—If the officer or person upon whom the writ is served shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but such person has escaped, or such officer or person has transferred the custody or restraint to

another, the return or answer shall state the facts particularly, and, in case of transfer, set forth the time and place, for what cause, and by what authority the transfer took place.

Fifth.—The return must be signed by the officer or person making it, and, except when a sworn public officer shall make return in his official capacity, it shall be verified by his oath.

**SOURCES:** Codes 1892, § 2240; 1906, § 2459; Hemingway's 1917, § 2025; 1930, § 1928; 1942, § 2829.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

Sufficiency of answer where party is in custody of captain of military company.

*Birdsong v. Blackman*, 127 Miss. 693, 90 So. 441 (1922).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 102, 154 et seq.

Return and other pleadings, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 231-262.

**CJS.** 39 C.J.S., Habeas Corpus §§ 312, 313.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-31. Penalty for disobedience of the writ.

Any person who is duly served with a writ of habeas corpus commanding him to produce the body of any other person in his custody, who shall fail to produce the body of the person before the judge, according to the command of the writ, shall forfeit and pay to the party not so produced the sum of One Thousand Dollars (\$1,000.00), to be recovered before any court having jurisdiction, the right to recover which shall not cease by the death of either party. The judge before whom the writ was made returnable may also punish the person failing to obey the command thereof or to perform the duties prescribed, or to obey such order as the judge may make, as for a contempt, and compel obedience by process of attachment or otherwise. Any officer from whom the custody of any person is taken by writ of habeas corpus who shall fail to return the cause of commitment of any prisoner or other person as prescribed, may be punished in like manner.



**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (3); 1857, ch. 48, art. 8; 1871, § 1407; 1880, § 2529; 1892, § 2241; 1906, § 2460; Hemingway's 1917, § 2026; 1930, § 1929; 1942, § 2830.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies § 174.

**CJS.** 39 C.J.S., Habeas Corpus § 270.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts.

58 Miss. L. J. 25, Spring, 1988.

## § 11-43-33. The trial.

The judge or chancellor before whom the prisoner or other person may be brought, shall inquire into the cause of imprisonment or detention, and shall either discharge, commit, admit to bail, or remand the prisoner, or award the custody to the party entitled thereto, as the law and the evidence shall require; and may also award costs and charges, for or against either party, as may seem right. And the clerk of the court in whose office the proceedings may be filed, shall issue execution for the costs and charges so awarded, against the party bound therefor. But the judge may continue the trial from day to day as the case may require.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (4); 1857, ch. 48, art. 10; 1871, § 1049; 1880, § 2530; 1892, § 2242; 1906, § 2461; Hemingway's 1917, § 2027; 1930, § 1930; 1942, § 2831.

**Cross References** — Continuance of action or proceeding where counsel is legislator, see § 11-1-9.

County prosecuting attorney's duty to appear at habeas corpus trials, see § 19-23-11.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

1. In general.
2. Custody of minors.
3. Discharge of accused.
4. Admission to bail.

### 1. In general.

The remedies contained in this section

[Code 1972, § 11-43-33] do not include a bar to any further prosecution for the charged offense, and the habeas corpus court could not release the prisoner from his bond to appear in the circuit court and could not enjoin the district attorney from prosecuting the petitioner for the charged

offense. *Keller v. Romero*, 303 So. 2d 481 (Miss. 1974).

That sheriff in habeas corpus trial took initiative and introduced evidence first did not affect materiality of evidence so as to preclude conviction for perjury. *Slade v. State*, 119 So. 355 (Miss. 1928).

## 2. Custody of minors.

In habeas corpus suit brought by mother to obtain custody of two children from father, custody having previously been granted mother by decree of chancery court, chancery decree was sufficient basis for awarding custody in habeas corpus suit to mother. *Hinman v. Craft*, 204 Miss. 568, 37 So. 2d 770 (1948).

Only final judgment that can be rendered for custody of child is its liberty or award to person entitled thereto. *Yarbrough v. Dunnam*, 130 Miss. 669, 94 So. 892 (1923).

After judgment awarding custody of infant to parents, court cannot require them to permit child to visit grandparents. *Gray v. Gray*, 121 Miss. 541, 83 So. 726 (1920).

## 3. Discharge of accused.

Accused, convicted on an affidavit charging no crime, should have been discharged on writ of habeas corpus. *Ex parte Weems*, 96 Miss. 635, 51 So. 2 (1910).

## 4. Admission to bail.

It is not essential on an application for bail by a person who is indicted for murder that all the witnesses whose names are indorsed on the indictment shall be examined. If the judge be led to believe that there is other testimony procurable and important, he should postpone the hearing. *Ex parte Floyd*, 60 Miss. 913 (1883).

A person discharged on bail will not be considered as restrained of his liberty so as to be entitled to a writ of habeas corpus, and if released on bail on habeas corpus, the supreme court on appeal from that decision cannot discharge him from the bond on grounds that he should have been discharged without bond. *Ex parte Walker*, 53 Miss. 366 (1876).

The bill of rights makes bail a matter of right for all crimes except capital felony where the "presumption is great or proof evident." The courts of many of the states hold the indictment for murder as furnishing "the presumption great" and decline to hear testimony to reduce the grade of the crime from murder to manslaughter. *Street v. State*, 30 Miss. 681 (1856); the practice has been to receive testimony aliunde, *Street v. State*, 43 Miss. 1 (1870).

## RESEARCH REFERENCES

**ALR.** Determination of sufficiency of charge of crime. 40 A.L.R.2d 1151.

Admission of petitioner to bail pending determination of habeas corpus on merits. 56 A.L.R.2d 668.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 A.L.R.3d 764.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies § 42 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**CJS.** 39 C.J.S., Habeas Corpus § 276-279, 344, 350-355, 381, 397-400.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 3:2.

## § 11-43-35. Temporary orders.

The court or judge may make any temporary order in the cause during the progress of the proceedings that may be right and proper, or that justice may require.

**SOURCES:** Codes, 1892, § 2243; 1906, § 2462; Hemingway's 1917, § 2028; 1930, § 1931; 1942, § 2832.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. Interstate compact on the placement of children.

As the Department of Human Services was the "sending agency" under the Interstate Compact on the Placement of Children, it had all the powers necessary to effectuate the purpose of the statute, including the power to intervene in a North Carolina lawsuit to bring back to Mississippi, for the purpose of determining cus-

tody, a child who had been sent to North Carolina to live with relatives and, therefore, the chancellor could order the department to intervene in the North Carolina lawsuit and return the child to the state of Mississippi so that a full trial on the issue of custody could be had. *Oktibbeha County Dep't of Human Servs. v. N.G.F.G.*, 782 So. 2d 1226 (Miss. 2001).

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-37. Return not conclusive.

The return or answer made to a writ of habeas corpus shall not be conclusive as to the facts therein stated, but evidence may be received to contradict the same.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (5); 1857, ch. 48, art. 11; 1871, § 1410; 1880, § 2531; 1892, § 2244; 1906, § 2463; Hemingway's 1917, § 2029; 1930, § 1932; 1942, § 2833.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

Under the Constitution of Mississippi, bail for capital crime is a matter of right if well founded doubt of the prisoner's guilt be sustained. *Ex parte Bridewell*, 57 Miss. 39 (1879).

Evidence is not admissible of the guilt or innocence of the relator where he has already been convicted. *Donnell v. State*, 48 Miss. 661, 12 Am. R. 375 (1873).



## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 117 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-39. Witnesses subpoenaed—affidavits of.

The judge or chancellor may issue or order subpoenas for witnesses and compel their attendance, as a circuit court could in term time, and fine witnesses or others for contempt. Whenever the personal attendance of a witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received in evidence.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (6); 1857, ch. 48, art. 12; 1871, § 1411; 1880, § 2532; 1892, § 2245; 1906, § 2464; Hemingway's 1917, § 2030; 1930, § 1933; 1942, § 2834.

**Cross References** — Subpoena of witnesses generally, see §§ 13-3-93 et seq., 99-9-11 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

In a habeas corpus proceeding by a mother against paternal aunt and paternal grandparents seeking custody of two children awarded to the mother by a prior divorce decree, the trial court erred in suppressing affidavits of nonresident wit-

nesses whose personal attendance could not be procured, where the affidavits were taken on notice to the adverse party, and counsel for both sides had examined them. Neal v. Neal, 238 Miss. 572, 119 So. 2d 273 (1960).

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-41. Record of proceedings.

The proceedings and judgment shall in all cases be entered of record. If the trial be in vacation, the proceedings shall be written out and signed by the judge or chancellor and deposited with the clerk of the circuit court of the county in which the habeas corpus is tried, unless the judge shall direct it to be deposited with such clerk of some other county. If either party require it, the evidence shall be made a part of the record by bill of exceptions, as in other cases.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (7); 1857, ch. 48, art. 13; 1871, § 1412; 1880, § 2533; 1892, § 2246; 1906, § 2465; Hemingway's 1917, § 2031; 1930, § 1934; 1942, § 2835.

**Cross References** — Record of trial, see §§ 9-13-31 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

### § 11-43-43. Conclusiveness of judgment.

The judgment rendered on the trial of any writ of habeas corpus shall be conclusive until reversed, and, whilst so in force, shall be a bar to another habeas corpus in the same cause, or to any other proceedings, to bring the same matter again in question, except by appeal or by action for false imprisonment; nor shall any person so discharged be afterward confined for the same cause, except by a court of competent jurisdiction.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 1 (8); 1857, ch. 48, art. 15; 1871, § 1413; 1880, § 2534; 1892, § 2247; 1906, § 2466; Hemingway's 1917, § 2032; 1930, § 1935; 1942, § 2836.

**Cross References** — Appeals from cases that are returnable at any time, see § 11-3-3.

Appeal in habeas corpus cases, see § 11-43-53.

Appeal from judgment on habeas corpus, see § 11-43-55.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

Under this section [Code 1942, § 2836], the remedy of one to whom habeas corpus has been denied is by appeal and not a subsequent petition. *Bellew v. Dedeaux*, 240 Miss. 79, 126 So. 2d 249 (1961).

Judgment awarding custody of child to person entitled thereto is *res judicata* of

rights of parties as facts then existed. *Yarbrough v. Dunnam*, 130 Miss. 669, 94 So. 892 (1923).

But new evidence of old facts will not do; a new state of case which in and of itself presents a ground for granting bail alone can prevent the bar. *Ex parte Nichols*, 62 Miss. 158 (1884); *Ex parte Hamilton*, 65

Miss. 98, 3 So. 68 (1887).

A legislative act making prisoner a competent witness does not give him a right to a new writ when the first was denied before the passage of the act. *Ex parte Nichols*, 62 Miss. 158 (1884).

The statute does not preclude the issuance of a second writ based upon facts which have occurred since the first hear-

ing. *Ex parte Pattison*, 56 Miss. 161 (1878); *Ex parte Bridewell*, 57 Miss. 177 (1879).

A mistrial is not such a fact as will entitle to bail, nor is bad health unless it be shown by the evidence that the confinement will probably produce fatal or serious results. *Ex parte Pattison*, 56 Miss. 161 (1878).

## RESEARCH REFERENCES

**ALR.** Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus. 60 A.L.R. Fed. 481.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 163 et seq.

Judgment, 13 Am. Jur. Pl & Pr Forms (Rev), Habeas Corpus, Forms 271-302.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-45. Sheriff to attend trial.

The sheriff, when required by the judge or chancellor, shall attend in person, or by deputy, upon the trial of a habeas corpus in his county, to keep order and execute the mandates of the judge or chancellor, and shall be subject to the orders of the judge or chancellor during the trial in vacation in the same manner as in term time. The judge or chancellor trying a habeas corpus in vacation shall have the same power to fine and imprison for contempt as in term time.

**SOURCES:** Codes, 1871, § 1414; 1880, § 2535; 1892, § 2248; 1906, § 2467; Hemingway's 1917, § 2033; 1930, § 1936; 1942, § 2837.

**Cross References** — Sheriff attending courts and executing orders, see § 19-25-35. Fee allowed sheriff for attendance of prisoner on habeas corpus trial, see § 25-7-21. Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.



§ 11-43-47. Costs in certain cases, and security for.

When the application for a writ of habeas corpus is in the nature of a civil action between parties, the law providing for security for costs shall be applicable; and in such cases persons who may produce the body of another, or render other services, may be allowed the same fees as allowed by law to officers for the same services, the costs to be taxed and collected as in other cases.

**SOURCES:** Codes, 1880, § 2538; 1892, § 2249; 1906, § 2468; Hemingway's 1917, § 2034; 1930, § 1937; 1942, § 2838.

**Cross References** — Deposit for costs being certified on transcript, see § 11-51-69.

Costs in criminal prosecutions, see §§ 99-1-11 et seq.

Deposit for costs in criminal appeals cases, see § 99-35-107.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Costs in civil actions or suits, see Chapter 53 of this title.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 167 et seq.

24A Am. Jur. Pl & Pr Forms (Rev), Venue, Form 291.2 (Motion — For change

of venue — To county where real property subject to litigation is located).

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-49. Defaulting witness dealt with.

If a witness shall not obey the subpoena served on him in case of habeas corpus, the judge or chancellor may not only issue, or cause the clerk to issue, an attachment for the witness, but shall indorse on the subpoena the default of the witness and a fine therefor, and file it with the other papers in the clerk's office of the proper circuit court. Scire facias shall issue for the witness, returnable before the court, and proceedings shall be had as provided in case of a defaulting witness in the circuit court.

**SOURCES:** Codes, 1880, § 2539; 1892, § 2250; 1906, § 2469; Hemingway's 1917, § 2035; 1930, § 1938; 1942, § 2839.

**Cross References** — Attachment of non-appearing subpoenaed witness, see §§ 13-3-103, 99-9-19.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-51. Liabilities and rights of witnesses.

Witnesses in a habeas corpus case shall be subject to the same penalties, and be entitled to the same privileges and compensation, and be paid in the same way, as in other cases. They may prove their attendance before the clerk in whose office the record of the proceeding is filed, and obtain from him a certificate of their attendance and of the compensation to which they are entitled, as in cases in the circuit courts; or the judge trying the case may give the witnesses certificates of their attendance and the compensation to which they are entitled, which shall have the same effect as such certificates in a like case by the clerk.

**SOURCES:** Codes, 1880, § 2541; 1892, § 2251; 1906, § 2470; Hemingway's 1917, § 2036; 1930, § 1939; 1942, § 2840.

**Cross References** — Witness fees, see §§ 25-7-47 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## RESEARCH REFERENCES

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-53. Appeal in habeas corpus.

Any party aggrieved by the judgment on the trial of a habeas corpus, shall have an appeal to the Supreme Court. If any person held in service by this state, or by the United States, should be discharged by any judge in vacation, or any court, on habeas corpus, the Attorney General or any district attorney, or any attorney duly authorized by the United States, may in like manner obtain an appeal to reverse the judgment by which such person was discharged.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 9; 1857, ch. 48, art. 16, 17; 1871, §§ 1415, 1416; 1880, §§ 2312, 2313; 1892, § 35; 1906, § 36; Hemingway's 1917, § 11; 1930, § 15; 1942, § 1149.

**Cross References** — Time for returning appeal in habeas corpus, see § 11-3-3.

Appeals in criminal cases, see §§ 99-35-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

All appeals from a trial of a habeas corpus, whether tried in circuit, chancery, or county court, must be to the Supreme

Court. *Wilson v. State*, 318 So. 2d 889 (Miss. 1975).

A county judge, passing upon an application in habeas corpus, acts not as a county court, but with all the power and authority of a circuit judge or chancellor, and an appeal may be taken direct to the supreme court under this section [Code 1942, § 1149]. *Cole v. Cole*, 194 Miss. 292, 12 So. 2d 425 (1943).

In a proceeding for a writ of habeas corpus to compel the admission of the relator to bail, the sheriff who has the custody of the relator is a "party aggrieved" and entitled to appeal. *Edmonson v. Ramsey*, 122 Miss. 450, 84 So. 455, 10 A.L.R. 380 (1920).

The state, though not formally designated as such, is always a real party to the record in habeas corpus proceedings where the petitioner is being held to await trial for an alleged violation of the criminal law, and is therefore entitled to appeal from a judgment adverse to its interest. *State v. Gordon*, 105 Miss. 454, 62 So. 431 (1913).

## RESEARCH REFERENCES

**ALR.** Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 102, 154 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**CJS.** 39 C.J.S., Habeas Corpus §§ 397-431.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## § 11-43-55. Procedure on appeal from judgment on habeas corpus.

An appeal from a judgment on the trial of a writ of habeas corpus may be had by or in behalf of the person deprived of his liberty on the same terms and conditions as are provided for in criminal cases; but such appeal shall not



entitle a party to be discharged on bail in any case held not to be one in which the party is entitled to bail. In all other cases, an appeal from a judgment on trial of a writ of habeas corpus may be had on their terms prescribed for appeals in civil cases, where a supersedeas is not desired.

**SOURCES:** Codes, 1880, §§ 2337, 2338; 1892, § 63; 1906, § 64; Hemingway's 1917, § 40; 1930, § 43; 1942, § 1177.

**Cross References** — Return-day for appeal in habeas corpus, see § 11-3-3.

Requirement for bail in habeas corpus, see § 11-43-13.

Conclusiveness of judgment in habeas corpus, see § 11-43-43.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

## JUDICIAL DECISIONS

### 1. In general.

All appeals from a trial of a habeas corpus, whether tried in circuit, chancery,

or county court, must be to the Supreme Court. *Wilson v. State*, 318 So. 2d 889 (Miss. 1975).

## RESEARCH REFERENCES

**ALR.** Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

**Am Jur.** 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 102, 154 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

**CJS.** 39 C.J.S., Habeas Corpus §§ 397-431.

**Law Reviews.** Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

## CHAPTER 44

### Compensation to Victims of Wrongful Conviction and Imprisonment

#### SEC.

- 11-44-1. Legislative findings and intent.
- 11-44-3. Prerequisite for claim for compensation.
- 11-44-5. Jurisdiction of claims for wrongful conviction and imprisonment.
- 11-44-7. Determination of eligibility for compensation; award of compensation.
- 11-44-9. Statute of limitations on commencement of action for compensation.
- 11-44-11. Appeal of claim of wrongful conviction and imprisonment decision.
- 11-44-13. Effect of death of claimant prior to filing claim or full payment of compensation.
- 11-44-15. Release from future claims against the state.

#### § 11-44-1. Legislative findings and intent.

The Legislature finds that innocent persons who have been wrongly convicted of felony crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and should be compensated. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the provisions of this chapter that innocent people who are wrongfully convicted be able to receive monetary compensation.

**SOURCES:** Laws, 2009, ch. 472, § 1, eff from and after July 1, 2009.

**Comparable Laws from other States** — Code of Alabama, §§ 29-2-150 et seq.  
California Penal Code, §§ 4900 et seq.  
Connecticut Annotated Statutes, §§ 54-102pp, 54-102uu.  
Florida Annotated Statutes, §§ 961.01 et seq.  
Texas Civil Practice and Remedies Code, §§ 103.001 et seq.  
Virginia Code Annotated, §§ 8.01-195.10 et seq.

#### § 11-44-3. Prerequisite for claim for compensation.

(1) In order to present an actionable claim for wrongful conviction and imprisonment under this chapter, a claimant must establish by documentary evidence that:

(a) The claimant has been convicted of one or more felonies and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence;

(b) On grounds not inconsistent with innocence:

(i) The claimant was pardoned for the felony or felonies for which sentenced and which are the grounds for the complaint and the pardon is based on the innocence of the claimant which must be affirmatively stated in the pardon; or

(ii) The judgment of conviction was vacated and/or reversed;

(c) If there was a vacatur or reversal, either the accusatory instrument was dismissed or nol prossed; or if a new trial was held, the defendant was found not guilty;

(d) The claimant's claim is not time-barred by the provisions of this chapter; and

(e) The claimant did not intentionally waive any appellate or post-conviction remedy otherwise available in order to benefit under this chapter.

(2) The claim shall be verified by the claimant.

(3) If the court finds after reading the claim that the claimant has not demonstrated the foregoing, it shall dismiss the claim, either on its own motion or on the state's motion. This dismissal shall be without prejudice to allow adequate refiling within ninety (90) days.

**SOURCES:** Laws, 2009, ch. 472, § 2, eff from and after July 1, 2009.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in (1) by substituting "...claim for wrongful conviction and imprisonment under this chapter..." for "...claim for wrongful conviction and imprisonment under this section..." The Joint Committee ratified the correction at its August 16, 2012, meeting.

### **§ 11-44-5. Jurisdiction of claims for wrongful conviction and imprisonment.**

Jurisdiction of all claims of wrongful conviction and imprisonment brought under this chapter shall lie in the circuit court of the county in which the claimant was convicted. The respondent will be the State of Mississippi, which will be represented by the Attorney General's office.

**SOURCES:** Laws, 2009, ch. 472, § 3, eff from and after July 1, 2009.

### **§ 11-44-7. Determination of eligibility for compensation; award of compensation.**

(1) In order to obtain a judgment under this chapter, a claimant must prove by a preponderance of the evidence that:

(a) He was convicted of one or more felonies and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(i) He has been pardoned for the felony or felonies for which he was sentenced and which are the grounds for the complaint and the pardon is based on the innocence of the claimant which must be affirmatively stated in the pardon; or

(ii) His judgment of conviction was reversed or vacated; and

1. The accusatory instrument was dismissed or nol prossed; or

2. If a new trial was ordered, he was found not guilty at the new trial; and

(b) He did not commit the felony or felonies for which he was sentenced and which are the grounds for the complaint, or the acts or omissions for which he was sentenced did not constitute a felony; and

(c) He did not commit or suborn perjury, or fabricate evidence to bring about his conviction.



(2) If the court finds that the claimant was wrongfully convicted and incarcerated pursuant to subsection (1) of this section, the court shall award:

(a) Fifty Thousand Dollars (\$50,000.00) for each year of incarceration regardless of the number of felonies for which a claimant was convicted, but the total amount for each claimant shall not exceed Five Hundred Thousand Dollars (\$500,000.00). There shall be no compensation for any preindictment detention. This award shall be paid to the claimant in installments of Fifty Thousand Dollars (\$50,000.00) per year until the award is fully paid. The state may purchase an annuity to satisfy this obligation.

(b) Reasonable attorney's fees for bringing a claim under this chapter calculated at ten percent (10%) of the amount awarded under paragraph (a) of this subsection for preparing and filing the claim, twenty percent (20%) for litigating the claim if it is contested by the Attorney General, and twenty-five percent (25%) if the claim is appealed, plus expenses. These fees shall not be deducted from the compensation due the claimant, nor is counsel entitled to receive additional fees from the client for a claim under this section.

(3) The award shall not be subject to:

(a) Any cap applicable to private parties in civil lawsuits;

(b) Any taxes, except that those portions of the judgment awarded as attorney's fees for bringing a claim under this chapter shall be taxable as income to the attorney; or

(c) Treatment as gross income to a claimant under the provisions of Title 27, Chapter 7, Mississippi Code of 1972.

(4) A claimant may choose to pursue a claim under this chapter in lieu of pursuing a claim against the State of Mississippi or a political subdivision thereof under the Mississippi Tort Claims Act, Section 11-46-1 et seq., Mississippi Code of 1972. Any claimant who obtains an award under this chapter may not obtain an award by reason of the same subject against the State of Mississippi or a political subdivision thereof under the provisions of the Mississippi Tort Claims Act, Section 11-46-1 et seq., Mississippi Code of 1972.

(5) The immunity of the State of Mississippi and any political subdivision thereof is hereby waived with respect to the claims described in this chapter and within the limits prescribed by this chapter.

**SOURCES:** Laws, 2009, ch. 472, § 4, eff from and after July 1, 2009.

### **§ 11-44-9. Statute of limitations on commencement of action for compensation.**

(1) An action for compensation brought by a wrongfully convicted person under the provisions of this chapter shall be commenced within three (3) years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in Section 11-44-3(1); provided, however, that any action by the state challenging or appealing the grant of said judicial relief shall toll the three-year period. Persons convicted, incarcerated and released

from custody prior to July 1, 2009, shall commence an action under this chapter not later than June 30, 2012.

(2) Notwithstanding any other provision of law, failure to file any applicable Notice of Claim shall not bar filing of a claim under this chapter.

**SOURCES:** Laws, 2009, ch. 472, § 5, eff from and after July 1, 2009.

**§ 11-44-11. Appeal of claim of wrongful conviction and imprisonment decision.**

Any party aggrieved by a decision as to a claim brought under this chapter is entitled to appeal the decision as in other civil cases.

**SOURCES:** Laws, 2009, ch. 472, § 6, eff from and after July 1, 2009.

**§ 11-44-13. Effect of death of claimant prior to filing claim or full payment of compensation.**

If a claimant dies prior to the full payment of any claim awarded under this chapter, the remaining payments shall be made to his or her estate or heirs. If any potential claimant dies prior to the filing of a claim, the claim may be filed by and on behalf of his or her estate or heirs.

**SOURCES:** Laws, 2009, ch. 472, § 7, eff from and after July 1, 2009.

**§ 11-44-15. Release from future claims against the state.**

Any claimant who receives compensation under this chapter shall sign a release from all claims against the state regarding the incarceration for which the claimant receives compensation.

**SOURCES:** Laws, 2009, ch. 472, § 8, eff from and after July 1, 2009.

## CHAPTER 45

### Suits by and Against the State or Its Political Subdivisions

SEC.

- 11-45-1. When the state may be sued.
- 11-45-3. Service of summons and conduct of case.
- 11-45-5. Payment of judgment or decree against the state.
- 11-45-7. Remedy against intruders on the lands of the state.
- 11-45-9. Any property accrued to the state recovered.
- 11-45-11. The state entitled to all actions — unlawful detainer for its lands.
- 11-45-13. Certain suits abated.
- 11-45-15. County to have like remedies.
- 11-45-17. County may sue and be sued.
- 11-45-19. Suit where part only of county is interested.
- 11-45-21. Bond not to be required.
- 11-45-23. Property recovered delivered to agent.
- 11-45-25. Suits by and against municipalities.

#### § 11-45-1. When the state may be sued.

Any person having a claim against the State of Mississippi, after demand made of the auditor of public accounts therefor, and his refusal to issue a warrant on the treasurer in payment of such claim, may, where it is not otherwise provided, bring suit therefor against the state, in the court having jurisdiction of the subject matter which holds its sessions at the seat of government; and, if there be no such court at the seat of government, such suit may be instituted in such court in the county in which the seat of government may be.

**SOURCES:** Codes, 1871, § 1573; 1880, § 2641; 1892, § 4248; 1906, § 4800; Hemingway's 1917, § 3164; 1930, § 5997; 1942, § 4387.

**Editor's Note** — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws, 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

**Cross References** — Filing of claims against state as result of purchases, services, salaries, travel expense, or other encumbrances made, or liabilities incurred, see § 7-7-27.

Duty of auditor of public accounts to pre-audit all claims, see § 7-7-33.

The issuance, signing, and delivery of warrants for payment of claims by auditor of public accounts, see § 7-7-35.



Issuance by auditor of public accounts of duplicate warrants in replacement of lost or destroyed warrants, see § 7-7-57.

Immunity of state and its political subdivisions from liability and suit for torts and torts of employees, see §§ 11-46-1 et seq.

Limitation of suits by and against state, counties and municipalities, see § 15-1-51.

## JUDICIAL DECISIONS

1. In general.
2. Necessity that claim be one that auditor is empowered to audit.

### 1. In general.

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. Art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. *Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC*, 864 So. 2d 939 (Miss. 2004).

The proprietary nature of a State agency's conduct is of no consequence in determining whether sovereign immunity is waived for torts committed while engaged in such conduct, since the proprietary-governmental function distinction applies only to cases involving municipalities. *Strait v. Pat Harrison Waterway Dist.*, 523 So. 2d 36 (Miss. 1988), overruled on other grounds, *Churchill v. Pearl River Basin Dev. Dist.*, 619 So. 2d 900 (Miss. 1993).

State auditor held to have discretion and judgment in connection with payment of fees due county officers on land sold for taxes, so that county officer was not entitled to mandamus to compel auditor to issue warrant without first bringing suit. *Thomas v. Price*, 171 Miss. 450, 158 So. 206 (1934).

A suit against the land commissioner to recover the purchase price of a tax title declared void is an action against the state and controlled by this section [Code 1942, § 4387]. *Brown v. Ford*, 112 Miss. 678, 73 So. 722 (1917).

An action against the state to recover the purchase price of a void tax title should have been brought in Hinds County instead of Wilkinson County. *Brown v. Ford*, 112 Miss. 678, 73 So. 722 (1917).

Where the bill fails to state cause of action the case should be dismissed. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281 (1916).

The auditor and treasurer were made, by Acts 1876 ch 108, the successors of levee board No. 1, and were liable to be sued as such. The state is a proper party to a suit which sought to enforce a right against said board. *State v. Woodruff*, 83 Miss. 111, 36 So. 79 (1904).

A sovereign state cannot be sued except by its consent. *Hall v. State*, 79 Miss. 38, 29 So. 994 (1901).

### 2. Necessity that claim be one that auditor is empowered to audit.

Claim by subcontractor against state building commission arising from nonpayment by general contractor is breach of contract claim for damages which auditor is not empowered to audit; accordingly, § 11-45-1 does not apply to claim. *Mississippi State Bldg. Comm'n v. S & S Moving, Inc.*, 475 So. 2d 159 (Miss. 1985).

Claim for privilege taxes erroneously collected, not being subject to allowance by auditor of public accounts, will not support action against state. *National Life & Accident Ins. Co. v. State*, 159 Miss. 513, 132 So. 549 (1931).

An action cannot be brought upon a claim which the auditor has no authority to audit and allow. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281 (1916).

The chancery court has no power to decree what the state should pay for alleged breach of contract with reference to claims against the state which the auditor may not allow. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281 (1916).

A claim for damages for breach of contract by the state cannot be allowed by the auditor. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281 (1916).

This section [Code 1942, § 4387] does not embrace claims which the auditor of

public accounts is not empowered to audit and allow. *Hall v. State*, 79 Miss. 38, 29 So. 994 (1901).

Under this section [Code 1942, § 4387], suits can be maintained against the state only upon claims which the auditor is empowered to audit. *State v. Dinkins*, 77 Miss. 874, 27 So. 832 (1900).

The governor has sole discretion in respect to offering and paying rewards for the arrest of escaped criminals, and consequently no suit can be maintained against the state to recover a reward which the governor declines to pay. *State v. Dinkins*, 77 Miss. 874, 27 So. 832 (1900).

## RESEARCH REFERENCES

**ALR.** Tortious breach of contract as within consent to suit against United States or state on contract. 1 A.L.R.2d 864.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

When may claims against United States under Federal Tort Claims Act (28 USCS §§ 2671-2680) be maintained as class action. 48 A.L.R. Fed. 860.

Exceptions to jurisdictional immunity of foreign states and their property under the Foreign Sovereign Immunities Act of 1976 (28 USCS §§ 1602 et seq.). 59 A.L.R. Fed. 99.

**Am Jur.** 72 Am. Jur. 2d, States, Territories, and Dependencies §§ 97 et seq.

**CJS.** 81 C.J.S., States §§ 274, 279, 297 et seq.

## § 11-45-3. Service of summons and conduct of case.

The summons in such suit shall be served on the Attorney General in the mode prescribed by law for the service of a summons in other cases; and he shall appear for the state. The suit shall be proceeded with as if it were between private persons; but a bill shall not be taken as confessed nor a judgment by default be rendered against the state. The answer of the state to any bill need not be under oath or under the great seal, but may be made by the Attorney General for the state.

**SOURCES:** Codes, 1871, §§ 1577, 1578; 1880, § 2642; 1892, § 4249; 1906, § 4801; Hemingway's 1917, § 3165; 1930, § 5998; 1942, § 4388.

**Cross References** — Duty of attorney general to direct issuance of process to carry into execution judgment in cause represented by him, see § 7-5-33.

## JUDICIAL DECISIONS

### 1. In general.

In action by plaintiff against state agency, where service was not made on Attorney General as required by Miss Code § 11-45-3 but was instead affected by mailing copy of summons and complaint to manager of local office that com-

mitted act complained of, claims against state agency were properly dismissed where plaintiff's counsel failed to establish good cause why service was not made within prescribed period but merely stated that he had not realized he had served wrong person until motion to dis-

miss was filed; court noted that deficiency in service had been expressly asserted and explained in agency's answer 4 ½ months

prior to motion to dismiss. *Way v. Mueller Brass Co.*, 840 F.2d 303 (5th Cir. 1988).

### RESEARCH REFERENCES

**ALR.** Local government tort liability: Minority as affecting notice of claim requirement. 58 A.L.R.4th 402.

**Am Jur.** 22 Am. Jur. Pl & Pr Forms (Rev), States, Territories, and Dependencies, Form 1 (allegation of complaint, petition, or declaration that state official is authorized agent for service of process).

18 Am. Jur. Pl & Pr Forms, States, Territories, and Dependencies, Form 18:1243 (allegation that state attorney general is authorized agent for service of process on state).

**CJS.** 81A C.J.S., States §§ 574, 575.

## § 11-45-5. Payment of judgment or decree against the state.

A judgment or decree against the state shall not be satisfied except by an appropriation therefor by the legislature, and an execution shall not be issued against the state.

**SOURCES:** Codes, 1871, § 1580; 1880, § 2644; 1892, § 4250; 1906, § 4802; Hemingway's 1917, § 3166; 1930, § 5999; 1942, § 4389.

### JUDICIAL DECISIONS

#### 1. In general.

In a civil rights suit commenced against the State and state officials over conditions at state penitentiary, the trial court did not act outside the scope of its authority in ordering the state auditor to issue a warrant upon the state treasurer and ordering the state treasurer in turn to satisfy the judgment of attorney's fees, where to strike down the order because it was in conflict with Code 1972, § 11-45-5, which prohibits the satisfaction of any judgment

against the state except by an appropriation therefor by the legislature would be allowing the state, by legislative action, to recloak itself with the Eleventh Amendment immunity which Congress had chosen to remove and would be contrary to the command of the Supremacy Clause of the United States Constitution. *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), reh'g granted, 636 F.2d 942 (5th Cir. 1981), reh'g denied, 641 F.2d 403 (5th Cir. 1981).

### RESEARCH REFERENCES

**Am Jur.** 72 Am. Jur. 2d, States, Territories, and Dependencies § 95.

**CJS.** 81A C.J.S., States § 586.

## § 11-45-7. Remedy against intruders on the lands of the state.

If any person shall unlawfully enter on, and intrude upon or hold land belonging to the state, or take possession of or hold any personal property belonging to the state, such person may be proceeded against by action to be instituted by the district attorney of the district, or by the escheator of the county in a proper case. On the trial of the issue, the court or jury shall assess damages for rents and profits, and for injury done to the property by the



despoilment of the timber or otherwise. If the trespass complained of be the cutting, belting, girdling, boxing, or otherwise injuring the timber, triple damages shall be recovered.

**SOURCES:** Codes, 1857, ch. 17, art. 13; 1880, § 893; 1892, § 4251; 1906, § 4803; Hemingway's 1917, § 3167; 1930, § 6000; 1942, § 4390.

**Cross References** — Persons through which land commissioner may prosecute suits concerning public lands, see § 29-1-7.

Duty of land commissioner to institute and prosecute suits to cancel patents to lands fraudulently obtained or issued, and to recover possession of land, see § 29-1-9.

Disposition by land commissioner of private claims to public lands, see § 29-1-13.

Duty of land commissioner to protect public lands from trespass, see § 29-1-17.

### RESEARCH REFERENCES

**ALR.** Standard of proof as to conduct underlying punitive damage awards-modern status. 58 A.L.R.4th 878.

**CJS.** 81A C.J.S., States §§ 529-531 et seq.

**Am Jur.** 72 Am. Jur. 2d, States, Territories, and Dependencies §§ 85 et seq.

### § 11-45-9. Any property accrued to the state recovered.

In like manner as set forth in Section 11-45-7, an action may be prosecuted in all cases where property, real or personal, has accrued to the state by any forfeiture or otherwise.

**SOURCES:** Codes, 1857, ch. 17, art. 13; 1880, § 895; 1892, § 4252; 1906, § 4804; Hemingway's 1917, § 3168; 1930, § 6001; 1942, § 4391.

### RESEARCH REFERENCES

**Am Jur.** 72 Am. Jur. 2d, States, Territories, and Dependencies §§ 85 et seq.

**CJS.** 81A C.J.S., States §§ 529-531 et seq.

### § 11-45-11. The state entitled to all actions — unlawful detainer for its lands.

The state shall be entitled to bring all actions and all remedies to which individuals are entitled in a given state of case. It may maintain the action of unlawful entry and detainer in all cases, at its option, for the recovery of land.

**SOURCES:** Codes, 1880, § 897; 1892, § 4253; 1906, § 4805; Hemingway's 1917, § 3169; 1930, § 6002; 1942, § 4392.

**Cross References** — Duty of attorney general to represent state officers in suits brought by them in their official capacity, see § 7-5-39.

Who is entitled to summary remedy of unlawful entry and detainer, see § 11-25-1.

Statute of limitations in suits by and against state, see § 15-1-51.

Persons through which land commissioner may prosecute suits concerning public lands, see § 29-1-7.

Duty of land commissioner to institute and prosecute suits to cancel patents to lands fraudulently obtained or issued, and to recover possession of land, see § 29-1-9.

Disposition by land commissioner of private claims to public lands, see § 29-1-13.

Duty of land commissioner to protect public lands from trespass, see § 29-1-17.

Criminal offense of conspiracy to defraud state, see §§ 97-7-11 to 97-7-15.

## JUDICIAL DECISIONS

### 1. In general.

A school district is an agent of the State, and therefore has within its authority all actions and all remedies to which an individual is entitled. *Harrison County v. City of Gulfport*, 557 So. 2d 780, 17 A.L.R.5th 974 (Miss. 1990).

A county board of education was an agent of the State, and therefore had the authority to object to a proposed annexation. The board of education was a party interested in, affected by or aggrieved by the proposed annexation within the meaning of § 21-1-31, where the territory sought to be annexed was served by schools administered by the county board of education. Additionally, the school board had the authority to exercise its standing and to employ counsel and participate fully in the annexation confirmation proceeding. *Harrison County v. City of Gulfport*, 557 So. 2d 780, 17 A.L.R.5th 974 (Miss. 1990).

A municipal separate school district may bring suit for alleged damages resulting from the alleged faulty construction of a district's school building against the contractor, the architect, the bonding company, the sub-contractors, and the furnishers of building materials. *Grenada Mun. Separate Sch. Dist. v. Jesco, Inc.*, 449 So. 2d 226 (Miss. 1984).

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of

the county budget law, and the state auditor is expressly authorized to sue for such recovery. *Lincoln County v. Entrican*, 230 So. 2d 801 (Miss. 1970).

The state has the right and power to file an action for the collection of unpaid privilege taxes and penalties thereon due the state and its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by Code 1942, § 2680. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

The state, county and municipality were the real parties in interest in a suit by the state for the collection of debts due the state and its political subdivisions as unpaid privilege taxes and penalties. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

The state does not legally become a party to a suit brought on its behalf unless the suit is brought by some officer having statutory authority so to do and a suit brought by the state tax collector without authority is not binding on the state, and a decree therein is not res judicata against the state. *State v. Rogers*, 206 Miss. 643, 39 So. 2d 533 (1949).

District attorney, with approval of attorney general, was authorized to maintain suit on behalf of county or district thereof against member of board of supervisors and his surety for unlawfully permitting a tractor and other construction equipment belonging to the county to be used for benefit of private individuals, to recover loss to the county arising from depreciation of such equipment, the illegal use of gasoline and oil, and the expenditure of considerable sums for wages to its employees. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a

member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

The fact that the state tax collector had previously brought suit on behalf of the state to recover for removal of sand and gravel from tidewater lands was not res adjudicata as to a subsequent suit on the identical cause of action brought by the state attorney-general, since no jurisdiction could be acquired over the state in the prior suit by the unauthorized act of one of its officials in assuming to appear on its behalf. *State ex rel. Rice v. Stewart*, 184

Miss. 202, 184 So. 44 (1938), error overruled, 184 Miss. 235, 185 So. 247 (1938).

The state, as trustee for the people of the state, was entitled to recover the value of sand and gravel alleged to have been dredged for commercial purposes from the bed of bayou where the tide ebbed and flowed therein. *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938), error overruled, 184 Miss. 235, 185 So. 247 (1938).

The state may sue a county as trustee of the 16th section lands and compel an accounting and enforce payment to townships of their proper share. *Robertson v. Monroe County*, 118 Miss. 520, 79 So. 184 (1918).

### RESEARCH REFERENCES

**ALR.** Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

State's standing to sue on behalf of its citizens. 42 A.L.R. Fed. 23.

**Am Jur.** 72 Am. Jur. 2d, States, Territories, and Dependencies §§ 85 et seq.

**CJS.** 81A C.J.S., States §§ 529-531 et seq.

**Law Reviews.** 1984 Mississippi Supreme Court Review: Corporate, Contract and Commercial Law. 55 Miss. L. J. 65, March, 1985.

### § 11-45-13. Certain suits abated.

All suits which have by acts of the Legislature been heretofore abated shall continue so abated. All rights of action and causes of action which the state, or any officer for the use of the state may have had, where by act of the Legislature such right has been abrogated and the authority and right to bring suit thereon denied, such right shall continue so abrogated and such right and authority to bring suit thereon and therefor shall continue to be denied.

**SOURCES:** Codes, 1930, § 6003; 1942, § 4393.

### § 11-45-15. County to have like remedies.

Any county may have like remedies given to recover any property belonging to it, or damages for injury thereto; and action may be brought in behalf of the county by the county prosecuting attorney or by someone employed therefor by the board of supervisors.

**SOURCES:** Codes, 1880, § 896; 1892, § 4254; 1906, § 4806; *Hemingway's* 1917, § 3170; 1930, § 6004; 1942, § 4394; *Laws*, 1978, ch. 509, § 2, eff from and after January 1, 1980.

**Cross References** — Limitations of suits by and against state, counties and municipalities, see § 15-1-51.



Employment of counsel by county board of supervisors, see § 19-3-49.

## JUDICIAL DECISIONS

### 1. In general.

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of the county budget law, and the state auditor is expressly authorized to sue for such recovery. *Lincoln County v. Entrican*, 230 So. 2d 801 (Miss. 1970).

If a district attorney may bring suit on behalf of a county, he may bring it where only part of the county is concerned. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

District attorney, with approval of attorney general, was authorized to maintain suit on behalf of county or district thereof against member of board of supervisors and his surety for unlawfully permitting tractor and other construction equipment

belonging to the county to be used for benefit of private individuals, to recover loss to the county arising from depreciation of such equipment, the illegal use of gasoline and oil, and the expenditure of considerable sums for wages to its employees. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

This section [Code 1942, § 4394] does not authorize a county to bring an action of mandamus affecting public interest, as in the case of mandamus to compel the state highway commission to allow a county moneys expended in building a bridge. *Hancock County v. State Hwy. Comm'n*, 188 Miss. 158, 193 So. 808 (1940).

A county may institute a suit against a railroad company for the conversion of negotiable bonds of the county issued in aid of the railroad. *Board of Supvrs. v. Georgia Pac. Ry.*, 11 So. 471 (Miss. 1892).

## RESEARCH REFERENCES

**Am Jur.** 56 *Am. Jur.* 2d, *Municipal Corporations, Counties, and Other Political Subdivisions*, § 735, 740.

**CJS.** 20 *C.J.S.*, *Counties* §§ 410, 411 et seq.

### § 11-45-17. County may sue and be sued.

Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

**SOURCES:** Codes, 1857, ch. 59, art. 34; 1871, § 1384; 1880, § 2175; 1892, § 290; 1906 § 309; *Hemingway's* 1917, § 3682; 1930, § 270; 1942, § 2955.

**Cross References** — Limitations of suits by and against state, counties and municipalities, see § 15-1-51.

## JUDICIAL DECISIONS

1. In general.
2. Suits by, or on behalf of, or in name of, county.
3. Suits against county.
4. —Venue.

### 1. In general.

A county had standing under § 21-1-31 to object to the annexation of county territory by a city since it was a party interested in, affected by or aggrieved by the annexations. Furthermore, a combined reading of §§ 11-45-17, 11-45-19, and 19-3-47(1)(b) vested in the county, acting by and through its board of supervisors, authority to exercise its standing and to employ counsel and participate fully in each annexation and confirmation proceeding. *Harrison County v. City of Gulfport*, 557 So. 2d 780, 17 A.L.R.5th 974 (Miss. 1990).

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of the county budget law, and the state auditor is expressly authorized to sue for such recovery. *Lincoln County v. Entrican*, 230 So. 2d 801 (Miss. 1970).

In a suit against members of a county school board and county superintendent to compel them to provide transportation for children of the school district who were legally enrolled in a school located in another school district, plaintiffs in addition to being citizens, property owners and taxpayers were also fathers and mothers of the children who were denied transportation, had the right to bring the action.

*Grenada County Sch. Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798 (1955), suggestion of error overruled, 224 Miss. 585, 81 So. 2d 694 (1955).

### 2. Suits by, or on behalf of, or in name of, county.

Authority of board of supervisors is not necessary in suit by or on behalf of the county against individual member of the board. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

This section [Code 1942, § 2955] does not authorize a county to bring an action of mandamus affecting public interest, as in the case of mandamus to compel the state highway commission to allow a county moneys expended in building a bridge. *Hancock County v. State Hwy. Comm'n*, 188 Miss. 158, 193 So. 808 (1940).

A private citizen cannot bring a suit on behalf of the county to challenge lease of its property. *AMOCO v. Interstate Whsle. Grocers, Inc.*, 138 Miss. 801, 104 So. 70 (1925).

A suit brought in the name of the board of supervisors for the benefit of the county, instead of in the name of county, is merely a misnomer which should have been objected to in the trial court, and a failure to object then amounts to a waiver and precludes the defendant from raising the point on appeal. *National Sur. Co. v. Board of Supvrs.*, 120 Miss. 706, 83 So. 8 (1919).

A drainage district with power to sue and be sued is not required to bring a suit in the name of the county. *Robertson v. Thomas*, 118 Miss. 423, 79 So. 289 (1918).

Where two or more officers are authorized to bring suit for the benefit of the

county, the one first to bring suit takes control of it. *Robertson v. Bank of Batesville*, 116 Miss. 501, 77 So. 318 (1918).

The board of supervisors may authorize, and the county can maintain, an action of replevin for logs cut for sale, and not for necessary estovers or for clearing so much of the land as a prudent owner in fee would clear for cultivation from sixteen sections leased in 1834 for ninety-nine years. *Board of Supvrs. v. Gans*, 80 Miss. 76, 31 So. 539 (1901).

In a suit by a county plea of set-off is bad which fails to show that the claim sought to be set off has been presented to the board of supervisors and rejected. *State ex rel. Noxubee County v. Banks*, 66 Miss. 431, 6 So. 184 (1889).

While it is only in regard to matters in which the county is interested that boards of supervisors may sue, it cannot escape liability for costs and damages which it has caused by the wrongful suing out of an injunction. *Freeman v. Supvrs.*, 66 Miss. 1, 5 So. 516 (1889).

### 3. Suits against county.

Preliminary petition to county board of supervisors to institute or permit petitioners to institute a suit to test the legality of annexation of territory of one consolidated school district to an adjoining consolidated school district, is a prerequisite to the right of the petitioners to file such a suit. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759 (1953), error overruled 217 Miss. 624, 65 So. 2d 838 (1953).

Where a petition which asked county board of supervisors to institute or permit petitioners to institute a suit to test the legality of purported annexation of territory of one consolidated district to an adjoining consolidated district, had been filed but had not been acted upon, this was litigation within the meaning of the Validating Act of 1952 and act was inapplicable. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759 (1953), error overruled 217 Miss. 624, 65 So. 2d 838 (1953).

One to whom, as the lowest bidder, a county has awarded a contract for lumber to be used during the year, cannot maintain an action against the county for breach of contract in purchasing lumber

from others. *Board of Supvrs. v. Payne*, 175 Miss. 12, 166 So. 332 (1936).

The amount of damage recoverable by an abutting owner for abandoning a public highway is loss resulting from the depreciation in the fair market value of his land. *Jackson v. Monroe County*, 124 Miss. 264, 86 So. 769 (1921).

The county will be liable for damages caused in constructing a road negligently under plans and specifications accepted and approved by the board where such work done according to contract has damaged plaintiff. *Covington County v. Watts*, 120 Miss. 428, 82 So. 309 (1919).

Authority to bring suit against a county does not necessarily carry with it the means of enforcing a judgment, but when judgment is rendered it should be paid by appropriation from any available fund, but if the county has no available funds nor power to levy tax to pay the same the payment of such judgment must be provided for by legislative enactment. *Town of Crenshaw v. Panola County*, 115 Miss. 891, 76 So. 741 (1917).

Counties are immune from liability to the same extent that the state is and unless statute authorizes a suit the county cannot be held liable. *City of Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682 (1917).

Public property of a county cannot be sold under execution against a county. *City of Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682 (1917).

### 4. —Venue.

Where a wrongful death action accrued prior to the enactment of the Mississippi Torts Claims Act, the action against the county was properly transferred to a court in the county. *Boston v. Hartford Accident & Indem. Co.*, 822 So. 2d 239 (Miss. 2002).

In an action against the state and two counties to recover for the death of a prisoner, who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and, therefore, proper venue was determined by § 11-46-13, rather than by § 11-45-17. *Estate of Jones v. Quinn*, 716 So. 2d 624 (Miss. 1998).

County must be sued in court having jurisdiction of amount sitting at county site, though another person is named as



joint defendant. *Simpson v. Neshoba County*, 157 Miss. 217, 127 So. 692 (1930).

Where a county deprives an abutting owner of access to his farm by vacating a county road, the county is liable for dam-

ages. *Morris v. Covington County*, 118 Miss. 875, 80 So. 337 (1918); *Jackson v. St. Louis & S.F.R. Co.*, 120 Miss. 149, 81 So. 796 (1919).

## RESEARCH REFERENCES

**ALR.** Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

**Am Jur.** 56 Am. Jur. 2d, *Municipal Corporations, Counties, and Other Political Subdivisions*, § 735, 740.

13 Am. Jur. Legal Forms 2d, *Municipal, School and State Tort Liability*, §§ 181:34-181:36 (claims).

18 Am. Jur. Pl & Pr Forms (Rev), *Municipal Corporations, Counties, and Other Political Subdivisions*, Forms 91 et seq. (notice and presentation of claims).

18 Am. Jur. Pl & Pr Forms (Rev), *Municipal Corporations, Counties, and Other Political Subdivisions*, Forms 101 et seq. (compromise or settlement of claims).

18 Am. Jur. Pl & Pr Forms (Rev), *Municipal Corporations, Counties, and Other Political Subdivisions*, Forms 111 et seq. (actions on claims).

**CJS.** 20 C.J.S., *Counties* §§ 414, 415 et seq.

## § 11-45-19. Suit where part only of county is interested.

Suit may be brought, in the name of the county, where only a part of the county or of its inhabitants are concerned, and where there is a public right of such part to be vindicated.

**SOURCES:** Codes, 1892, § 291; 1906, § 310; Hemingway's 1917, § 3683; 1930, § 271; 1942, § 2956.

**Cross References** — Statute of limitations in suits by and against counties, see § 15-1-51.

## JUDICIAL DECISIONS

1. In general.
2. Particular actions.

### 1. In general.

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

If a district attorney may bring suit on behalf of a county, he may bring it where only part of the county is concerned. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

### 2. Particular actions.

A county had standing under § 21-1-31 to object to the annexation of county territory by a city since it was a party interested in, affected by or aggrieved by the annexations. Furthermore, a combined reading of §§ 11-45-17, 11-45-19, and 19-

3-47(1)(b) vested in the county, acting by and through its board of supervisors, authority to exercise its standing and to employ counsel and participate fully in each annexation and confirmation proceeding. *Harrison County v. City of Gulfport*, 557 So. 2d 780, 17 A.L.R.5th 974 (Miss. 1990).

In a suit against members of a county school board and county superintendent to compel them to provide transportation for children of the school district who were legally enrolled in a school located in another school district, plaintiffs in addition to being citizens, property owners and taxpayers were also fathers and mothers of the children who were denied transportation, and had the right to bring the action. *Grenada County Sch. Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798 (1955), suggestion of error overruled, 224 Miss. 585, 81 So. 2d 694 (1955).

Preliminary petition to county board of supervisors to institute or permit petitioners to institute a suit to test the legality of annexation of territory of one consolidated school district to an adjoining consolidated school district, is a prerequisite to the right of the petitioners to file such a suit. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759 (1953), error overruled 217 Miss. 624, 65 So. 2d 838 (1953).

Where a petition which asked county board of supervisors to institute or permit petitioners to institute a suit to test the legality of purported annexation of territory of one consolidated district to an adjoining consolidated district, had been filed but had not been acted upon, this was litigation within the meaning of the Validating Act of 1952 and act was inapplicable. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759 (1953), error overruled 217 Miss. 624, 65 So. 2d 838 (1953).

A bill in name of individual taxpayers and patrons of consolidated line school district complaining of order of A. county school board transferring A. county pupils of line school to other schools within A. county did not lie, where there was no allegation of any special claim or interest of complainants as compared with balance of taxpayers and patrons of district and no allegation that county board of supervisors had been asked and had refused to vindicate complainants' rights. *Storey v. Rhodes*, 178 Miss. 776, 174 So. 560 (1937), but see *Grenada Mun. Separate Sch. Dist. v. Jesco, Inc.*, 449 So. 2d 226 (Miss. 1984).

County held to have sufficient interest in suit to compel admission of Chinese children into white schools to warrant allowance to state's attorney-general for counsel to defend suit. *Coahoma County v. Knox*, 173 Miss. 789, 163 So. 451 (1935).

## § 11-45-21. Bond not to be required.

Neither the state nor any county shall be required to give bond in any suit.

**SOURCES:** Codes, 1880, § 897; 1892, § 4255; 1906, § 4807; Hemingway's 1917, § 3171; 1930, § 6005; 1942, § 4395.

**Cross References** — State and local governments, and officials thereof, not having to give appeal bond on appeals, see § 11-51-101.

## JUDICIAL DECISIONS

### 1. In general.

An action by the state for the collection of debts due to the state and its political subdivisions as unpaid privilege taxes and penalties thereon was a suit within the meaning of this section [Code 1942,

§ 4395]. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

The state, county and municipality are the real parties in interest in a suit by the state for the collection of debts due the state and its political subdivisions as un-

paid privilege taxes and penalties. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

The state has the right to file action for the collection of unpaid privilege taxes and the interest thereon due the state and

its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by Code 1942, § 2680. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

### § 11-45-23. Property recovered delivered to agent.

When the state or any county, shall recover property by suit, the possession of the property shall be delivered to such officer, agent or representative of the state or county as may be designated by proper authority to receive it, or having right to its custody for the state or county.

**SOURCES:** Codes, 1880, § 898; 1892, § 4256; 1906, § 4808; Hemingway's 1917, § 3172; 1930, § 6006; 1942, § 4396.

### § 11-45-25. Suits by and against municipalities.

A municipality may sue and be sued by its corporate name. Suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one (1) county. In a case where a county has two (2) judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located. In cases where a municipality is located in two (2) counties, such suits shall be brought in the county in which the principal office of the municipality is located. As to justice court actions, the same shall be brought in the county in which the municipality or its principal office is located.

**SOURCES:** Codes, 1892, § 2912; 1906, § 3300; Hemingway's 1917, § 5796; 1930, § 2370; 1942, § 3374-02; Laws, 1938, ch. 335; Laws, 1950, ch. 491, § 2; Laws, 1981, ch. 471, § 39; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

**Cross References** — Location for bringing suits within jurisdiction of justice of the peace, see § 11-9-101.

Limitations of suits by and against state, counties and municipalities, see § 15-1-51.



For another section derived from same 1942 code section, see § 21-1-5.  
Establishment of police courts in municipalities, see §§ 21-23-1 et seq.  
Claims by or against municipalities, generally, see §§ 21-39-5 et seq.

## JUDICIAL DECISIONS

### I. Under Current Law.

1. Venue.
- 2.-5. [Reserved for future use.]

### II. Under Former Law.

6. In general.

#### I. Under Current Law.

##### 1. Venue.

In an action against the state and two counties to recover for the death of a prisoner, who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and, therefore, proper venue was determined by § 11-46-13, rather than by § 11-45-25. *Estate of Jones v. Quinn*, 716 So. 2d 624 (Miss. 1998).

##### 2.-5. [Reserved for future use.]

#### II. Under Former Law.

##### 6. In general.

A judgment in mandamus rendered against the mayor and board of aldermen of the municipality instead of the municipality itself is not for such reason void.

*Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579 (1910), error overruled, 97 Miss. 89, 52 So. 692 (1910).

A municipality is not subject to garnishment for the wages of employees where the same are exempt, and it is the duty of the municipality to set up the facts in its answer to the writ of garnishment. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965 (1902).

A municipality, unless subjected thereto by statute, is not liable to suit by garnishment or otherwise for debts arising from its exercise of governmental functions. *Clarksdale Compress & Storage Co. v. W.R. Caldwell Co.*, 80 Miss. 343, 31 So. 790 (1902).

A plaintiff or complainant who seeks to subject a municipality to garnishment on the ground that its debt to the defendant was contracted in its private capacity, and not for the exercise of governmental functions, must show the nature of the transaction, and the facts which render it amenable to the process. *Clarksdale Compress & Storage Co. v. W.R. Caldwell Co.*, 80 Miss. 343, 31 So. 790 (1902).

## RESEARCH REFERENCES

**ALR.** Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Insufficiency of notice of claim against municipality as regards statement of place where accident occurred. 69 A.L.R.4th 484.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

**Am Jur.** 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 696, 732.

Notice and presentation of claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 91 et seq.

Compromise or settlement of claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 101 et seq.

Actions on claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 111 et seq.

18 Am. Jur. Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Forms 1 et seq.

Claims, 13 Am. Jur. Legal Forms 2d, Municipal, School, and State Tort Liability, §§ 181:34-181:36.

**CJS.** 64 C.J.S., Municipal Corporations §§ 2541-2546 et seq.

## CHAPTER 46

### Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees

SEC.	
11-46-1.	Definitions.
11-46-3.	Declaration of legislative intent.
11-46-5.	Waiver of immunity; course and scope of employment; presumptions.
11-46-6.	Repealed.
11-46-7.	Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.
11-46-8.	Foster parents covered under this chapter.
11-46-9.	Exemption of governmental entity from liability on claims based on specified circumstances.
11-46-11.	Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind.
11-46-13.	Jurisdiction; appeals; venue.
11-46-15.	Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award.
11-46-16.	Expired.
11-46-17.	Creation of Tort Claims Fund; liability insurance.
11-46-18.	Mississippi Tort Claims Board; membership; payment of expenses; officers; meetings.
11-46-19.	Powers and duties of board.
11-46-20.	Tort Claims Board; regulation of liability coverage of governmental entities; annual review of insurance plans; other powers; fees.
11-46-21.	Repealed.
11-46-23.	Provisions of chapter independent and severable.

#### § 11-46-1. Definitions.

As used in this chapter the following terms shall have the meanings herein ascribed unless the context otherwise requires:

(a) "Claim" means any demand to recover damages from a governmental entity as compensation for injuries.

(b) "Claimant" means any person seeking compensation under the provisions of this chapter, whether by administrative remedy or through the courts.

(c) "Board" means the Mississippi Tort Claims Board.

(d) "Department" means the Department of Finance and Administration.

(e) "Director" means the executive director of the department who is also the executive director of the board.

(f) "Employee" means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without



compensation. The term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision; provided, however, that for purposes of the limits of liability provided for in Section 11-46-15, the term "employee" shall include physicians under contract to provide health services with the State Board of Health, the State Board of Mental Health or any county or municipal jail facility while rendering services under such contract. The term "employee" shall also include any physician, dentist or other health care practitioner employed by the University of Mississippi Medical Center (UMMC) and its departmental practice plans who is a faculty member and provides health care services only for patients at UMMC or its affiliated practice sites. The term "employee" shall also include any physician, dentist or other health care practitioner employed by any university under the control of the Board of Trustees of State Institutions of Higher Learning who practices only on the campus of any university under the control of the Board of Trustees of State Institutions of Higher Learning. The term "employee" shall also include any physician, dentist or other health care practitioner employed by the State Veterans Affairs Board and who provides health care services for patients for the State Veterans Affairs Board. The term "employee" shall also include Mississippi Department of Human Services licensed foster parents for the limited purposes of coverage under the Tort Claims Act as provided in Section 11-46-8.

(g) "Governmental entity" means and includes the state and political subdivisions as herein defined.

(h) "Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that is actionable at law or in equity.

(i) "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including but not limited to, any county, municipality, school district, community hospital as defined in Section 41-13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.

(j) "State" means the State of Mississippi and any office, department, agency, division, bureau, commission, board, institution, hospital, college, university, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.

(k) "Law" means all species of law including, but not limited to any and all constitutions, statutes, case law, common law, customary law, court order, court rule, court decision, court opinion, court judgment or mandate, administrative rule or regulation, executive order, or principle or rule of equity.

**SOURCES:** Laws, 1984, ch. 495, § 1; reenacted without change, Laws, 1985, ch. 474, § 1; Laws, 1988, ch. 479, § 2; Laws, 1993, ch. 476, § 1; Laws, 1999, ch. 518, § 1; Laws, 2002, 3rd Ex. Sess., ch. 2, § 2, eff from and after Jan. 1, 2003.

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

**Cross References** — Immunity from suit of political subdivisions as they are defined in this section, see § 11-46-3.

Applicability of sections 11-46-1 et seq. to community hospitals, their owners, and their boards of trustees, see § 41-13-11.

Applicability of §§ 11-46-1 et seq. to causes of action arising out of any wrongful act or omission in connection with an activity or operation of a hospital, nursing home or other community hospital facility or community health program, see § 41-13-11.

Application of this chapter to actions by and against electric utilities arising out of injuries resulting from contact with high voltage overhead lines, see § 45-15-13.

"State" or a "political subdivision", as defined in this section, as being an employer subject to the Workers' Compensation Law, see § 71-3-5.

## JUDICIAL DECISIONS

1. In general.
2. Applicability.
3. Constitutionality.
4. Employee.
5. Political subdivision.
6. Dismissal of claim.
7. Expert testimony.
8. Standard of care.
9. Miscellaneous.

### 1. In general.

Where a nurse working at an adult detention center witnessed a sheriff's department employee beat an inmate and cause injuries that ultimately led to the inmate's death, the nurse failed to state a claim against the County for common law negligence and negligence under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to -23 (Supp. 2010) because the nurse failed to establish a breach of any duty owed her by the County. *Smith v. Harrison County*, 67 So. 3d 815 (Miss. Ct. App. 2011).

In an action brought under the Mississippi Tort Claims Act, plaintiff failed to prove that an ambulance driver was negligent as a matter of law in operating an ambulance during an emergency when she ran over plaintiff's foot and caused

him to suffer damages. *Albright v. Delta Reg'l Med. Ctr.*, 899 So. 2d 897 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

In the context of actions pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 to 11-46-23, the common thread running through cases where an officer acts with reckless disregard in operating a motor vehicle is an appreciation of the unreasonable risk of the danger involved coupled with a conscious indifference to the consequences that are certain to follow. *Davis v. Latch*, 873 So. 2d 1059 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. *Davis v. Hoss*, 869 So. 2d 397 (Miss. 2004).

Chancery court lacked subject matter jurisdiction to consider the individuals' claims brought pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code

Ann. § 11-46-1 et seq. against the Mississippi Municipality Liability Plan, for injuries suffered as the result of a motor vehicle accident with a city police officer, as Miss. Const. Art. 6, §§ 159 & 161 did not include actions under the MTCA; rather, the circuit court had jurisdiction over the matter pursuant to Miss. Const. Art. 6, § 156. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint as to her claim under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. because she had specified and separated the negligence-and tort-based state law claims from the constitutional tort claims brought pursuant to 42 U.S.C.S. § 1983 in her amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers; and Miss. R. Civ. P. 8(a) only required that notice of a claim be given. *Elkins v. McKenzie*, 865 So. 2d 1065 (Miss. 2003).

Because the only claim for equitable relief in a negligence action brought under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, was a request for an accounting, the proper jurisdiction was in a circuit court, and not in chancery court. *City of Ridgeland v. Fowler*, 846 So. 2d 210 (Miss. 2003).

The clear intent of the legislature in enacting this chapter was to immunize the state and its political subdivisions from any tortious conduct, including tortious breach of implied term or condition of any warranty or contract; however, the provisions of this chapter have no application to a pure breach of contract action. *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208 (Miss. Ct. App. 1999).

This chapter does not proscribe actions against the state for the return of private property allegedly wrongfully acquired by the state or its agencies or institutions. *Greyhound Welfare Found. v. Mississippi State Univ.*, 736 So. 2d 1048 (Miss. 1999).

Negligence cause of action against municipality, arising after Pruetts decision

abolishing judicially-created sovereign immunity but before Presley decision prospectively holding unconstitutional the tort claims act provision stating sovereign immunity provisions were not yet effective, was governed by pre-Pruett common law. (*Per Mills, J.*, with three justices concurring and three justices concurring in the result). *Hord v. City of Yazoo City*, 702 So. 2d 121 (Miss. 1997).

Physicians and other medical personnel at state prison, against whom action was brought following death of prisoner, were not the "state" or its "political subdivisions", and thus did not come within scope of statute under which state and its political subdivisions are not, have never been, and shall not be liable and are entitled to immunity. *Sparks v. Kim*, 701 So. 2d 1113 (Miss. 1997).

Codification of principles of sovereign immunity did not violate Mississippi constitutional provision that courts shall be open and remedy shall be available for every injury; remedy clause is not absolute guarantee of trial and it is legislature's decision whether or not to address restrictions upon actions against government entities. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

Codification of principles of sovereign immunity did not violate due process clause of Fourteenth Amendment; there was no right to sue state or its political subdivisions at common law and, through codification, legislature continued to withhold such right, and thus there was no property right to sue state. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

The decision of *Presley v. Mississippi State Highway Commission* (Miss. 1992) 608 So. 2d 1288, which declared the codified principle of sovereign immunity (§§ 11-46-1 et seq.) unconstitutional, has no retroactive application. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

There is no "property right" to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi



Constitution or the 14th Amendment to the United States Constitution. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

The Mississippi Legislature's post-Pruett legislative enactments on sovereign immunity (§§ 11-46-1 et seq.) do not violate the remedy clause of the Mississippi Constitution. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

The governmental immunity and tort claims act should not be construed to immunize governmental authorities and agencies from suits other than for money damages. *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995), but see *USPCI of Miss., Inc. v. State ex rel. McGowan*, 688 So. 2d 783 (Miss. 1997).

The decision of the Supreme Court declaring unconstitutional the portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) mandating that all claims against the State be governed by case law governing sovereign immunity as it existed on November 10, 1982, applies prospectively only, and is "purely prospective" so that it applies only to claims arising after the mandate issues. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

To the extent that § 11-46-6 [Repealed] purports to freeze the doctrine of sovereign immunity to the state of development of the common law prior to *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046, it is void; the State is immunized from claims arising thereafter to the extent that the Supreme Court would do so applying the evolving standards of common law, including any extensions or contractions of the doctrine deemed appropriate, on a case by case basis and to the extent that those benefitting by the immunity did not prepare themselves by acquiring insurance policies covering the liability in question in the event that immunity did not obtain. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the deci-

sion in *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

State Highway Commission is alter ego of state and shares in state's Eleventh Amendment immunity from suit in federal court. *Brady v. Michelin Reifenwerke*, 613 F. Supp. 1076 (S.D. Miss. 1985).

## 2. Applicability.

Given the context of the relationship between the manager and the nursing home, there was no genuine issue of material fact regarding whether the manager was an "instrumentality" of the nursing home; as an instrumentality of a community hospital, the manager was entitled to the protections, limitations, and immunities of the Mississippi Tort Claims Act. *Estate of Fedrick v. Quorum Health Res., Inc.*, — So. 2d —, 2008 Miss. App. LEXIS 672 (Miss. Ct. App. Nov. 4, 2008), opinion withdrawn by, substituted opinion at 45 So. 3d 667, 2009 Miss. App. LEXIS 926 (Miss. Ct. App. 2009), reversed by, remanded by 45 So. 3d 641, 2010 Miss. LEXIS 363 (Miss. 2010).

Trial court, on remand, had to determine whether at the time of the alleged negligent conduct, the doctor was an employee of a state entity covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1; if so, the trial court had to further determine whether the statute of limitations had run as to the doctor as prescribed by Miss. Code Ann. § 11-46-11. *McClain v. Clark*, 992 So. 2d 636 (Miss. 2008).

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper because the state university, falling within the coverage of Miss. Code Ann. § 11-46-1(j), was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity; it was difficult to fathom how the professor's failure to put down dry sand before the pour involved a policy judgment of a

social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. *City of Natchez v. Jackson*, 941 So. 2d 865 (Miss. Ct. App. 2006).

Finding in favor of the hospital in the patient's action under the Mississippi Tort Claims Act was proper because the patient failed to prove that the treatment he received was the proximate cause of his alleged injuries. *Lander v. Singing River Hosp. Sys.*, 933 So. 2d 1043 (Miss. Ct. App. 2006).

Dismissal of the decedent's mother's and a student's action against a state university resulting from a shooting on campus was appropriate under Miss. Code Ann. § 11-46-1 et seq. because the shooting of the victims was not the harm that would have otherwise resulted from failing to log the gunman in on campus; additionally, there was no authority that the university, through an employee, had a duty to warn the victims of the dangerous condition of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398 (Miss. Ct. App. 2006).

Police did not have immunity from suit where a police officer acted recklessly in initiating a police chase of a suspect where the chase was not because a serious crime had just been committed; the vehicles exceeded the speed limit in a residential neighborhood, in the dark, with a low probability of apprehending the suspect, as he was known as someone who would flee and had successfully fled in the past. *City of Ellisville v. Richardson*, 913 So. 2d 973 (Miss. 2005).

Miss. Code Ann. § 11-46-3 granted immunity to the state and its political subdivisions for breach of implied term or

condition of any warranty or contract. Thus, although the decedent was indeed a third-party beneficiary of the written contract between the city and the development district, her estate was not permitted to pursue claims of breach of implied terms of that contract against the city or its political subdivisions. *City of Jackson v. Estate of Stewart*, 908 So. 2d 703 (Miss. 2005).

Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, did not provide immunity for a city that neglected to inspect or maintain a city ditch; business was entitled to damages when, during a heavy rain, the ditch flooded, causing property damage. *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60 (Miss. 2005).

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., where the general hospital was entitled to a venue in the county in which the principal offices were located, Miss. Code Ann. § 11-11-3(1), because the decedent's heirs failed to assert a reasonable claim of liability against the medical center and treating physicians. *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997 (Miss. 2004).

Personal injury plaintiffs' motion for a remand of the matter to state court was granted because it could not be stated that the Mississippi Department of Transportation (MDOT) was fraudulently joined as a defendant in the action simply to defeat diversity jurisdiction, particularly when the MDOT could be held potentially liable to plaintiffs under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Johnson v. James Constr. Group, LLC*, 306 F. Supp. 2d 654 (S.D. Miss. 2004).

Department of Public Safety was not immune from liability in a suit by a driver. A state trooper, who was speeding excessively, acted in reckless disregard of the driver's safety. *Miss. Dep't of Pub. Safety v. Durn*, 861 So. 2d 990 (Miss. 2003).

Under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., whether governmental conduct was discretionary required a two-prong analysis:



(1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment involved social, economic or political policy alternatives, and, conversely, governmental conduct was ministerial if imposed by law, and its performance was not dependent on the employee's judgment. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350 (Miss. 2003).

While parole supervision procedures appeared to be ministerial in nature, a field officer's responsibilities to monitor and supervise a parolee were immune from suit in cases where the State had no indication of a specific threat on a parolee's part to harm an individual. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350 (Miss. 2003).

The University of Mississippi Medical Center and the University Anesthesia Services Practice Group (UAS) established in connection with the Medical Center are instrumentalities of the State of Mississippi within the meaning of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23 and, as such, waived their immunity against a claim for medical malpractice liability only to the extent that UAS had purchased liability insurance; further, a staff anesthesiologist who participated in an operation in which a child suffered brain damage while sedated was an employee of the Center entitled to immunity despite also being a member of UAS and despite the fact that the doctor had personal liability insurance. *Mozingo v. Scharf*, 828 So. 2d 1246 (Miss. 2002).

Sections 11-46-1 et seq., applied to a case where the event giving rise to the action occurred on June 1, 1994, clearly after the Act went into effect. *Henderson v. Un-Named Emergency Room*, 758 So. 2d 422 (Miss. 2000).

### 3. Constitutionality.

The fact that the parties disagreed as to whether an individual was an employee within the meaning of the statute did not mean the statute's definition was constitutionally vague. *Smith v. Braden*, 765 So. 2d 546 (Miss. 2000).

The Tort Claims Act does not violate the right to due process by depriving persons of their day in court as there is no prop-

erty right to sue the state. *Smith v. Braden*, 765 So. 2d 546 (Miss. 2000).

The Tort Claims Act does not violate the right to equal protection by protecting a physician employed by the state, while not protecting other physicians practicing medicine in Mississippi. The relevant question is whether the plaintiff, rather than the defendant, is treated differently from others that are similarly situated. *Smith v. Braden*, 765 So. 2d 546 (Miss. 2000).

Sections 11-46-1 to 11-46-23 do not violate the constitutional requirements that courts be open and that a remedy be available for every injury since the remedy clause is not an absolute guarantee of trial and it is the legislature's decision whether to address restrictions upon actions against government entities. *Quinn v. Mississippi State Univ.*, 720 So. 2d 843 (Miss. 1998).

The court rejected the contention that the Sovereign Immunity Act is unconstitutional as it pertains to claims arising between April 1, 1993, and October 1, 1993. *Chamberlin v. City of Hernando*, 716 So. 2d 596 (Miss. 1998).

### 4. Employee.

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her 10-month-old son. *Gorton v. Rance*, 52 So. 3d 351 (Miss. 2011).

Although a patient alleged that he was injured by the negligence of a doctor who was an independent contractor of a hospital, the Mississippi Tort Claims Act provided immunity to the state and its political subdivisions, such as the hospital, for the negligence of its independent contractors. Therefore, the trial court properly entered summary judgment in favor of the hospital. *Brown v. Delta Reg'l Med. Ctr.*, 997 So. 2d 195 (Miss. 2008).



Plaintiff VA patient conceded that a vascular surgeon was a state employee, and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574 (S.D. Miss. 2007), reversed by, remanded by 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

Pursuant to Miss. Code Ann. § 11-46-1(f) and Miller factors, the doctor was an employee of the state hospital and the state for purposes of liability under the Mississippi Tort Claims Act; therefore, summary judgment was properly granted in favor of the doctor on the husband's wrongful death and medical malpractice claims. *Barksdale v. Carroll*, 944 So. 2d 107 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 697 (Miss. 2006).

Doctor acted as an employee of the state of Mississippi when he treated the patient; therefore, the doctor was entitled to immunity as provided in the Mississippi Tort Claims Act and the trial court erred when it denied the doctor's motion for summary judgment. *Meeks v. Miller*, 956 So. 2d 942 (Miss. Ct. App. 2006), affirmed by 956 So. 2d 864, 2007 Miss. LEXIS 281 (Miss. 2007).

According to the plain language of Miss. Code Ann. § 11-46-1(f), the State intends to protect part-time workers, full-time workers, salaried employees, and uncompensated employees. The purpose of the Mississippi Torts Claim Act (MTCA) is to provide immunity to the physicians who are acting on behalf of the State or a political subdivision in any official capacity, temporarily or permanently, in the service of the State or a political subdivision, whether with or without compensation; the 2002 amendment to Miss. Code

Ann. § 11-46-1 was not intended as an additional restriction to exclude certain physicians, but, rather, the addition was meant to assure that the physicians who were members of the departmental practice plans were fully protected under the MTCA. Thus, the appellate court was unable to conclude that the doctor (who was being sued by decedent's husband) was not an employee, merely because he did not belong to the departmental practice plan; an uncompensated, part-time physician at University of Mississippi Medical Center does not have to be a member of the employee practice plans to be considered an employee under Miss. Code Ann. § 11-46-1(f) of the MTCA. *Barksdale v. Carroll*, — So. 2d —, 2006 Miss. App. LEXIS 177 (Miss. Ct. App. Mar. 14, 2006), substituted opinion at, opinion withdrawn by 944 So. 2d 107, 2006 Miss. App. LEXIS 638 (Miss. Ct. App. 2006).

In a car accident case, where decedent's husband was suing a doctor who was an employee of the University of Mississippi Medical Center (UMMC), and the State, for purposes of liability under Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), the doctor was immune from liability because (1) he was acting as a supervisor with regard to the decedent; (2) he did not choose his patients or the residents that he supervised; (3) he was acting as a faculty physician and was following the direction of the UMMC; (4) over the phone, he acted in a supervisory capacity to a surgical resident, which involved little judgment or discretion; and (5) he was acting as an uncompensated faculty member for the UMMC, not as an independent contractor. Therefore, the doctor's motion for summary judgment on the husband's second amended complaint alleging causes of action for malpractice, negligence and medical negligence, *res ipsa loquitur*, and failure to obtain informed consent, was properly granted. *Barksdale v. Carroll*, — So. 2d —, 2006 Miss. App. LEXIS 177 (Miss. Ct. App. Mar. 14, 2006), substituted opinion at, opinion withdrawn by 944 So. 2d 107, 2006 Miss. App. LEXIS 638 (Miss. Ct. App. 2006).

Doctor was not immune under the Mississippi Tort Claims Act, Miss. Code Ann.

§ 11-46-7(2), from a patient's malpractice suit because the doctor was an independent contractor, rather than an employee of a county hospital, within the meaning of "employee" in Miss. Code Ann. § 11-46-1(f), where the doctor's contract was with a private corporation that assigned her to work at the hospital and issued her paycheck. *Carpenter v. Reinhard*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Grant of summary judgment against the patient in her medical malpractice action against the physician was proper where the physician was an employee of the state university medical center and therefore an employee of the state of Mississippi. Thus, he was immune from liability under Miss. Code Ann. § 11-46-7(2) of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Owens v. Thomae*, 904 So. 2d 207 (Miss. Ct. App. 2005).

In a medical malpractice action, a doctor was not entitled to summary judgment on the issue of immunity under the Mississippi Tort Claims Act because there were disputed issues of fact regarding the doctor's true employment status, including the nature of the doctor's contractual and business relationships with a county hospital and a private corporation. *Carpenter v. Reinhard*, 345 F. Supp. 2d 629 (N.D. Miss. Nov. 22, 2004).

Although a man, who fell under the definition of "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that the man was a county employee, the individual failed to establish that the county withheld information regarding the employee's work status, nor did the individual show that the county provided the individual with misleading or inaccurate information, and the individual did not exercise due diligence in determining the true parties of the lawsuit or in determining the man's work status; thus, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the man on the grounds that the individual failed to

substantially comply with the notice requirements of the MTCA, and, therefore, the statute of limitations had expired. *Ray v. Keith*, 859 So. 2d 995 (Miss. 2003).

For purposes of Miss. Code Ann. § 11-46-1(f) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, receiving income for a University of Mississippi Medical Center medical practice plan does not make a physician an independent contractor. *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

For purposes of Miss. Code Ann. § 11-46-1(f) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, the doctor who supervised a procedure that left the patient a paraplegic was a state employee and immune from liability because (1) the doctor was employed by the University of Mississippi Medical Center (UMMC) and acting according to the terms and conditions of the doctor's contract; (2) the doctor was a full-time faculty member at UMMC and had never engaged in the practice of medicine outside the course and scope of the doctor's employment; and (3) the doctor was a supervising teacher and trainer of residents (interns and fellows as well) and did not receive compensation from any person or entity other than a State entity. *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

Summary judgment for the defendant physician was not appropriate in a medical malpractice action where the plaintiffs did not dispute that the physician was an employee of a state university in his role as an assistant professor, but there was a material issue of fact as to whether he was an employee of the state university in connection with his private practice. *Smith v. Braden*, 765 So. 2d 546 (Miss. 2000).

The defendant physician was not entitled to summary judgment in a medical malpractice action on the basis of the one year statute of limitations contained in the Tort Claims Act. There was a triable issue of fact regarding whether he was a state employee within the meaning of the statute while engaged in clinical outpatient practice under the general auspices of the state university which employed



him. *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000).

The evidence showed that a doctor was not a staff physician, but rather a post-graduate house staff officer, and thus she was an employee of the state, who was provided with no additional compensation for her services; thus, the Tort Claims Act applied to her, and the lower court was correct in dismissing a medical malpractice action against her; however, the evidence with regard to two other doctors was not clear, and the cases against them were remanded for additional discovery. *Pickens v. Donaldson*, 748 So. 2d 684 (Miss. 1999).

### 5. Political subdivision.

Trial court erred by denying the community hospital's motion for summary judgment because: (1) the community hospital was a political subdivision of the State under Miss. Code Ann. § 11-46-1(i), and therefore the son was subject to the notice requirements and statutes of limitations of Miss. Code Ann. § 11-46-11(1); (2) under § 11-46-11(1), proper service of notice to the hospital would be on the CEO of the hospital, and not the county; (3) the trial court erred by concluding that substantial compliance with § 11-46-11(1) in regard to whom the notice was sent was erroneous; and (4) because the son never filed the statutorily required notice with the hospital's CEO, the hospital's sovereign immunity from suit was intact. *Tallahatchie Gen. Hosp. v. Howe*, 49 So. 3d 86 (Miss. 2010).

Husband and wife's 42 U.S.C.S. § 1983 suit against a Mississippi county sheriff's department failed because the department when viewed in accordance with Fed. R. Civ. P. 17(b)(3) and the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was not a separate legal entity that could be sued. *Winn v. Harrison County*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 35323 (S.D. Miss. Apr. 27, 2009).

Where the deceased patient's daughter brought a medical malpractice suit against the University of Mississippi Medical Center, the Supreme Court of Mississippi held that the medical center was an instrument of the State and subject to the requirements of the Mississippi

Tort Claims Act, Miss. Code Ann. § 11-46-1(j). Therefore, plaintiff was required to timely give notice of her claim to the medical center within one year as provided by Miss. Code Ann. § 11-46-11(3). *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, the trial court determined that he was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-5. The doctor was an employee of a "community hospital" within the definition of "political subdivision" pursuant to Miss. Code Ann. § 11-46-1(i). *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008).

While plaintiffs erred under Miss. Code Ann. § 11-46-1(i) in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. *Mieger v. Pearl River County*, 986 So. 2d 1025 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-



59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006).

State legislature did not intend for the Mississippi Tort Claims Act (MTCA) to extend to a private entity such as defendant, a transit company that executed an agreement with a city to operate and maintain a public transportation system; defendant was not created for the sole purpose of fulfilling a state mandated government service (rather, defendant was presumably created to be a profitable business for the benefit of its shareholders). *Thompson v. McDonald Transit Assocs.*, 440 F. Supp. 2d 530 (S.D. Miss. 2006).

Although Miss. Code Ann. § 19-25-19 states that all sheriffs shall be liable for the acts of their deputies, this does not provide sufficient weight to tip the argument in favor of finding that a sheriff's department is a separate political subdivision or governmental entity for purposes of the Mississippi Tort Claims Act (MTCA). *Brown v. Thompson*, 927 So. 2d 733 (Miss. 2006).

In a case of first impression, the Supreme Court of Mississippi held that a county sheriff's department was not a political subdivision as defined in Miss. Code Ann. § 11-46-1(i), of the Mississippi Tort Claims Act (MTCA), and thus an individual's suit naming the sheriff's department was not properly filed; the county should have been named as the governmental defendant. A review of the structural relationship between counties and sheriff's departments in Miss. Code Ann. § 19-25-13 and Miss. Code Ann. § 19-25-19 supported that holding. *Brown v. Thompson*, 927 So. 2d 733 (Miss. 2006).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery

having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under the exception of Miss. Code Ann. § 11-46-9(1)(c). *Keen v. Simpson County*, 904 So. 2d 1157 (Miss. Ct. App. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Working in conjunction with Miss. Code Ann. § 11-46-3(1), § 11-46-1(i) defines "political subdivisions" to specifically include school districts. *Harris v. McCray*, 867 So. 2d 188 (Miss. 2003).

Airport authority that argued it was a "joint airport board" was nevertheless a governmental entity that exercised powers that were declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity, and thus was a political subdivision under subsection (i); the airport authority could not escape liability by merely asserting that it was really an airport board because airport boards, although not specifically listed, were by definition subject to the statute. *Spencer v. Greenwood/Leflore Airport Auth.*, 834 So. 2d 707 (Miss. 2003).

For purposes of Miss. Code Ann. § 11-46-1(i), (j) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, the Univer-

sity Anesthesia Services is an instrumentality of the State, even though it is a private, for-profit corporation that pays state taxes like other private corporations. *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

For purposes of Miss. Code Ann. § 11-46-1(i), (j) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, where a medical practice group was created by the University of Mississippi Medical Center (UMMC), and is overseen by UMMC, and the purpose is to supplement the income of its faculty; when the day-to-day oversight is left to the department chair, subject to limited oversight by the vice chancellor, and its membership is composed solely of full-time UMMC-faculty physicians; where the faculty physicians can only practice at UMMC-approved sites, and the money is distributed on a point system based on factors other than mere patient service, the medical practice group is a State entity. *Watts v. Tsang*, 828 So. 2d 785 (Miss. 2002).

School district was entitled to sovereign immunity from wrongful death action arising out of death of eight-year-old special education student who ran away from school. *Brown v. Houston Sch. Dist.*, 704 So. 2d 1325 (Miss. 1997).

#### **6. Dismissal of claim.**

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contractual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., that all administrative remedies be exhausted prior to filing suit. *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907 (Miss. 2011).

State court negligence claim under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 through 11-46-23 (Rev. 2002), was properly dismissed on the ground of *res judicata* because administrator's prior federal 42 U.S.C.S. § 1983 suit was derived from the same underly-

ing facts and circumstances, and the four elements of the doctrine of *res judicata* were met. *Hill v. Carroll County*, 17 So. 3d 1081 (Miss. 2009).

Civil rights litigant's motion to amend his pro se complaint in tort to add a federal claim under 42 U.S.C.S. § 1983 for violation of his right to free speech on the ground that the tort claims were barred by the Mississippi Tort Claims Act was properly denied because the federal claim was barred under the applicable residual three-year statute of limitation period in Miss. Code Ann. § 15-1-49 and because the amended claim did not relate back to the time of the filing of the original pleading, pursuant to Miss. R. Civ. P. 15(c); the proposed amendment did not pass the identity of transaction test because the tort claims asserted in the original complaint did not bear a relation to the free speech claim and the defendant was not on notice regarding the free speech claim. *Giles v. Stokes*, 988 So. 2d 926 (Miss. Ct. App. 2008).

Where a county hospital and its employee were sued in tort for injuries related to a car accident that occurred when the employee was running an errand for her employer, the dismissal of the employee from the action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., did not act as a release of her insurance company. The insurance company was contractually obligated to defend or indemnify the county hospital as an additional insured under the language of the insurance policy. *Franklin County Mem'l Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So. 2d 872 (Miss. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, after he was struck by the police officer while jogging was appropriate because the jogger failed to prove that the officer acted with reckless disregard of the safety and well-being of others, Miss. Code Ann. § 11-46-9(1)(c). *Morton v. City of Shelby*, 984 So. 2d 323 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

Dismissal of the employee's action after he was terminated was proper because



although he filed his suit against the sheriff's department and the sheriff within the statutorily prescribed period in Miss. Code Ann. § 11-46-11(3), he still failed to comply with the Mississippi Tort Claims Act since he filed his complaint 37 days before he filed his notice of claim with the sheriff's department. *Clanton v. DeSoto County Sheriff's Dep't*, 963 So. 2d 560 (Miss. Ct. App. 2007).

In an action pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., where a slow-moving county motor grader executed a turn on the highway, even though the operator did not give a hand signal, the grader operator was not negligent in failing to do same or for failing to keep a proper lookout, but the injured driver was negligent in passing the grader within 100 feet of an intersection and failing to keep a proper lookout. *Barnett v. Lauderdale County Bd. of Supervisors*, 880 So. 2d 1085 (Miss. Ct. App. 2004).

Evidence showed the officer was traveling approximately 37 miles per hour with lights and sirens activated, there was nothing obstructing the view of either the person later injured or the officer, and the greater weight of evidence also proved that the person's left turn signal was not activated. In addition, the officer had consciously stopped at the previous two intersections because the officer considered both of those to be blind intersections, and therefore, the officer's behavior supported the finding that the officer appreciated the risk involved in approaching the intersection and did not act with reckless disregard. *Davis v. Latch*, 873 So. 2d 1059 (Miss. Ct. App. 2004).

Grant of summary judgment in favor of the employee's employer was proper where the employee failed to substantially comply with the notice provisions of the Mississippi Tort Claim Act's, Miss. Code Ann. § 11-46-1 et seq., Miss. Code Ann. § 11-46-11. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970 (Miss. 2004).

When a victim was raped by a parolee accepted from another state for supervision, summary judgment was correctly granted to the State in the victim's action against it for negligently accepting supervision of the parolee and negligently su-

pervising him because acceptance of the parolee's supervision was mandatory under the Uniform Act for Out-of-State Parolee Supervision, Miss. Code Ann. § 47-7-71, as he had family and a job in Mississippi, and decisions made by the parolee's supervising parole officer in the course of the parolee's supervision were discretionary, so the State could not be held liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350 (Miss. 2003).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, — So. 2d —, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), opinion withdrawn by, substituted opinion at 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

In an arrestee's suit alleging that a deputy sheriff used excessive force, the arrestee's state-law tort claims were dismissed because the arrestee failed, under the substantial compliance standard, to comply with the notice provisions of the Mississippi Tort Claims Act. *Whiting v. Tunica County*, 222 F. Supp. 2d 809 (N.D. Miss. 2002).

### 7. Expert testimony.

In a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., a trial court did not err by allowing expert testimony under Miss. R. Evid. 702 because a witness did not have to be a pulmonologist in order to opine on matters concerning aspiration pneumonia; the witness had received specialized training and knowledge in medical school and by treating other patients. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141 (Miss. 2007).

### 8. Standard of care.

Where alleged negligent actions are caused by an employee who is not a doctor



or a nurse in a medical malpractice case, the conduct must be evaluated using traditional negligence/reasonable care standards; therefore, in a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., the reasonable care standard was properly applied where an employee's action caused water to be aspirated by a post-surgical patient, which allegedly resulted in pneumonia. This action contradicted the medical records, which stated that the patient was to receive nothing by mouth. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141 (Miss. 2007).

### 9. Miscellaneous.

Personal-injury action did not need to be remanded for a determination of the mother's competency under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because the son did not request a determination of unsoundness of mind from the trial court and issues not raised in the trial court were barred from consideration at the appellate level. Further, because the son brought the action on behalf of his mother and she was not the plaintiff in the case, her competence to assert her rights in the lawsuit was not at issue. *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941 (Miss. 2011).

There was no showing of inequitable conduct on behalf of either defendant in a personal injury action since no action by either reasonably could have induced the mother's son to believe that defendants were not entitled to the privileges and immunities of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. Thus, the trial court erred by finding that the doctrine of equitable estoppel prevented defendants from asserting the MTCA statute of limitations. *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941 (Miss. 2011).

Driver and center did not waive their defenses under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Although there was an approximately 11-month delay in the case, during the delay no party took any action to advance the litigation and during the delay, the

center and driver pursued their affirmative defenses by informing the mother's son of their intent to seek a hearing on the motion to dismiss, Miss. Code Ann. § 11-46-11(3). *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941 (Miss. 2011).

Trial court did not apply an incorrect standard of care for comparative negligence when it failed to require an employee to show that a county sheriff's deputy acted with reckless disregard because the deputy was not afforded the protection provided by Miss. Code Ann. § 11-46-9(1)(c) when his personal injury suit against the employer, a non-governmental entity, was not a claim as defined under Miss. Code Ann. § 11-46-1(a); section 11-46-9(1)(c) limits liability, not fault, when a plaintiff files suit against a governmental entity, and there was no reason why it should prohibit the allocation of fault when an employee of the governmental entity files suit against a non-governmental entity. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Pursuant to 28 U.S.C.S. § 1367(c)(3), a court declined to exercise supplemental jurisdiction over the Mississippi Tort Claims Act (MTCA) claims of an arrestee and her children after their federal 42 U.S.C.S. § 1983 claims were dismissed with prejudice, as the Mississippi Supreme Court expressed a strong preference that MTCA claims be litigated before a state circuit judge. *Smith v. Turner*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 101175 (N.D. Miss. Dec. 15, 2008).

After dismissing, upon summary judgment, a former student's 42 U.S.C.S. § 1983 claims against a university and its officials, a court declined, pursuant to 28 U.S.C.S. § 1367(c)(3), to exercise supplemental jurisdiction over the student's Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., and state law breach of contract claims. *Senu-Oke v. Jackson State Univ.*, 521 F. Supp. 2d 551 (S.D. Miss. 2007), affirmed by 283 Fed. Appx. 236, 2008 U.S. App. LEXIS 13264 (5th Cir. Miss. 2008).

## ATTORNEY GENERAL OPINIONS

Drainage district is political subdivisions of state, as well as private enterprise, and should have liability insurance coverage. Bradley Sept. 8, 1993, A.G. Op. #93-0632.

Office of district attorney is not exempt from supporting Tort Claims System through requirements to have liability insurance by virtue of general immunity. Mellen, Jan. 12, 1994, A.G. Op. #93-0705.

Although counties and cities are without authority to provide specific types of insurance set forth in Section 25-15-101 to volunteer firefighters, tort risk coverage may be provided under Section 11-46-1. Ranck, Feb. 16, 1994, A.G. Op. #94-0080.

Sections 11-46-1 et seq. include actions brought against state agency employees and political subdivision employees in federal law actions for acts or omissions occurring within the course and scope of their duties. Hardy, March 2, 1995, A.G. Op. #95-0084.

The Mississippi Business Finance Corporation (MBFC), as a state agency, has sovereign immunity. MBFC does not have the authority to execute an agreement which would, in effect, waive the immunity by agreeing to indemnify a third party for claims. Pittman, March 29, 1995, A.G. Op. #95-0107.

The Workers' Compensation Commission peer reviewers fall within the definition of Section 11-46-1(f) and as such would be entitled to a defense subject to all provisions of the Act. Additionally, if Section 11-46-9(1)(d) applies, the Commission's peer reviewers would be exempt from liability and therefore immune from suit. Porter, August 23, 1995, A.G. Op. #95-0343.

The definition, in Section 11-46-1(f), does exclude from the protection of the Act those persons "acting on behalf of the state" who are "independent contractors." Howell, March 8, 1996, A.G. Op. #96-0137.

The Tort Claims Act is not a "law with respect to the acquisition, operation or disposition of property," and therefore a housing authority is not excluded from the requirements of the Tort Claims Act. See Sections 11-46-1(i), 43-33-5 and 43-33-11.

Hardy, March 29, 1996, A.G. Op. #96-0157.

There appears to be no statutory prohibition to using wanted posters in an effort to find individuals with outstanding contempt of court warrants. However, the Mississippi Tort Claims Act as set forth in Section 11-46-1 et. seq., does not protect state agencies or political subdivisions from defamation. Moran, July 8, 1996, A.G. Op. #96-0431.

If the county does not choose to provide a bond for the medical examiner, and the medical examiner is sued in her official capacity, the county would be obligated to provide legal counsel. See Sections 25-1-47 and 11-46-1, et seq. Brooks, December 20, 1996, A.G. Op. #96-0835.

Staff physicians under contract with the University of Mississippi Medical Center are employees of a governmental entity of the State of Mississippi, and the Medical Center is responsible for affording them a defense and paying any judgment against them or settlement for any claim arising out of an act or omission within the course and scope of their employment, and within the limits of the Mississippi Tort Claims Act. Conerly, September 4, 1998, A.G. Op. #98-0500.

A county supervisor falls within the definition of "employee" under the Mississippi Tort Claims Act. Ross, Jr., Jan. 22, 2002, A.G. Op. #01-0754.

An unpaid volunteer acting on behalf of a state university hospital is afforded coverage under the Tort Claims Act. Connerly, Mar. 29, 2002, A.G. Op. #02-0144.

Full-time staff doctors employed by and paid by a public hospital owned by a county are considered employees for purposes of the Tort Claims Act, and as such, are not personally liable for acts or omissions occurring within the course and scope of their employment. Brown, Apr. 26, 2002, A.G. Op. #02-0211.

The Bolivar Medical Center Foundation is a public corporation and the respective trustees and employees are covered by the Tort Claims Act. Griffith, Oct. 18, 2002, A.G. Op. #02-0590.

Employees of the Pat Harrison Waterway District acting within the scope and course of their employment are covered by the Tort Claims Act. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

Doctors, nurses and pharmacists employed by the State Department of Health and acting within the scope and course of their employment are covered by the Tort Claims Act. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

A legal defense is provided to doctors, nurses and pharmacists employed by the State Department of Health even though the conduct is alleged to be outside the course and scope of their employment. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

There is no reason for a practitioner to obtain additional liability coverage as long as the acts are within the course and scope of his employment with the State Health Department. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

Physicians, while performing responsibilities as Emergency Medical Services Medical Directors, are acting on behalf of the state in an official capacity and would fall within the definition of "employee" under the Mississippi Tort Claims Act. Amy, Aug. 8, 2005, A.G. Op. 05-0366.

No authority can be found for a state agency to enter into a contract which includes language obligating the state to defend a vendor or contractor, when the state or its employees are negligent. The state may affirmatively acknowledge its potential liability for negligence under the Tort Claims Act. Stringer, Jan. 25, 2006, A.G. Op. 06-0610.

In an instance where a Mississippi Animal Response Team volunteer is injured in a training exercise sponsored by the Mississippi Board of Animal Health, or where the volunteer injures a third party at such training event, any liability claims arising out of actions of the volunteer are

subject to the Mississippi Tort Claims Act. Watson, Feb. 3, 2006, A.G. Op. 06-0005.

A county may enter private land and remove tree stumps and debris as part of a settlement with the landowner. Clanton, Feb. 10, 2006, A.G. Op. 06-0023.

Where a Mississippi Animal Response Team volunteer is injured in a training exercise sponsored by the Mississippi Board of Animal Health, or where the volunteer injures a third party at such training event, any liability claims arising out of actions of the volunteer are subject to the Mississippi Tort Claims Act. Watson, Feb. 24, 2006, A.G. Op. 06-0050.

Although a community hospital is a political subdivision protected by the Mississippi Tort Claims Act, any non-profit corporation or limited liability company formed by the hospital is not. Williamson, Apr. 7, 2006, A.G. Op. 06-0040.

There is no authority that would allow a city to reimburse city employees for the cost incurred for damage that was caused to their personal property while it was housed or displayed on city property. Lawrence, June 26, 2006, A.G. Op. 06-0237.

A community hospital is a political subdivision protected by the Mississippi Tort Claims Act. Donnell, July 22, 2005, A.G. Op. 05-0304.

A county may accept the donation of services and materials from a private developer for public construction projects performed on public land, including county roads. The county board of supervisors should make the appropriate findings of fact citing the need for the work and characterizing the work as a donation, and record the findings in the minutes. The board of supervisors should also assess any potential liability concerns with the county's insurance carrier regarding the implications under the Tort Claims Act. Bond, February 23, 2007, A.G. Op. #07-00048

## RESEARCH REFERENCES

**ALR.** Liability of county for torts in connection with activities which pertain,

or are claimed to pertain, to private or proprietary function. 16 A.L.R.2d 1079.



Persons upon whom notice of injury or claim against municipal corporation may or must be served. 23 A.L.R.2d 969.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 A.L.R.2d 203.

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 A.L.R.2d 1057.

Operation of garage for maintenance and repair of municipal vehicles as governmental function. 26 A.L.R.2d 944.

Installation or operation of parking meters as within governmental immunity from tort liability. 33 A.L.R.2d 761.

Infancy or incapacity as affecting notice required as condition of holding municipality or other political subdivision liable for personal injury. 34 A.L.R.2d 725.

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 A.L.R.2d 1210.

Maintenance of auditorium, community recreational center, building, or the like, by municipal corporation as governmental or proprietary function for purposes of tort liability. 47 A.L.R.2d 544.

Municipal operation of bathing beach or swimming pool as governmental or proprietary function, for purposes of tort liability. 55 A.L.R.2d 1434.

Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to personal injury or death as result of a nuisance. 56 A.L.R.2d 1415.

Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. 57 A.L.R.2d 1336.

Municipal immunity from liability for torts. 60 A.L.R.2d 1198.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body. 65 A.L.R.2d 1278.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 A.L.R.2d 1437.

What is "motor vehicle" or the like within statute waiving governmental im-

munity as to operation of such vehicles. 77 A.L.R.2d 945.

Liability for performing an autopsy. 83 A.L.R.2d 955.

Snow removal operations as within doctrine of governmental immunity from tort liability. 92 A.L.R.2d 796.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 A.L.R.3d 382.

Modern status of the rules as to immunity of foreign sovereign from suit in federal or state courts. 25 A.L.R.3d 322.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 A.L.R.3d 703.

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection. 34 A.L.R.3d 1008.

Tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students. 36 A.L.R.3d 330.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes. 37 A.L.R.3d 712.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and playgrounds. 37 A.L.R.3d 738.

Tort liability of public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision. 38 A.L.R.3d 830.

Liability of municipal corporation for negligent performance of building inspector's duties. 41 A.L.R.3d 567.

Liability of governmental entity or public officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of highway. 45 A.L.R.3d 875.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit. 55 A.L.R.3d 930.

Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity. 59 A.L.R.3d 93.

Liability of governmental entity for issuance of permit for construction which caused or accelerated flooding. 62 A.L.R.3d 514.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 A.L.R.3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 A.L.R.3d 90.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

Governmental tort liability for social service agency's negligence in placement, or supervision after placement, of children. 90 A.L.R.3d 1214.

Governmental liability from operation of zoo. 92 A.L.R.3d 832.

Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land. 100 A.L.R.3d 510.

Liability of university, college, or other school for failure to protect student from crime. 1 A.L.R.4th 1099.

Tort liability of public schools and institutions of higher learning for educational malpractice. 1 A.L.R.4th 1139.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge. 2 A.L.R.4th 635.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury — modern status. 7 A.L.R.4th 1063.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity. 7 A.L.R.4th 1129.

Construction and application, under state law, of doctrine of "executive privilege". 10 A.L.R.4th 355.

Liability of state, in issuing automobile certificate of title, for failure to discover title defect. 28 A.L.R.4th 184.

Governmental tort liability as to highway median barriers. 58 A.L.R.4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects. 58 A.L.R.4th 1197.

Governmental liability for failure to post highway deer crossing warning signs. 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park. 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody. 60 A.L.R.4th 942.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 48 A.L.R.5th 129.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USCS sec. 1346(b). 6 A.L.R. Fed. 373.

Effect of Foreign Sovereign Immunities Act (28 USCS secs. 1330, 1441(d), 1602 et seq.) on right to jury trial in action against foreign state. 56 A.L.R. Fed. 679.

**Am Jur.** 41 Am. Jur. Trials 1, Social Worker Malpractice for Failure to Protect Foster Children.

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

Fraiser, A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees Individual Liability, Exemptions to the Waiver of Immunity, Non-Jury Trial, and Limitation of Liability, 68 Miss L.J. 703, Spring, 1999.

Litigation in Mississippi Today: A Symposium: Comment: Mississippi Tort Claims Act: Is Discretionary Immunity Useless?, 71 Miss. L.J. 695, Winter, 2002.

Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnos-

ing the Disease and Prescribing a Remedy, 22 Miss. C. L. Rev. 9, Fall, 2002.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions, 76 Miss. L.J. 973, Spring, 2007.

### § 11-46-3. Declaration of legislative intent.

(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract, including but not limited to libel, slander or defamation, by the state or its political subdivisions, or any such act, omission or breach by any employee of the state or its political subdivisions, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor.

(2) The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state, before and after November 10, 1982, and before and after July 1, 1984, and is and has been in full force and effect in this state except only in the case of rights which, prior to the date of final passage hereof, have become vested by final judgment of a court of competent jurisdiction or by the express terms of any written contract or other instrument in writing.

**SOURCES:** Laws, 1984, ch. 495, § 2; reenacted and amended, Laws, 1985, ch. 474, § 2; reenacted and amended, Laws, 1986, ch. 438, § 1; Laws, 1987, ch. 483, § 1; Laws, 1988, ch. 442, § 1; Laws, 1989, ch. 537, § 1; Laws, 1990, ch. 518, § 1; Laws, 1991, ch. 618, § 1; Laws, 1992, ch. 491 § 3; Laws, 1992 Special Session, ch. 3, § 1; Laws, 1993, ch. 476, § 2, eff from and after passage (approved April 1, 1993).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur



prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

**Cross References** — Waiver of immunity granted in this section, see § 11-46-5.

## JUDICIAL DECISIONS

1. In general.
2. Retroactivity.
3. Implied contracts.
4. Illustrative cases.

### 1. In general.

A thorough review of Miss. Code Ann. § 1-3-33 and the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., revealed that there was no contrary intent manifested by the Legislature that meant that the MTCA should be interpreted only in the singular manner; Miss. Code Ann. § 11-46-15(1) was interpreted by using singular or plural language. The Legislature did not manifestly express a contrary intention not to include plural language in its Declaration of Legislative Intent set forth in Miss. Code Ann. § 11-46-3. *Miss. DOT v. Allred*, 928 So. 2d 152 (Miss. 2006).

Resident's argument that the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-3, should not apply to investment property was untenable as Miss. Code Ann. § 11-46-3 (1) explicitly mentioned immunity pertaining to proprietary functions; furthermore, under a political subdivision's broad power to purchase and hold real estate, the lesser power to lease was necessarily implied. *Davis v. Forrest Royale Apts.*, 938 So. 2d 293 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 545 (Miss. 2006).

In conjunction with Miss. Code Ann. § 11-46-3(1), § 11-46-1(i) defines “political subdivisions” to specifically include school districts. *Harris v. McCray*, 867 So. 2d 188 (Miss. 2003).

The statute does not violate the separation of powers doctrine. *Fortune v. Lee County Bd. of Supvrs.*, 725 So. 2d 747 (Miss. 1998).

Under subsection (2), only acts of an incorporated municipality which are proprietary in nature are excepted from sovereign immunity. *Mosby v. Moore*, 716 So. 2d 551 (Miss. 1998).

Department of Transportation had sovereign immunity from liability to motorist who was injured at intersection where department was conducting road construction when oncoming ambulance struck her car at intersection, allegedly after department's flagman flagged motorist to proceed with left turn; department's purchase of liability insurance for employees operating motor vehicles in performance of official duties did not waive immunity, as flagman was not operating motor vehicle. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597 (Miss. 1997).

Department of Transportation had sovereign immunity on claim for indemnification by ambulance service that was sued for injuries sustained by motorist when oncoming ambulance struck her car at intersection, allegedly after department's flagman flagged her to proceed with left turn. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597 (Miss. 1997).

Sovereign immunity applies to actions where state is possible joint tort-feasor. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597 (Miss. 1997).

School district was “political subdivision” of state and thus was protected by sovereign immunity from negligence suit arising from incident on August 26, 1993, after effective date of statute restoring sovereign immunity for state and its political subdivisions, but before effective date of statute largely waiving such immunity for political subdivisions. *Gressett ex rel. Gressett v. Newton Separate Mun. Sch. Dist.*, 697 So. 2d 444 (Miss. 1997).

Codification of principles of sovereign immunity did not violate Mississippi constitutional provision that courts shall be open and remedy shall be available for every injury; remedy clause is not absolute guarantee of trial and it is legislature's decision whether or not to address restrictions upon actions against government entities. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

Codification of principles of sovereign immunity did not violate due process clause of Fourteenth Amendment; there was no right to sue state or its political subdivisions at common law and, through codification, legislature continued to withhold such right, and thus there was no property right to sue state. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

Sovereign immunity cloaks all "governmental functions" a city performs. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

"Governmental functions," which are cloaked with sovereign immunity, are those functions which a city is required to undertake. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Operation of fire department, including the supply of water to combat fires, is a governmental function, cloaked by sovereign immunity, even if the same supply provides drinking water, which is proprietary activity. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

City could not lose sovereign immunity for fire protection service in annexed area through negligence per se, where annexation ordinance did not require specific placement of water lines or mains in a certain point. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Governmental officers are immune from personal liability for fire protection decisions if the decision to provide water lines, or certain aspects of fire protection to property, is a discretionary matter involving public policy decisions. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Provision of water lines, under annexation ordinance providing for installment of water lines "when necessary and economically feasible," was discretionary decision, for which city officials were entitled to qualified immunity. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

The decision of *Presley v. Mississippi State Highway Commission* (Miss. 1992) 608 So. 2d 1288, which declared the codi-

fied principle of sovereign immunity (§§ 11-46-1 et seq.) unconstitutional, has no retroactive application. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

There is no "property right" to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi Constitution or the 14th Amendment to the United States Constitution. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

The Mississippi Legislature's post-Pruett legislative enactments on sovereign immunity (§§ 11-46-1 et seq.) do not violate the remedy clause of the Mississippi Constitution. *Robinson v. Stewart*, 655 So. 2d 866 (Miss. 1995), rehearing denied.

A city's operation of a service garage and towing service for its vehicles was a proprietary function, and therefore the defense of sovereign immunity was not available in a wrongful death action against the city arising from a collision between the deceased's car and a city tow truck. *Thomas v. Hilburn*, 654 So. 2d 898 (Miss. 1995).

For purposes of governmental immunity, the statutory framework for reporting cases of suspected child abuse includes elements of both ministerial and discretionary conduct; § 43-21-353 first requires a person to make a determination of whether "reasonable cause" exists as a foundation for an incident report, which involves a duty to investigate a ministerial duty and a decision as to whether reasonable cause exists a decision involving the exercise of personal judgment and discretion; if a determination is made that there is reasonable cause to report the incident, the statute then mandates that an immediate oral report be issued to the Department of Human Services an action involving no discretion. *T.M. v. Noblitt*, 650 So. 2d 1340 (Miss. 1995).

The governor was not protected by § 11-46-3 in a declaratory action alleging that he engaged in rulemaking under state law and violated the plaintiff's right to take



part in the rulemaking process under the state's Administrative Procedures Law because he failed to give notice of his plans to adopt a Capacity Assurance Plan before its submission to the United States Environmental Protection Agency, since the statute is part of the governmental immunity and tort claims act and the plaintiff's claim was not based on tort damages under § 11-46-3(1). *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995), but see *USPCI of Miss., Inc. v. State ex rel. McGowan*, 688 So. 2d 783 (Miss. 1997).

The governmental immunity and tort claims act should not be construed to immunize governmental authorities and agencies from suits other than for money damages. *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995), but see *USPCI of Miss., Inc. v. State ex rel. McGowan*, 688 So. 2d 783 (Miss. 1997).

A county was protected by sovereign immunity in a wrongful death action arising from an automobile collision which occurred on a county road bridge on September 20, 1985, following the enactment of §§ 11-46-1 et seq. *Coplin v. Francis*, 631 So. 2d 752 (Miss. 1994).

The decision of the Supreme Court declaring unconstitutional the portion of the Sovereign Immunity Act (§§ 11-41-6 et seq.) mandating that all claims against the State be governed by case law governing sovereign immunity as it existed on November 10, 1982, applies prospectively only, and is "purely prospective" so that it applies only to claims arising after the mandate issues. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

To the extent that § 11-46-6 purports to freeze the doctrine of sovereign immunity to the state of development of the common law prior to *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046, it is void; the State is immunized from claims arising thereafter to the extent that the Supreme Court would do so applying the evolving standards of common law, including any extensions or contractions of the doctrine deemed appropriate, on a case by case basis and to the extent that those benefiting by the immunity did not prepare themselves by acquiring insurance policies covering the liability in question in

the event that immunity did not obtain. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. *Presley v. Mississippi State Hwy. Comm'n*, 608 So. 2d 1288 (Miss. 1992).

In a personal injury action against a city and city officials, the 6-year statute of limitations set forth in § 15-1-49, rather than the 2-year statute of limitations set forth in § 11-46-11(3) of the Tort Claims Act, applied since the Tort Claims Act had not yet taken effect. *Starnes v. City of Vardaman*, 580 So. 2d 733 (Miss. 1991).

The continuance of electrical power is a property interest worthy of due process protections. Thus, the defense of sovereign immunity was not available to a county where a homeowner alleged that he had been damaged when the county and an electrical utility discontinued his electrical power, since sovereign immunity is no defense where a violation of constitutional rights is concerned. *Tucker v. Hinds County*, 558 So. 2d 869 (Miss. 1990).

## 2. Retroactivity.

Where the plaintiff was not prejudiced by application of the retroactive provisions of this section, she had no standing to assert that the retroactive provisions of this section rendered this section constitutionally defective as a whole. *Lincoln County Sch. Dist. v. Doe*, 749 So. 2d 943 (Miss. 1999).

## 3 Implied contracts.

County was not entitled to a dismissal of a health care provider's reimbursement claim for a prisoner's medical expenses under Miss. Code Ann. § 47-1-59 because such claims were separate and distinct from the state's law related to sovereign immunity and the claims were not implied contractual claims subject to immunity



under Miss. Code Ann. § 11-46-3. *Vuncannon v. United States*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52190 (N.D. Miss. June 22, 2009).

Building owner's claims against a city for money had and received and unjust enrichment constituted implied-in-law contract causes of action and were covered by the Mississippi Tort Claims Act because under Miss. Code Ann. § 11-46-3(1), the legislature intended for the state and its political subdivisions to be immune from suits for breach of an implied term or condition of any contract. 1704 21st Ave., Ltd v. City of Gulfport, 988 So. 2d 412 (Miss. Ct. App. 2008).

#### 4. Illustrative cases.

Miss. Code Ann. § 11-46-3 granted immunity to the state and its political subdivisions for breach of implied term or condition of any warranty or contract. Thus, although the decedent was indeed a third-party beneficiary of the written contract between the city and the development district, her estate was not permit-

ted to pursue claims of breach of implied terms of that contract against the city or its political subdivisions. *City of Jackson v. Estate of Stewart*, 908 So. 2d 703 (Miss. 2005).

In a driver's suit against a county for failing to install warning signs near a curve, the evidence was sufficient to support a verdict for the county; compliance with the Manual on Uniform Traffic Control Devices was not conclusive as to the standard of care. *Donaldson v. Covington County*, 846 So. 2d 219 (Miss. 2003).

Although the "interim" version of Miss. Code Ann. § 11-46-3 (Supp. 1993) was in effect at the time of the police officer's automobile accident with plaintiff, the immunity exception provided in subsection (3) of that section was inapplicable because the operation and maintenance of a police department was not a function of proprietary nature; thus, the city was entitled to summary judgment on the issue of sovereign immunity. *Gale v. Thomas*, 759 So. 2d 1150 (Miss. 1999).

### ATTORNEY GENERAL OPINIONS

Municipality does not have authority to waive immunity set forth in Section 11-46-1, et seq., by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify railroad for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and vegetation on private property, such as railroad right-of-way. Scott Nov. 3, 1993, A.G. Op. #93-0727.

A nonprofit corporation established by a regional housing authority pursuant to § 43-33-11(i) is excluded from the provisions of the Mississippi Tort Claims Act. *McArty*, April 9, 1999, A.G. Op. #99-0150.

A for-profit corporation established by a nonprofit corporation which has been established by a regional housing authority pursuant to § 43-33-11(i) is excluded from the provisions of the Mississippi Tort Claims Act. *McArty*, April 9, 1999, A.G. Op. #99-0150.

### RESEARCH REFERENCES

**ALR.** Governmental liability for failure to post highway deer crossing warning signs. 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park. 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or ne-

glected children from parents' custody. 60 A.L.R.4th 942.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.A. § 2671). 166 A.L.R. Fed. 187.

**Am Jur.** 51 Am. Jur. 2d (Rev), Limita-

tion of Actions, §§ 88, 324.

57 Am. Jur. 2d, Municipal, School, and State Tort Liability, §§ 53 et seq.

64 Am. Jur. 2d, Public Works and Contracts, §§ 111 et seq.

63C Am. Jur. 2d, Public Officers and Employees, §§ 298 et seq.

72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 87-89.

19 Am. Jur. POF2d p 583, Governmental Entity's Liability for Injuries caused by Negligently Released Individual.

**CJS.** 81A C.J.S., States §§ 474 et seq.

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

## § 11-46-5. Waiver of immunity; course and scope of employment; presumptions.

(1) Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions; provided, however, immunity of a governmental entity in any such case shall be waived only to the extent of the maximum amount of liability provided for in Section 11-46-15.

(2) For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.

(3) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(4) Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

**SOURCES:** Laws, 1984, ch. 495, § 3; reenacted and amended, Laws, 1985, ch. 474, § 3; reenacted and amended, Laws, 1986, ch. 438, § 2; Laws, 1987, ch. 483, § 2; Laws, 1988, ch. 442, § 2; Laws, 1989, ch. 537, § 2; Laws, 1990, ch. 518, § 2; Laws, 1991, ch. 618, § 2; Laws, 1992, ch. 491 § 4, eff from and after passage (approved May 12, 1992).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

**Cross References** — Immunity of vocational rehabilitation agency for the blind from suit for damages arising out of the operation of the agency's motor vehicles, see § 37-33-55.

Repeal of provisions requiring motor vehicle liability insurance on department of human service's vehicles on date sovereign immunity of state is waived as provided in this section, see § 37-33-55.

**Federal Aspects** — Eleventh Amendment to the Constitution of the United States, see USCS, Constitution, Amendment 11.

## JUDICIAL DECISIONS

1. In general.
2. Applicability of waiver.
3. Course and scope of employment.
4. Evidence sufficient to prove liability.
5. Evidence insufficient to prove liability.
6. Employee.
7. Waiver of immunity defense.

### 1. In general.

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity as Miss. Code Ann. § 11-46-5(1) permitted school districts to be sued. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006).

Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court

held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. *City of Jackson v. Calcote*, 910 So. 2d 1103 (Miss. Ct. App. 2005).

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute, Miss. Code Ann. § 11-7-13. *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Dismissal of a minor student's suit against a school district and others over an alleged sexual assault by male students was affirmed, where the trial court's finding of no causation in fact, as the student failed to show she had been sexually assaulted, and that the district met its duty to use ordinary care to protect students from harm, were supported by the record. *T.K. v. Simpson County Sch. Dist.*, 846 So. 2d 312 (Miss. Ct. App. 2003).

Because the parents failed to support their contention that Miss. Code Ann. § 11-46-5 superseded the specific types of immunity set forth in Miss. Code Ann. § 11-46-9, failure to cite legal authority in support of an issue was a procedural bar on appeal. *Webb v. DeSoto County*, 843 So. 2d 682 (Miss. 2003).

School district was "political subdivision" of state and thus was protected by sovereign immunity from negligence suit



arising from incident on August 26, 1993, after effective date of statute restoring sovereign immunity for state and its political subdivisions, but before effective date of statute largely waiving such immunity for political subdivisions. *Gressett ex rel. Gressett v. Newton Separate Mun. Sch. Dist.*, 697 So. 2d 444 (Miss. 1997).

While decision to replace bridge with culvert on county road was discretionary one to which qualified immunity attached, fact issue existed as to whether county supervisor who determined that replacement was necessary, determined size of culvert needed, and supervised installation of culvert substantially exceeded his authority or was so grossly negligent that his action could be described as constructively intentional such that he was deprived of immunity, precluding summary judgment for supervisor on motorist's personal injury claim. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

## 2. Applicability of waiver.

Store patron's 42 U.S.C.S. § 1983 and state law tort claims against the State of Mississippi, the Mississippi Department of Public Safety, the Mississippi Highway Patrol, and a state trooper, in his official capacity, in connection with the patron's detainment for shoplifting at a store were barred under U.S. Const. Amend. XI immunity and Miss. Code Ann. § 11-46-5(4); the *Ex Parte Young* exception did not apply because the patron was seeking monetary, not injunctive, relief. *Hopkins v. Mississippi*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52686 (S.D. Miss. June 23, 2009).

Former state university student's defamation, breach of contract, and other unspecified state-law claims against the university, a state board of trustees, and several professors were barred under U.S. Const. Amend. XI, and Miss. Code Ann. § 11-46-5 did not waive such immunity because the student's suit was brought in federal court. *Washington v. Jackson State Univ.*, 532 F. Supp. 2d 804 (S.D. Miss. Mar. 15, 2006), appeal dismissed by 244 Fed. Appx. 589, 2007 U.S. App. LEXIS 18811 (5th Cir. Miss. 2007).

## 3. Course and scope of employment.

Plaintiff VA patient conceded that a vascular surgeon was a state employee,

and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574 (S.D. Miss. 2007), reversed by, remanded by 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625 (Miss. Ct. App. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005).

In the patient's suit against the doctor and the state hospital for the death of the patient's unborn child, the Miller factors were more than sufficient to determine the status of physicians working for state hospitals, and the state hospital's disclaimer of liability for the doctor's acts did not change the legal status of the doctor,

especially when the state hospital had admitted that the doctor was its employee. Thus, the trial court properly determined that the doctor was shielded from liability under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1-23. *Wright v. Quesnel*, 876 So. 2d 362 (Miss. 2004).

Where a deputy assaulted an individual in attempting to force the individual to sit for a casino security photograph, the deputy was acting for the casino, and not in his official capacity for the county, and the deputy was not entitled to immunity. *Kirk v. Crump*, 886 So. 2d 741 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Dismissal of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., 11-46-5. *Whitt v. Gordon*, 872 So. 2d 71 (Miss. Ct. App. 2004).

Because a public school coach's actions at a fund-raiser where a plaintiff was injured were performed not for his own benefit but for the school's, the trial court properly held that he had acted in the scope of his employment and was thus immune from suit under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq. *Singley v. Smith*, 844 So. 2d 448 (Miss. 2003).

Proof by a preponderance of the evidence is necessary to overcome the presumption created by Miss. Code Ann. § 11-46-5 that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment. *Singley v. Smith*, 844 So. 2d 448 (Miss. 2003).

An employee can be found to be acting outside the course and scope of employment if acting with malice. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584 (Miss. 2001).

A county sheriff was acting in his official capacity when he responded to an emergency call at a residence and eventually shot a suspect; the plaintiff failed to offer any evidence to suggest that the sheriff

was not acting as an employee of the county; and there was a wealth of evidence to show that the sheriff acted in his official capacity. *Holmes v. Defer*, 722 So. 2d 624 (Miss. 1998), overruled regarding strict compliance requirement, *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

Where the plaintiff sued the defendant city for false arrest, subsection (2) did not bar the city's liability. *Foster v. Noel*, 715 So. 2d 174 (Miss. 1998).

#### **4. Evidence sufficient to prove liability.**

In a child's suit against the Mississippi Department of Human Services (DHS), failure to investigate a child's allegations of sexual abuse by an employee of a youth care facility was a ministerial act for which DHS could be held liable. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253 (Miss. Ct. App. 2007).

#### **5. Evidence insufficient to prove liability.**

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper under Miss. Code Ann. § 11-46-9(1)(d) because the university was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity codified at Miss. Code Ann. § 11-46-5; it was difficult to fathom how the professor's failure to put down dry sand before the pour involved a policy judgment of a social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

When a teacher's aide was escorting an autistic child to his classroom, the child became agitated while the aide continued to move him through the hallway. The child suffered bruises as a result of the teacher's aide's fully sensible attempts to restrain him, and no treatment or medication was warranted or prescribed for the bruises; the aide's restraint of the child constituted control and discipline under Miss. Code Ann. § 37-11-57, and the circuit court properly applied Miss. Code



Ann. § 11-46-9(1)(x) in finding that said actions did not constitute wanton and willful conduct to allow the parents to recover damages. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

Officer didn't show malice in an arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune from from liability. *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So. 2d 1013 (Miss. Ct. App. 2004).

Primary issue was whether the physicians were acting as employees of the University of Mississippi Medical Center (UMMC), or whether they were independent contractors for purposes of immunity or liability, and although the physicians did wear two hats, because they were entitled to engage, to an extent, in separate private practice, the appellate court, applying the standard of *Miller v. Meeks*, held that the State exercised reasonable control over the physicians, including the power to terminate the physicians' contract, the uncontroverted evidence was that the physicians were acting as employees of UMMC at the time of the subject surgery on the complaining patient, and pursuant to Mississippi's former sovereign immunity law, Miss. Code Ann. § 11-46-7(2), the physicians were immune from liability. *Brown v. Warren*, 858 So. 2d 168 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, all the individual was able to show with regard to his negligence claim, was that the Bureau and its agents made a series of challengeable choices, from the level of

training before sending an officer on a drug buy, to the directions given that officer; bad judgment; however, was insufficient for liability where the individual offered no evidence to meet the evidentiary burden of the reckless disregard standard. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465 (Miss. Ct. App. 2003).

## 6. Employee.

Although a patient alleged that he was injured by the negligence of a doctor who was an independent contractor of a hospital, the Mississippi Tort Claims Act provided immunity to the state and its political subdivisions, such as the hospital, for the negligence of its independent contractors. Therefore, the trial court properly entered summary judgment in favor of the hospital. *Brown v. Delta Reg'l Med. Ctr.*, 997 So. 2d 195 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, the trial court determined that he was an employee of the community hospital for purposes of immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-5. The partnership was an "instrumentality" of the community hospital and was entitled to the protections, limitations and immunities of the MTCA. *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008).

## 7. Waiver of immunity defense.

A doctor's participation in a medical malpractice action for eleven years, coupled with his failure to pursue the immunity affirmative defense under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1, et seq., constituted a waiver of such defense. *Aikens v. Whites*, 8 So. 3d 139 (Miss. 2008).

## ATTORNEY GENERAL OPINIONS

Municipality does not have authority to waive immunity set forth in Section 11-46-1, et seq., by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify rail-

road for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and



vegetation on private property, such as railroad right-of-way. Scott Nov. 3, 1993, A.G. Op. #93-0727.

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course

and scope of their duties on Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. Tardy, Jan. 5, 1994, A.G. Op. #93-0972.

## RESEARCH REFERENCES

**ALR.** Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body. 65 A.L.R.2d 1278.

Immunity of police or other law enforcement officer from liability in defamation action. 100 A.L.R.5th 341.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under

Federal Tort Claims Act (28 U.S.C.A. § 2671). 166 A.L.R. Fed. 187.

**Am Jur.** 18 Am. Jur. Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Forms 1 et seq.

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Constitutional Law — Fourth Amendment — The Warrantless Use of Thermal Imaging Technologies Is Unconstitutional, 71 Miss. L.J. 325, Fall, 2001.

## § 11-46-6. Repealed.

Repealed by Laws of 1992 Special Session, ch. 3, § 2, eff from and after passage (approved September 16, 1992).

[Laws, 1987, ch. 483, § 3; Laws, 1988, ch. 442, § 3; Laws, 1989, ch. 537, § 3; Laws, 1990, ch. 518, § 3; Laws, 1991, ch. 618, § 3; Laws, 1992, ch. 491, § 5]

**Editor's Note** — Former § 11-46-6 prescribed the claims and causes of action to which Chapter 46, Title 11, Miss. Code of 1972 applied.

## § 11-46-7. Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its

employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

(2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided, however, that to the extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligation shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(4) The responsibility of a governmental entity to provide a defense for its employee shall apply whether the claim is brought in a court of this or any other state or in a court of the United States.

(5) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same suit brought on the claim against the governmental entity or its employee.

(6) The duty to defend and to pay any judgment as provided in subsection (3) of this section shall continue after employment with the governmental entity has been terminated, if the occurrence for which liability is alleged

happened within the course and scope of duty while the employee was in the employ of the governmental entity.

(7) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(8) Nothing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity. Any immunity or other bar to a civil suit under Mississippi or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

**SOURCES:** Laws, 1984, ch. 495, § 5; reenacted and amended, Laws, 1985, ch. 474, § 4; reenacted and amended, Laws, 1986, ch. 438, § 3; Laws, 1987, ch. 483, § 4; Laws, 1988, ch. 442, § 4; Laws, 1989, ch. 537, § 4; Laws, 1990, ch. 518, § 4; Laws, 1991, ch. 618, § 4; Laws, 1992, ch. 491 § 6; Laws, 1993, ch. 476, § 3, *eff from and after passage* (approved April 1, 1993).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

**Cross References** — Statute of limitations and notice requirements, see § 11-46-11.

## JUDICIAL DECISIONS

1. In general.
2. Constitutionality.
3. Course and scope of duties.
4. Applicability.
5. Joinder.

### 1. In general.

Five-part test articulated by the Mississippi Supreme Court to analyze a doctor's employment status for purposes of Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), in a case involving a doctor who served as both a contract employee for a state hospital and also as a solo practitioner, is not applicable in cases where a doctor has no direct contractual relationship with a state hospital. *Carpenter v. Reinhard*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Trial court did not err in dismissing the decedent's estate's negligence action

against the circuit court clerks for failing to enroll a foreign judgment, which allegedly prevented the estate from being able to execute the judgment, because according to Miss. Code Ann. § 11-46-7(1) of the Mississippi Tort Claims Act (MTCA), when bringing suit against a governmental official for actions taken in his or her official capacity, a plaintiff must comply with the provisions of the MTCA. Among the provisions of the MTCA with which the estate failed to comply was the one-year statute of limitations and the notice of claim requirements of Miss. Code Ann. § 11-46-11. *Estate of Spiegel v. Western Sur. Co.*, 908 So. 2d 859 (Miss. Ct. App. 2005).

Absent evidence showing otherwise, state environmental agencies and their employee were immune to landowners' claims of tortious interference with con-



tract and business relations concerning the development of protected wetlands that belonged to the landowners. *Dunston v. Miss. Dep't of Marine Res.*, 892 So. 2d 837 (Miss. Ct. App. 2005).

Deputy responding to a call from a fellow officer was not speeding and did not sound a siren because the deputy did not want there to be any accidents resulting from motorists coming to an abrupt stop, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. *Kelley v. Grenada County*, 859 So. 2d 1049 (Miss. Ct. App. 2003).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Mississippi Torts Claims Act provides the exclusive civil remedy for claims of negligence against a school district. *Harris v. McCray*, 867 So. 2d 188 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint as to her claim under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., because she had specified and separated the negligence-and tort-based state law claims from the constitutional tort claims brought pursuant to 42 U.S.C.S. § 1983 in her amended

complaint; under Miss. Code Ann. § 11-46-7(1) the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers; and Miss. R. Civ. P. 8(a) only required that notice of a claim be given. *Elkins v. McKenzie*, 865 So. 2d 1065 (Miss. 2003).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, — So. 2d —, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), opinion withdrawn by, substituted opinion at 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

City was liable for the wrongful death of a driver under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because several officers acted in reckless disregard of the safety of the driver when they initiated a police chase in violation of department policy. *City of Jackson v. Brister*, 838 So. 2d 274 (Miss. 2003).

Court affirmed the trial court's dismissal of a physician, a faculty neurosurgeon at a state medical center, from a patient's medical malpractice action on the grounds of immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2); there was nothing to support the patient's claim that the physician was an independent contractor because the physician performed the patient's operation in front of a surgical resident in furtherance of the resident's education, given that the state exercised sufficient control over the physician, and the fact that the physician exercised independent judgment in performing the operation did not make the physician an independent contractor. *Clayton v. Harkey*, 826 So. 2d 1283 (Miss. 2002).

In a case where a mother filed a lawsuit for damages after her son died in police custody, the trial court correctly granted summary judgment to a sheriff and a

sheriff's deputy because the mother failed to also sue the county. *Conrod v. Holder*, 825 So. 2d 16 (Miss. 2002).

Trial court erred in granting summary judgment on the ground of governmental immunity to two psychiatrists who worked for a medical center at a state school, where a conservator claimed that his father had suffered side effects from prescription drugs the psychiatrists prescribed, as genuine issues of material fact existed as to whether the psychiatrists were protected by immunity for their actions. *Bennett v. Madakasira*, 821 So. 2d 794 (Miss. 2002).

Where doctor was hired as an employee of a community hospital, which was afforded immunity protection under Miss. Code Ann. § 41-13-11(5), and the doctor was found to be an employee of the hospital rather than an independent contractor, the patient was not able to proceed with a medical malpractice action against the doctor because the doctor was entitled to sovereign immunity protection. *Gilchrist v. Veach*, 807 So. 2d 485 (Miss. Ct. App. 2002).

Under the plain language of the Mississippi Tort Claims Act even though a government employee may not be personally liable for acts and omissions occurring within the course and scope of the employee's duties, the employee's still may be joined in the action against the employer, if the acts or omissions are ones for which the governmental entity may be liable. *Stewart v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002).

Statute provided the exclusive civil remedy against a governmental entity and its employees for acts or omissions that give rise to a suit; any claim filed against a governmental entity and its employees had to be brought under the statutory scheme. *City of Jackson v. Sutton*, 797 So. 2d 977 (Miss. 2001).

Where a school district was dismissed from a motor vehicle personal injury action because it was never served with process and the plaintiffs did not appeal that dismissal, the school district employee vehicle operator was not individually liable, due to immunity granted to an employee acting within the course and scope of her employment. *Cotton v. Paschall*, 782 So. 2d 1215 (Miss. 2001).

No claim upon which relief could be granted was stated in an action alleging that a student was physically injured when a teacher administered excessive corporal punishment to him where it was alleged that the teacher was acting within the course and scope of her employment. *Duncan v. Chamblee*, 757 So. 2d 946 (Miss. 1999).

Nurses employed by a community hospital owned by a county were immune under subsection (2) of this section for alleged negligence which occurred within the course and scope of their duties. *Jones v. Baptist Mem. Hospital-Golden Triangle*, 735 So. 2d 993 (Miss. 1999).

## 2. Constitutionality.

Statute was not in conflict with Mississippi Constitution because it did not violate due process; there was no property right to sue the State and without such a property interest there could be no due process violation. *City of Jackson v. Sutton*, 797 So. 2d 977 (Miss. 2001).

## 3. Course and scope of duties.

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), the driver could not be held personally liable. *King v. Bunton*, 43 So. 3d 361 (Miss. 2010).

The trial court did not err in finding in favor of a driver in her action against a city and a police officer under the Mississippi Tort Claims Act (MTCA), because there was substantial, credible evidence to support a finding of reckless disregard for public safety on the part of the officer. The officer knew that there was a good chance that traffic would be coming through the green light of the busy intersection and she proceeded against her own red light, even though her view to the left was completely blocked by a truck; there-



fore, the trial court did not err in finding that the officer's conduct went beyond mere negligence to reckless disregard and that the city was therefore not immune from liability under the MTCA. *City of Jackson v. Presley*, 40 So. 3d 578 (Miss. Ct. App. 2009), reversed by 40 So. 3d 520, 2010 Miss. LEXIS 385 (Miss. 2010).

Store patron's 42 U.S.C.S. § 1983 and state law tort claims against the State of Mississippi, the Mississippi Department of Public Safety, the Mississippi Highway Patrol, and a state trooper, in his official capacity, in connection with the patron's detainment for shoplifting at a store were barred under U.S. Const. Amend. XI immunity and Miss. Code Ann. § 11-46-5(4), but if the trooper, who was working as a store security guard during his off-duty hours, was acting in his capacity as a public employee, then to the extent the patron was alleging that the trooper acted with malice and thereby exceeded the course and scope of his employment, he could potentially be held individually or personally liable under Miss. Code Ann. § 11-46-7(2), but the State of Mississippi, the Mississippi Department of Public Safety, and the Mississippi Highway Patrol could not. *Hopkins v. Mississippi*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52686 (S.D. Miss. June 23, 2009).

Plaintiff VA patient conceded that a vascular surgeon was a state employee, and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574 (S.D. Miss. 2007), reversed by, remanded by 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

There was substantial credible evidence to conclude that the instructor was acting within the course and scope of his employ-

ment at the time of the student's injuries; there was nothing on the tape to indicate that the instructor was doing anything other than what he was told. *Hayes v. Univ. of Southern Miss.*, 952 So. 2d 261 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 190 (Miss. 2007).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625 (Miss. Ct. App. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005).

In plaintiff's personal injury action against a police officer, court did not err in finding that the officer was not individually liable under Miss. Code Ann. § 11-46-7(2) because the officer was acting within the course and scope of his employment at the time when he stopped plaintiff's vehicle and drew his gun. Officer had received a call that two vehicles were speeding and that shots had been fired. *Smith v. Brookhaven*, 914 So. 2d 180 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 750 (Miss. 2005).

Officer didn't show malice in arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune



from from liability. *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So. 2d 1013 (Miss. Ct. App. 2004).

As a security officer who hugged and kissed appellant after arresting her for driving under the influence had not been acting within the scope of the officer's employment with a water district, appellant's claims against the district were properly dismissed on summary judgment. *Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So. 2d 357 (Miss. 2004).

Where the driver of a car was stopped during a police chase and then the driver gunned the engine and hit defendant police officer as the car again sped away, and the officer shot at the car, hitting plaintiff, a passenger in the car, the passenger's state law claims of assault, battery, aggravated assault, false arrest, false imprisonment, and intentional infliction of emotional distress failed, as none of the state law claims alleged misconduct occurring outside the scope of employment under Miss. Code Ann. § 11-46-7(2); rather, the officer's actions were within the course and scope of employment. *Herman v. City of Shannon*, 296 F. Supp. 2d 709 (N.D. Miss. 2003).

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2) barred plaintiff's state law claims against the police chief and the officer because the wrongful arrest of plaintiff occurred in the scope and course of their employment, but did not bar the state law claims against the city under Miss. Code Ann. § 11-46-9(1)(c) because the officer was acting within the scope of his employment when he acted with reckless disregard in the arrest of the mother. *Craddock v. Hicks*, 314 F. Supp. 2d 648 (N.D. Miss. 2003).

State officials were immune from liability following the death of a 15-year-old who was incarcerated at the Oakley Training School, as a nurse's misdiagnosis of meningitis as a cold virus or flu did not establish "deliberate indifference" or give rise to cause of action; under the Mississippi Tort Claims Act officials and employees had immunity, under Miss. Code Ann. §§ 11-46-7(2) and 11-46-9(1)(m). *Mallery v. Taylor*, 805 So. 2d 613 (Miss. Ct. App. 2002).

An employee can be found to be acting outside the course and scope of employ-

ment if acting with malice. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584 (Miss. 2001).

Physicians employed by the University of Mississippi Medical Center were entitled to immunity in a medical malpractice action arising from their conduct during a 10 day period in January 1993 where (1) there was no dispute that the physicians were employees of the medical center acting within the course and scope of their employment, (2) the patient was a Medicaid patient who did not choose any particular doctor, and (3) the physicians were assigned to the patient in accordance with their duties at the medical center as a public hospital and an educational institution. *Sullivan v. Washington*, 768 So. 2d 881 (Miss. 2000).

Plaintiff's assertion that the police officer was acting within the course of his employment at the time of the accident was fatal to her attempt to hold the officer personally liable because subsection (2) precludes liability for acts of an officer that occur within the course and scope of his duties. *Gale v. Thomas*, 759 So. 2d 1150 (Miss. 1999).

Statute under which governmental entity and its employees are immune from any claim asserted by prison inmate could not be applied retroactively to bar action brought against prison physicians and other medical personnel following death of prison inmate, which occurred prior to effective date of statute, as state prison physicians and other prison personnel were not protected by sovereign immunity as it existed prior to enactment of statute. *Sparks v. Kim*, 701 So. 2d 1113 (Miss. 1997).

#### 4. Applicability.

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her

10-month-old son. *Gorton v. Rance*, 52 So. 3d 351 (Miss. 2011).

Plaintiff landowner's state law claims were based on constitutional violations of due process and governmental takings and not based or founded on torts. Therefore, any immunity under the Mississippi Tort Claims Act defendant city sought to assert was inapplicable. *Pearson v. City of Louisville*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Physician was entitled to the immunity provided under Miss. Code Ann. § 11-46-7 with respect to a patient's claim of negligence per se because there was no evidence that he acted maliciously when he evaluated her for involuntary commitment for mental health treatment; moreover, the patient did not dispute that the physician was subject immunity under § 11-46-7 and did not explain how an exception for intentional torts applied to a claim for per se negligence in violating a statute or negligently providing mental care. *Tebo v. Tebo*, 550 F.3d 492 (5th Cir. 2008).

Where a county hospital and its employee were sued in tort for injuries related to a car accident that occurred when the employee was running an errand for her employer, the dismissal of the employee from the action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., did not act as a release of her insurance company. The insurance company was contractually obligated to defend or indemnify the county hospital as an additional insured under the language of the insurance policy; Miss. Code Ann. § 11-46-7(5) did not apply. *Franklin County Mem'l Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So. 2d 872 (Miss. 2008).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were acting in their official roles in enforcing a facially valid Virginia custody order granting custody of children to the children's mother, immunity under Miss. Code Ann. § 11-46-7(2) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705 (Miss. Ct. App. 2007).

Dismissal of the decedent's mother's and a student's action against a state university resulting from a shooting on campus was appropriate where Miss. Code Ann. § 11-46-7(1) provided the exclusive civil remedy against state and governmental entities and the underlying act of the claims was the fact that the gunman shot the victims; there was no authority suggesting that the university, through an employee, had a duty to warn the victims of the dangerous conditions of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398 (Miss. Ct. App. 2006).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to res judicata; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006).

From the time of the resident's injury on May 7, 2001, she was under a duty to exercise due diligence in ascertaining the proper defendant; the warranty deed, which listed Forrest County as the owner of the property, was available to the resident during the entire period, had she chosen to exercise due diligence by examining it; her own failure to exercise due diligence did not excuse her duty to comply with the procedural requirements of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Davis v. Forrest Royale Apts.*, 938 So. 2d 293 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 545 (Miss. 2006).



Doctor was not immune under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), from a patient's malpractice suit because the doctor was an independent contractor, rather than an employee of a county hospital, where the doctor's contract was with a private corporation that assigned her to work at the hospital and issued her paycheck. *Carpenter v. Reinhard*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Grant of summary judgment against the patient in her medical malpractice action against the physician was proper where the physician was an employee of the state university medical center and therefore an employee of the state of Mississippi. Thus, he was immune from liability under Miss. Code Ann. § 11-46-7(2) of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Owens v. Thomae*, 904 So. 2d 207 (Miss. Ct. App. 2005).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, regarding the applicabil-

ity of the Mississippi Tort Claims Act in a doctoral student's action alleging that defendants' conduct prevented her from receiving her doctoral degree because although the student claimed that the action was in contract, clearly tort claims were before the jury, and the Act's statute of limitations had run. *Univ. of S. Miss. v. Williams*, 891 So. 2d 160 (Miss. 2004).

### 5. Joinder.

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. To be in compliance with the MTCA, plaintiff would have had to sue the partnership, joining the doctor under Miss. Code Ann. § 11-46-7(2) in his representative capacity only, and would have been required to provide ninety-day notice pursuant to Miss. Code Ann. § 11-46-11(1). *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008).

## ATTORNEY GENERAL OPINIONS

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course and scope of their duties on the Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. *Tardy*, Jan. 5, 1994, A.G. Op. #93-0972.

Under Section 11-46-7(3), a School District may not require that school district personnel who use their personal vehicles for travel in the course of their employment provide proof of liability insurance coverage on such vehicles. *Sadler*, February 9, 1995, A.G. Op. #95-0006.

Since Section 11-46-7 creates an exclusive remedy against the state for an employee's negligence, and clearly states that no employee shall be held personally liable for any judgments obtained in any action brought under the Mississippi Tort Claims Act, within the course and scope of his employment, then no state employee's

insurer should ever be liable to a plaintiff for injuries sustained as a result of the employee's negligence, thereby obviating the need for the insurer to defend or pay any judgment or settlement. *Hardy*, February 16, 1996, A.G. Op. #96-0053.

Staff physicians under contract with the University of Mississippi Medical Center are employees of a governmental entity of the State of Mississippi, and the Medical Center is responsible for affording them a defense and paying any judgment against them or settlement for any claim arising out of an act or omission within the course and scope of their employment, and within the limits of the Mississippi Tort Claims Act. *Conerly*, September 4, 1998, A.G. Op. #98-0500.

Doctors, nurses and pharmacists employed by the State Department of Health and acting within the scope and course of their employment are covered by the Tort Claims Act. *Amy*, Jan. 17, 2003, A.G. Op. #02-0746.



A legal defense is provided to doctors, nurses and pharmacists employed by the State Department of Health even though the conduct is alleged to be outside the course and scope of their employment. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

There is no reason for a practitioner to obtain additional liability coverage as long as the acts are within the course and scope of his employment with the State Health Department. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

In a situation in which a complainant files an action against an employer or employee for acts which the employer has determined to be outside the course and scope of the employee's duties for the employer, the employer may choose to seek a determination of that question by the court prior to declining to provide a defense for the employee. Banks, Feb. 17, 2006, A.G. Op. 06-0047.

### RESEARCH REFERENCES

**ALR.** Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

**Am Jur.** 5 Am. Jur. Proof of Facts 3d, Defamation by Employer, §§ 1 et seq.

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

## § 11-46-8. Foster parents covered under this chapter.

Mississippi Department of Human Services licensed foster parents shall be covered under this chapter for claims made by parties other than the foster child which are based on inadequate supervision or inadequate care of the foster child on the part of the foster parent.

**SOURCES:** Laws, 1999, ch. 518, § 2, eff from and after July 1, 1999.

## § 11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage chan-

nels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 65-43-1 or 65-43-3, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;

(b) Receives no revenue;



(c) Has no employees; and

(d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

**SOURCES:** Laws, 1984, ch. 495, § 6; reenacted without change, 1985, ch. 474, § 5; Laws, 1987, ch. 483, § 5; Laws, 1993, ch. 476, § 4; Laws, 1994, ch. 334, § 1; Laws, 1995, ch. 483, § 1; Laws, 1996, ch. 538, § 1; Laws, 1997, ch. 512, § 2; Laws, 2007, ch. 582, § 21, eff July 18, 2007 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

On July 18, 2007, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws of 2007, ch. 582, § 21.

**Federal Aspects** — Provisions of the National Guard Tort Claims Act, see 32 USCS § 715.

## JUDICIAL DECISIONS

1. In general.
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### 1. In general.

Miss. Code Ann. § 11-46-9(1)(b) required the use of ordinary care when performing a statutory duty, and Miss. Code Ann. § 11-46-9(1)(d) had no requirement of ordinary care when the act was a discretionary function; the student was not harmed or injured at school, nor was she harmed or injured during the numerous times that she skipped school and walked off campus, instead, she was injured when her bus driver took her to his home, and the duty to hire and supervise employees was necessarily and logically dependent

upon judgment and discretion, and this discretionary function did not require that the school district exercise ordinary care. *A.B. v. Stone County Sch. Dist.*, 14 So. 3d 794 (Miss. Ct. App. 2009).

Summary judgment was properly awarded to a county board of supervisors in plaintiffs' action to recover damages for injuries sustained after their vehicle collided with a mailbox on the shoulder of a road because plaintiffs' evidence failed to establish that the county owned the property where the mailbox was located, as required for a claim under Miss. Code Ann. § 11-46-9(1)(v). *Bryant v. Bd. of Supervisors*, 10 So. 3d 919 (Miss. Ct. App. 2008).

In granting immunity from claims brought by an inmate, Miss. Code Ann. § 11-46-9(1)(m) does not distinguish between those lawfully and those unlawfully within the custody of the state. *Brooks v. Pennington*, 995 So. 2d 733 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Construction project was executed by the independent contractor's employees, and appellants presented no evidence that the Mississippi Department of Transportation's (MDOT) employees committed any act or omission that led to the accident; the supreme court could not look to apply the immunity provisions of the Mississippi Tort Claims Act (MTCA) unless some wrong by the government was first established, and the requisite negligence could not be established. *Chisolm v. Miss. DOT*, 942 So. 2d 136 (Miss. 2006).

Legal principle referred to as "Frasier's octopus" applies to an individual claim, but may or may not apply to all claims; therefore, summary judgment was improperly granted to a department of transportation on claims of negligent construction, negligent maintenance, negligent improvement, and failure to warn based on a finding of immunity under Miss. Code Ann. § 11-46-9(1)(p) on a defective design claim. *MacDonald v. Miss. DOT*, 955 So. 2d 355 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 246 (Miss. Apr. 19, 2007).

County and deputy sheriff were immune from that arose out of a traffic collision when the deputy was on his way to have spare keys made for the county's gas pumps, which was deemed to be performance of governmental duties, and the deputy did not act with reckless disregard of a risk. At worst, the deputy's action in pulling into an intersection was negligent. *Reynolds v. County of Wilkinson*, 936 So. 2d 395 (Miss. Ct. App. 2006).

In a case where a mental health patient suffered injuries due to a fall during an attempted escape, Miss. Code Ann. § 11-46-9(1)(m) did not shield a state department of mental health from liability because it only pertained to penal institutions. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006).

In a case where a patient in a mental health facility was injured during an attempted escape, liability was not precluded under Miss. Code Ann. § 97-9-25 and Miss. Code Ann. § 11-46-9(1)(f) because an attempted escape by a mental patient was not a criminal act. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006).

Miss. Code Ann. § 11-46-9(1) provided that any governmental entity and its employees who were acting within the scope of their employment were not liable for any claim unless the employee acted in reckless disregard of the safety and well-being of any person; therefore, because the driver had to show more than mere negligence to establish reckless disregard and there was no indication that the deputy acted with deliberate disregard for the safety of others when he hit her vehicle, the trial court properly granted the sheriff summary judgment in her lawsuit seeking to collect for injuries that she sustained in an accident with a sheriff's department vehicle. *Jackson v. Payne*, 922 So. 2d 48 (Miss. Ct. App. 2006).

County was not immune from its duty to properly maintain and repair the bridge and its duty to warn of a dangerous condition where the county had been on notice for five years that the bridge needed repair and was in danger of imminent collapse; the county had more than enough money to fix the bridge, without jeopardizing funds for other road and bridge projects. *Ladner v. Stone County*, 938 So. 2d 270 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Driver could not maintain a dangerous condition cause of action against the State Aid defendants because there was no dispute that the bridge was a county road, not a state highway. *Ladner v. Stone County*, 938 So. 2d 270 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Inmate's state claims were barred pursuant to Miss. Code Ann. § 11-46-9(m) because the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, specifically excluded claims arising under state law while a person was lawfully incarcerated in a penal facility. *Harvison v. Greene County Sheriff Dep't*, 899 So. 2d 922 (Miss. Ct. App. 2005).

Miss. Code Ann. § 11-46-9 did not provide immunity for a city that neglected to inspect or maintain a city ditch; a business was entitled to recover damages when, during a heavy rain, the ditch flooded, causing property damage. *City of*



Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60 (Miss. 2005).

Officer didn't show malice in an arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune from liability. Pearl River Valley Water Supply Dist. v. Bridges, 878 So. 2d 1013 (Miss. Ct. App. 2004).

Inmate was an inmate of the county jail at the time of the incident in question and appellees were exempt from liability under Miss. Code Ann. § 11-46-9(1)(m); because a governmental entity was immune from all claims arising from claimants who were inmates at the time the claim arose, Miss. Code Ann. § 11-46-9(1)(m) of the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., did not apply to sheriff's department employees. Love v. Sunflower County Sheriff's Dep't, 860 So. 2d 797 (Miss. 2003).

Miss. Code Ann. § 11-46-9(1)(m) clearly barred the parents' wrongful death suit against the county and individuals after the death of their son while he was incarcerated in the county detention center; since § 11-46-9(1)(m) provided the decedent with no remedy, it also prevented a suit by the heirs, and the parents were unable to bring a wrongful death suit on behalf of a prisoner who died while incarcerated. Webb v. DeSoto County, 843 So. 2d 682 (Miss. 2003).

Legislature expressly stated the governmental entity would be immune from all liability from any claim of any claimant who was an inmate at the time the claim arose; an inmate remained an inmate while being transported, while participating in public service work programs or while on leave if a pass was granted. Wallace v. Town of Raleigh, 815 So. 2d 1203 (Miss. 2002).

After witnessing the deceased's commission of several criminal offenses, which were more than misdemeanors, the officers were empowered to stop and arrest him as there was a causal nexus between the deceased's criminal activity and the actions of the officers. Tory v. City of Edwards, 829 So. 2d 1246 (Miss. Ct. App. 2002).

Miss. Code Ann. § 11-46-9(1)(m) preserves the government's sovereign immu-

nity with regard to the claims of jail inmates. Liggins v. Coahoma County Sheriff's Dep't, 823 So. 2d 1152 (Miss. 2002).

Tort Claims Act was the exclusive route for filing suit against a governmental entity and its employees; governmental entity and its employees acting within the course and scope of their employment were free of liability for a claim based upon any of the acts or omissions enumerated therein. City of Jackson v. Sutton, 797 So. 2d 977 (Miss. 2001).

Governor was not protected by sovereign immunity from resident's action to compel public hearing pursuant to Administrative Procedures Law (APL) before submitting Capacity Assurance Plan (CAP) to federal Environmental Protection Agency (EPA). USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Under § 83-11-101(1), uninsured motorist (UM) carrier was entitled to assert city's defense of sovereign immunity (§ 11-46-9) in connection with collision between fire truck and insured; insured's statutory right to UM benefits is limited to instances in which insured would be entitled, at time of injury, to recover through legal action. Coleman v. American Mfrs. Mut. Ins. Co., 930 F. Supp. 255 (N.D. Miss. 1996).

Decision to replace bridge with culvert on county road was discretionary function to which qualified immunity attached in personal injury action brought by motorist. Mohundro v. Alcorn County, 675 So. 2d 848 (Miss. 1996).

Evidence did not establish breach of ministerial duty on part of county supervisors in their individual capacities in connection with replacement of bridge with culvert on county road; while statute required culverts to be not less than full width of crown of roadway and to have guide or warning posts on either side, there was no evidence that such minimum standards were not met. Mohundro v. Alcorn County, 675 So. 2d 848 (Miss. 1996).

While decision to replace bridge with culvert on county road was discretionary one to which qualified immunity attached, fact issue existed as to whether county



supervisor who determined that replacement was necessary, determined size of culvert needed, and supervised installation of culvert substantially exceeded his authority or was so grossly negligent that his action could be described as constructively intentional such that he was deprived of immunity, precluding summary judgment for supervisor on motorist's personal injury claim. *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996).

Sovereign immunity cloaks all "governmental functions" a city performs. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

"Governmental functions," which are cloaked with sovereign immunity, are those functions which a city is required to undertake. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Operation of fire department, including the supply of water to combat fires, is a governmental function, cloaked by sovereign immunity, even if the same supply provides drinking water, which is proprietary activity. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

City could not lose sovereign immunity for fire protection service in annexed area through negligence per se, where annexation ordinance did not require specific placement of water lines or mains in a certain point. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Governmental officers are immune from personal liability for fire protection decisions if the decision to provide water lines, or certain aspects of fire protection to property, is a discretionary matter involving public policy decisions. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Provision of water lines, under annexation ordinance providing for installment of water lines "when necessary and economically feasible," was discretionary decision, for which city officials were entitled to qualified immunity. *Westbrook v. City of Jackson*, 665 So. 2d 833 (Miss. 1995), rehearing denied.

A city's operation of a service garage and towing service for its vehicles was a

proprietary function, and therefore the defense of sovereign immunity was not available in a wrongful death action against the city arising from a collision between the deceased's car and a city tow truck. *Thomas v. Hilburn*, 654 So. 2d 898 (Miss. 1995).

For purposes of governmental immunity, the statutory framework for reporting cases of suspected child abuse includes elements of both ministerial and discretionary conduct; § 43-21-353 first requires a person to make a determination of whether "reasonable cause" exists as a foundation for an incident report, which involves a duty to investigate a ministerial duty and a decision as to whether reasonable cause exists a decision involving the exercise of personal judgment and discretion; if a determination is made that there is reasonable cause to report the incident, the statute then mandates that an immediate oral report be issued to the Department of Human Services an action involving no discretion. *T.M. v. Noblitt*, 650 So. 2d 1340 (Miss. 1995).

When the State is sued to determine whether a state statute or action is unconstitutional, the State cannot be held liable for damages if the conduct falls within one of the exceptions found in § 11-46-9. *State v. Hinds County Bd. of Supvrs.*, 635 So. 2d 839 (Miss. 1994).

A county's action seeking a determination of whether § 47-5-112 [Repealed] violated any constitutional rights enjoyed by the county was not barred, since there is no sovereign immunity when the relief sought is a declaration that a particular statute or action of the State is unconstitutional. *State v. Hinds County Bd. of Supvrs.*, 635 So. 2d 839 (Miss. 1994).

Sheriff's deputies who obtained a search warrant were shielded from liability by qualified immunity since the action of obtaining the search warrant was discretionary rather than ministerial. *Barrett v. Miller*, 599 So. 2d 559 (Miss. 1992).

Sheriff deputies were not exercising discretionary authority in searching a home where the deputies were acting under a search warrant which gave them the authority to search and set out the parameters in which the search should be carried out; the execution of the search

warrant was a ministerial act and required no discretionary decision making, aside from the places in the house to be searched, on the part of the deputies executing the warrant, and therefore the deputies who executed it were not shielded from liability by qualified immunity. *Barrett v. Miller*, 599 So. 2d 559 (Miss. 1992).

A sheriff's duties with respect to operating a jail and keeping prisoners confined were discretionary in nature and, therefore, the sheriff was entitled to the protection of qualified immunity in a suit to recover for the wrongful death of a victim who was murdered by escaped inmates. *McQueen v. Williams*, 587 So. 2d 918 (Miss. 1991).

Any liability on the part of the Mississippi State Highway Commission for a breach of its implied warranty that plans and specifications to a contractor for resurfacing would provide a reasonably safe highway, was premised upon a tort liability arising from negligently defective plans and specifications, rather than any contractual obligation, and therefore the Commission was immune from suit. *Employers Ins. v. Mississippi State Hwy. Comm'n*, 575 So. 2d 999 (Miss. 1990), cert. denied, 502 U.S. 817, 112 S. Ct. 72, 116 L. Ed. 2d 46 (1991).

The governor's duties under § 47-5-93 and § 7-1-5(c) and (d) are discretionary and, as such, the governor enjoys a qualified immunity to a civil suit for damages based on the governor's alleged failure to perform his duties under those statutes. *McFadden v. State*, 542 So. 2d 871 (Miss. 1989).

Although ordinarily private individual may not maintain suit against school district to enforce zoning ordinance or to enjoin what is in essence public nuisance created by construction of school building, where construction of school building in violation of municipal offstreet parking ordinance would obstruct abutting landowner's right of ingress and egress, landowner may obtain injunction against construction of building unless and until school district complies with parking ordinance. *Robinson v. Indianola Mun. Separate Sch. Dist.*, 467 So. 2d 911 (Miss. 1985).

## 2. Construction with other laws.

Property owners' negligence suit fell within the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, because it was a claim against state agencies, but because Miss. Code Ann. § 11-46-9(1)(f) of the MTCA and Miss. Code Ann. § 33-15-21 of the Mississippi Emergency Management Law (MEML), Miss. Code Ann. §§ 33-15-1 to 33-15-53, working together, the Mississippi Port Authority and Mississippi Development Authority were immune from liability stemming from emergency management activities; accordingly, the MTCA had not superseded the MEML as the two could be read in harmony. *Parsons v. Miss. State Port Auth. at Gulfport*, 996 So. 2d 165 (Miss. Ct. App. 2008).

While Miss. Code Ann. § 11-7-13 allows wrongful death beneficiaries to maintain an action to recover damages as would the decedent if death had not ensued, the action is derivative and the beneficiaries stand in the position of their decedent; thus, where the decedent was a prison inmate who could not have filed an action against the Mississippi Department of Corrections or a prison superintendent because of the immunity granted in Miss. Code Ann. § 11-46-9(1)(m), his wrongful death beneficiaries could not maintain a wrongful death action against those defendants. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399 (2004).

The purchase of liability insurance by a governmental entity under § 11-46-17(4) does not limit the exclusions or exemptions enumerated in this section. *Leslie v. City of Biloxi*, 758 So. 2d 430 (Miss. 2000).

## 3. Constitutionality.

The Remedy Clause, Miss. Const. art. 3, § 24, does not conflict with sovereign immunity, does not require exceptions to sovereign immunity, and does not grant an absolute guarantee of a trial; thus, no violation of the Remedy Clause occurred when plaintiff's action against the Mississippi Department of Corrections and a prison official for the wrongful death of an inmate was dismissed based on the immunity granted in Miss. Code Ann. § 11-46-9(1)(m). *Carter v. Miss. Dep't of Corr.*, 860



So. 2d 1187 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399 (2004).

Sovereign immunity does not violate due process; such a violation requires the infringement of a liberty or property right and as the right to sue the State has been withheld by the Mississippi Legislature, the denial of the right to sue the State or other governmental entities or employees under Miss. Code Ann. § 11-46-9(1)(m) does not infringe upon any property right and does not violate due process. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399 (2004).

Miss. Code Ann. § 11-46-9(1)(m), which denies inmates the right to bring claims against the State or other governmental entities, does not violate the Equal Protection clause of the Fourteenth Amendment because there is a legitimate purpose in protecting governmental entities from claims brought by inmates. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399 (2004).

Subsection (1)(d) of this section does not violate either the fourteenth amendment of the U.S. Constitution or the Remedy Clause of the Mississippi Constitution, Article 3, Section 24, which guarantees that individuals shall have access to courts to redress their injuries. *Jones v. Mississippi DOT*, 744 So. 2d 256 (Miss. 1999).

#### **4. Absence, condition, malfunction, or removal by third parties of sign, signal, warning device, etc.**

Where a state transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because road repairs were discretionary functions, the state did not waive its immunity by failing to warn of the dangerous condition because the risk of hydroplaning after inclement weather was an open and obvious danger to one exercising due care. *Lee v. Miss. DOT*, 37 So. 3d 73 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34

So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010).

Placement of a warning sign at a culvert is considered a ministerial function, as set forth in Miss. Code Ann. § 65-21-1. *Barr v. Hancock County*, 950 So. 2d 254 (Miss. Ct. App. 2007).

Miss. Code Ann. § 11-46-9 and the corresponding case law make it clear that a governmental entity is immune from claims arising from a non-obvious dangerous condition on government property, or failure to warn of the dangerous condition, absent actual or constructive notice of the dangerous condition. *Jones v. Miss. Transp. Comm'n*, 920 So. 2d 516 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a county in a wrongful death action filed by a driver's beneficiaries under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(v), because the beneficiaries failed to present any evidence that the accumulation of excess gravel on roads constituted a dangerous condition. *Lowery v. Harrison County Bd. of Supervisors*, 891 So. 2d 264 (Miss. Ct. App. 2004).

Miss. Code Ann. § 11-46-9(1)(w) does not require a governmental entity to actively patrol areas containing warning signs to see if a third party has removed the signs. The statute exempts the governmental entity from liability for the removal of warning signs unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. *Mitchell v. City of Greenville*, 846 So. 2d 1028 (Miss. 2003).

Where precautions were taken to warn motorists of the dangerous road condition, the city was not required to actively patrol areas containing warning signs to see if a third party removed the signs, and no evidence was presented to indicate that the city knew or should have known that the sign was blown or tipped over; therefore, the city was entitled to immunity from suit and entitled to summary judgment. *Mitchell v. City of Greenville*, 846 So. 2d 1028 (Miss. 2003).

In a citizen's negligence suit against the city for injuries she sustained when she



fell at a construction site that had no warning devices, the city was not immune under Miss. Code Ann. § 11-46-9(v), (w) because the condition was not obvious and readily apparent. *City of Newton v. Lofton*, 840 So. 2d 833 (Miss. Ct. App. 2003).

Subsection (1)(a) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs alleged that the county was negligent in its failure to warn of the danger at the curve because there were no advisory speed limits, warning signs or other devices at the curve where the accident occurred; the plaintiffs did not assert claims relating to legislative, judicial or administrative action or inaction and, instead, complained about an alleged dangerous condition about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000).

In light of the plain language of subsection (1)(b), which makes qualified sovereign immunity contingent on the exercise of ordinary care, a county was not entitled to summary judgment in an action arising from a single vehicle accident where the plaintiffs alleged that the county was negligent in its failure to warn of a dangerous curve. *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000).

Subsection (1)(p) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs did not assert claims relating to the design, plan or construction of the road at issue and, instead, complained about an alleged dangerous condition about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000).

Subsection (1)(e) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs did not assert claims relating to the adoption, or failure to adopt, a statute, ordinance or regulation and, instead, complained about an alleged dangerous condi-

tion about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223 (Miss. 2000).

Subsection (1)(w) of this section is an extension of an exemption subsumed in subsection (1)(d) of this section, as opposed to the establishment of a new exemption. *Jones v. Mississippi DOT*, 744 So. 2d 256 (Miss. 1999).

### 5. Adequate governmental services.

City was immune to a homeowner's claim of negligence in which he claimed that the city's negligent maintenance of his dirt road had caused damage to his wife physically and to his vehicles because: (1) the claim arose from an injury which resulted solely from the effect rain had on the road, and (2) even if one concluded that the city had a duty to purchase its own grading equipment, that was a discretionary decision for which the city had immunity under the act. *Schepens v. City of Long Beach*, 924 So. 2d 620 (Miss. Ct. App. 2006).

While subsection (1)(g) of this section provides that a school district is immune for certain policy decisions, such as how much money to allocate, it does not immunize a school district for failure to fulfill its statutory obligations; a school board is required by § 37-7-301(d) to erect, repair, and equip school facilities as well as maintain, control, and care for the same, and subsection (1)(g) of this section provides a school district and its employees with protection from liability while performing or failing to perform such statutory duties so long as ordinary care is exercised. *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234 (Miss. 1999).

### 6. Discretionary functions.

In a premises liability action for injuries a claimant sustained when the claimant was trampled by a cow, the Mississippi Fairgrounds Commission was immune from liability under the discretionary-function exemption at Miss. Code Ann. § 11-46-9(1)(d) of the Mississippi Tort Claims Act; the livestock show furthered important social, economic and political policies. *Wiltshire v. Miss. Fairgrounds Comm'n*, 75 So. 3d 563 (Miss. Ct. App.

2011), writ of certiorari denied by 73 So. 3d 1168, 2011 Miss. LEXIS 549 (Miss. 2011).

Trial court erred in granting a city summary judgment in landowners' action to recover for the damages they sustained when raw sewage flooded their homes due to blockage in the city's sewage lines because a genuine issue of material fact existed as to whether the city violated a ministerial duty that it articulated and imposed on itself in a subdivision ordinance as to minimum-design standards and sewage pipe size; the record reflected evidence that the city breached a ministerial duty set forth in its own ordinance that contained no element of choice. *Fortenberry v. City of Jackson*, 71 So. 3d 1211 (Miss. Ct. App. 2010), reversed by 71 So. 3d 1196, 2011 Miss. LEXIS 88 (Miss. 2011).

Circuit court erred in denying a school district's motion for summary judgment as to a mother's negligence claim because the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), operated to shield the district and its coaches and employees from any liability for the death of her son, who allegedly suffered from heat stroke during football practice, since nothing in the record indicated that the district and/or the football coaches, or any district employee or staff member, violated any statute, ordinance, or regulation concerning conducting football practice, and the conduct at issue constituted discretionary behavior; the district's discretionary decision to allow coaches the ability to set and conduct practices was rooted in policy because coaches know their players and had to be able to control their teams. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1 (Miss. 2010).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because highway repairs were discretionary functions. *Lee v. Miss. DOT*, 37 So. 3d 73 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010).

School district was immune from suit with regard to a minor's action seeking to recover damages after he fell from the bed of a pickup truck while being transported by another student to football practice based on the discretionary function exemption of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d). *Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187 (Miss. Ct. App. 2009).

Mississippi Transportation Commission was immune from liability under Miss. Code Ann. § 11-46-9(1)(d) in a wrongful death suit alleging negligent highway maintenance and negligence in failing to install necessary traffic control devices because decisions regarding the maintenance and repair of highways and the placement of traffic control devices were discretionary matters entrusted to public officials. Because such decisions involved discretionary functions and not ministerial adherence to established policy or protocol, the discretionary decisions were subject to immunity under the Mississippi Tort Claims Act. *Knight v. Miss. Transp. Comm'n*, 10 So. 3d 962 (Miss. Ct. App. 2009).

Order granting summary judgment in favor of a county's board of supervisors with regard to a properly owner's action for damage to his timberland was affirmed because the board was immune under Miss. Code Ann. § 11-16-9(1)(d). While Miss. Code Ann. § 65-21-1 set the minimum length for a culvert, it did not make the sizing and installation of a culvert ministerial; therefore, such functions were entitled to immunity under Miss. Code Ann. § 11-46-9(1)(d) as a discretionary function. *Fisher v. Lauderdale County Bd. of Supervisors*, 7 So. 3d 968 (Miss. Ct. App. 2009).

In action brought by a husband and wife against defendants, a city, its mayor, the chief of police, and police officers, pursuant to 42 U.S.C.S. § 1983 and state law, the court denied defendants' motion to dismiss because the police protection and discretionary function exemptions to waiver of immunity under Miss. Code Ann. § 11-46-9(1)(c), (d) did not apply; the husband was not engaged in criminal activity at the time of his arrest, so the issue regarding the applicability of § 11-46-



9(1)(c) was whether the officers acted in reckless disregard of the husband's safety or well being, and it could not be said that the officers' actions, as identified in plaintiffs' allegations of excessive force and wrongful arrest, fell within the exemption, and if, as the husband alleged, the officers had no arguable basis for concluding they had probable cause to arrest the husband, it would seem that they had no discretion to arrest him, and in no event did the officers have discretion to use excessive force against him. *McGregory v. City of Jackson*, 504 F. Supp. 2d 143 (S.D. Miss. 2007).

In an action brought by plaintiff against defendants, a city, its mayor, the chief of police, and a police officer, pursuant to 42 U.S.C.S. § 1983 and state law, asserting claims of excessive force, false arrest and false imprisonment, and various other state tort claims, the court granted defendants' motion to dismiss for immunity pursuant to Fed. R. Civ. P. 12(b)(6) because Miss. Code Ann. § 11-46-9(1)(c), (d) did not provide exceptions to the Mississippi Tort Claims Act (MTCA) waiver of immunity for plaintiff's claims, as the court was unable to conclude on the basis of the facts alleged by plaintiff that defendants were immune under the MTCA. *Spencer v. City of Jackson*, 511 F. Supp. 2d 671 (S.D. Miss. 2007). \*

After learning of the former professor's affair with a student at a university where he previously taught, the decision of the former president of the university and the former vice-president of academic affairs to recommend the professor for only a one-year position necessarily involved an act of choice or judgment, as by nature the president's and vice-president's administrative positions at the university required them to make those types of choices and judgments regarding the faculty, and Miss. Code Ann. § 37-101-15(f) provided that the executive head of the university nominate for election all subordinate employees of the university; nothing in the statute limited the discretion of the president and thus the action by the president and vice-president recommending the professor for one year's employment instead of tenure-track, after learning of the affair with the student, was a

discretionary act immune from suit under Miss. Code Ann. § 11-46-9(1)(d). *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 150 (Miss. 2008).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were enforcing a facially valid Virginia custody order granting custody of children to the children's mother, it arose out of a judicial action; thus, immunity under Miss. Code Ann. § 11-46-9(1)(a) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705 (Miss. Ct. App. 2007).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were enforcing a facially valid Virginia custody order granting custody of children to the children's mother, they acted with discretion and were forced to make choices that involved social, economical, or political policy alternatives; thus, immunity under Miss. Code Ann. § 11-46-9(1)(d) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705 (Miss. Ct. App. 2007).

Miss. Code Ann. § 65-21-1 plainly states that certain construction requirements must be met once a governmental entity determines that a culvert is needed; it only sets forth the minimum requirements to be met with regard to the construction of culverts, and any decisions made outside of those minimum requirements are discretionary functions of government. *Barr v. Hancock County*, 950 So. 2d 254 (Miss. Ct. App. 2007).

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper under Miss. Code Ann. § 11-46-9(1)(d) because the university was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity codified at Miss. Code Ann. § 11-46-5; it was difficult to fathom how the professor's failure to put down



dry sand before the pour involved a policy judgment of a social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

Summary judgment was properly awarded to the Mississippi Transportation Commission (MTC) in appellants' action for injuries and death resulting from a two-vehicle collision because the MTC's duty to place warning signs was discretionary under Miss. Code Ann. § 63-3-303; hence, the MTC's failure to place warning signs was shielded from liability according to Miss. Code Ann. § 11-46-9(1)(d). *Willingham v. Miss. Transp. Comm'n*, 944 So. 2d 949 (Miss. Ct. App. 2006).

State hospital was entitled to immunity from tort liability pursuant to Miss. Code Ann. § 41-4-7(g) because the hospital was acting in a discretionary manner when it made placement decisions for the patient and allowed the patient to participate in a day program where the patient suffered an injury; the decisions were a matter of social policy and the hospital and its employees were thus immune from tort liability in a lawsuit filed by the patient. *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10 (Miss. 2006).

When the Mississippi Department of Mental Health enacted policies and procedures pursuant to Miss. Code Ann. § 41-4-7(g), it was enacting in a discretionary fashion and was thus immune from tort liability when a patient was injured allegedly because of a placement decision that was made for him while he was committed to a state hospital. *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10 (Miss. 2006).

Officer's actions with regard to the icy condition on the highway involved an element of choice or judgment, and therefore his decision to promptly notify the Mississippi Department of Transportation of the condition rather than remaining at the scene after the first accident was discretionary and not ministerial, and there was no statute, regulation, or police department policy that outlined how the officer should have addressed the condition; accordingly, the precise time, manner, and conditions by which the officer's duties

were to be observed were not prescribed, and therefore were left to the judgment of the officer. *Willing v. Benz*, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

Regional housing authority's officers were immune from tort liability based on their actions in the wake of a flood that damaged a developer's apartment complex because their issuance of housing choice vouchers to the developer's tenants during a declared state of emergency, although based upon their questionable reliance on erroneous statements, qualified as discretionary acts under Miss. Code Ann. 11-46-9(d). *Urban Developers LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006).

Waterway district was immune from liability under Miss. Code Ann. § 11-46-9 in a wrongful death case because its discretionary decisions regarding the operation of a swimming facility were grounded in public policy, there was inadequate proof regarding knowledge of a missing buoy and signs, and there could have been other causes of a drowning. *Dotts v. Pat Harrison Waterway Dist.*, 933 So. 2d 322 (Miss. Ct. App. 2006).

While Miss. Code Ann. § 63-3-305 contains the term "shall", it also contains the phrase, "as they may deem necessary", which, as state legal precedent suggests, means that a local authority's placement of traffic control devices is a discretionary duty. Because the placement of traffic control devices, including road construction signs, is a discretionary duty, Miss. Code Ann. § 11-46-9(1)(d) applies, and a county cannot be liable with regard to the placement of such signs, regardless of whether or not it abused its discretion in doing so. *Dozier v. Hinds County*, 379 F. Supp. 2d 834 (S.D. Miss. 2005).

Trial court did not err in granting summary judgment to Mississippi Department of Transportation (DOT) in a wrongful death because the DOT was immune under Miss. Code Ann. § 11-46-9(1)(d), failing to warn of a dangerous condition, because the placement of warning signs was a discretionary function not within

the context of ordinary care. *Barrentine v. Miss. DOT*, 913 So. 2d 391 (Miss. Ct. App. 2005).

Claimants in a wrongful death action were not entitled to a remand because a non-diverse county defendant had been fraudulently joined in the cause, making removal under 28 U.S.C.S. § 1441 appropriate. The county was not responsible for the placement of stop signs at the intersection where the accident occurred, and its placement of road construction signs near the intersection was a discretionary governmental function, for which the county had immunity and no duty of ordinary care under Miss. Code Ann. § 11-46-9(1)(d); thus, the county had no basis for liability. *Dozier v. Hinds County*, 354 F. Supp. 2d 707 (S.D. Miss. 2005).

Where the victim was shot by her estranged husband the county was not liable for the failure of the justice court clerk or justice court judge to transmit the signed arrest warrant to the county sheriff's department. The alleged conduct of both the justice court clerk and judge fell squarely within Miss. Code Ann. § 11-46-9(1)(a) and the trial court properly found that sovereign immunity prevented prosecution of the injured person's negligence based claims; moreover, the actions of said officials were discretionary and the ordinary care standard was not applicable to Miss. Code Ann. § 11-46-9(1)(d). *Collins v. Tallahatchie County*, 876 So. 2d 284 (Miss. 2004).

Although a student suffered damages as a result of heatstroke during a high school football practice, the school district and the football coach were immune from liability under the Mississippi Tort Claims Act; acts or omissions of the coach were discretionary in nature. *Harris v. McCray*, 867 So. 2d 188 (Miss. 2003).

Statute did not provide immunity to the city and the driver as the discretionary act of deciding to help an invalid exit a van did not implicate any social, economic or political policy. *Stewart v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002).

The addition of the abuse of discretion phrase into subsection (1)(d) of this section is not in derogation of the common law right and, therefore, the subsection need not be construed against any such

limitation under the rules of statutory construction. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31, 1999), subst. op., 754 So. 2d 1136 (Miss. 1999).

The discretionary function exemption contained in subsection (1)(d) of this section did not bar an action in which a 14 year old student who was assaulted by a fellow student alleged that the school was negligent in failing to (1) maintain a safe environment, (2) properly monitor its grounds, (3) properly supervise its students, and (4) have a route of safe departure for detention students. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136 (Miss. 1999).

### **7. Police or fire protection.**

Court properly entered judgment for appellees under Miss. Code Ann. § 11-46-9 after a vehicle being chased by police struck their vehicle, because the pursuing officer was not familiar with the police department's pursuit policy and continued to pursue a suspect into a residential area, despite the fact that the suspect had driven recklessly on the highway, was becoming increasingly reckless, and was obviously not going to stop. *City of Jackson v. Law*, 65 So. 3d 821 (Miss. 2011).

Deputy who stopped at an intersection and, with his blue lights and sirens activated, slowly proceeded across in a stop-and-start fashion, exercised sufficient safety measures to prompt other drivers near the intersection to yield the right-of-way, including the driver traveling in the lane ahead of plaintiffs. Thus, viewing the evidence in the light most favorable to plaintiffs, the deputy's conduct did not demonstrate a conscious indifference to consequences, nor did it rise to the level of reckless disregard for the safety and well-being of persons not engaged in criminal activity, so as subject the county to liability under Miss. Code Ann. § 11-46-9(1)(c). *Rayner v. Pennington*, 25 So. 3d 305 (Miss. 2010).

Where police officers, responding to a 911 call relating to a domestic complaint, went to the house and interviewed all of the parties present, and where neither the victim nor her boyfriend expressed a desire to press charges against the other, the trial court did not err in finding that there



was insufficient evidence to establish intentional harm by the officers, or a conscious indifference on their part to the consequences of their actions. As such, the officers did not act with reckless disregard for the safety and well-being of the victim, and liability under Miss. Code Ann. § 11-46-9(1)(c) did not exist. *City of Laurel v. Williams*, 21 So. 3d 1170 (Miss. 2009).

The trial court did not err in finding in favor of a driver in her action against a city and a police officer under the Mississippi Tort Claims Act (MTCA), because there was substantial, credible evidence to support a finding of reckless disregard for public safety on the part of the officer. The officer knew that there was a good chance that traffic would be coming through the green light of the busy intersection and she proceeded against her own red light, even though her view to the left was completely blocked by a truck; therefore, the trial court did not err in finding that the officer's conduct went beyond mere negligence to reckless disregard and that the city was therefore not immune from liability under the MTCA. *City of Jackson v. Presley*, 40 So. 3d 578 (Miss. Ct. App. 2009), reversed by 40 So. 3d 520, 2010 Miss. LEXIS 385 (Miss. 2010).

In a wrongful death case in which the administratrix of the deceased's estate appealed the trial court's dismissal of the case, she unsuccessfully argued that a police officer acted in reckless disregard of the deceased's safety and well-being by failing to properly investigate the 911 call. Even assuming that the officer's investigation was inadequate, his behavior was, at most, simple negligence, which did not support a finding of liability under the Mississippi Tort Claims Act. *Davis v. City of Clarksdale*, 18 So. 3d 246 (Miss. 2009).

Trial court did not err in entering judgment in favor of a police officer in an action filed by a father and sons to recover damages for injuries they sustained when the officer hit their ATV because the officer's actions were protected under the sovereign immunity provided by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), when they did not amount to reckless disregard for the safety of others; an expert in police pursuit interviewed the officer, reviewed the deposi-

tions and the accident report, and viewed the accident scene, and he ultimately concluded that the officer did not act in reckless disregard in the accident. *Giles v. Brown*, 31 So. 3d 1232 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 178 (Miss. 2010).

In a 42 U.S.C.S. § 1983 suit, an arrestee adequately pled claims for excessive use of force against a police officer because the arrestee had a clearly established Fourth Amendment right not to be bodily removed from his car and thrown to the ground after allegedly committing a traffic infraction; the officer's actions were not shielded by the doctrine of qualified immunity or by governmental immunity arising under Miss. Code Ann. § 11-46-9(1). *Stepney v. City of Columbia*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16376 (S.D. Miss. Feb. 18, 2009).

In a wrongful death case in which a mother asserted state law tort claims for negligent and/or intentional infliction of emotional distress and for loss of consortium against a sheriff, those claims failed. Not only was the sheriff protected from liability by the police protection exception under Miss. Code Ann. § 11-46-9(1)(c), but even if he was not exempt, the mother's allegations and proof did not support her claims in any event. *Bradley v. City of Jackson*, 590 F. Supp. 2d 817 (S.D. Miss. 2008).

In a mother's wrongful death action, the trial court properly held that the actions of a police chief in attempting to execute an arrest warrant against a daughter's boyfriend were discretionary in nature and that the city was entitled to discretionary function immunity pursuant to Miss. Code Ann. § 11-46-9(1)(d) because the chief's actions in attempting to execute the warrant were reasonable and appropriate. *Estate of Carr v. City of Ruleville*, 5 So. 3d 455 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 136 (Miss. 2009).

Mississippi Department of Public Safety and the Mississippi Highway Patrol were exempt from liability, under Miss. Code Ann. § 11-46-9(1)(c), because plaintiff did not meet his burden of show-



ing by a preponderance of the evidence that a first law enforcement officer intentionally disregarded information and thus, acted in reckless disregard when he misidentified plaintiff or his vehicle because (1) the first officer knew only the make, model, and color of vehicle for which he was looking; (2) the first officer pulled over a vehicle which appeared to fit the description he had been given, which was traveling very near to a pursuing officer at the time the first officer was approaching the pursuing officer to assist him in the pursuit; (3) after the stop, plaintiff, by his own admission, neither identified himself nor complied with the first officer's requests during takedown and handcuffing; and (4) although the first officer mistakenly identified plaintiff as the suspect, plaintiff failed to prove that the officers acted in any way other than reasonably under the circumstances. *Phillips v. Miss. Dep't of Pub. Safety*, 978 So. 2d 656 (Miss. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, after he was struck by the police officer while jogging was appropriate because the jogger failed to prove that the officer acted with reckless disregard of the safety and well-being of others, *Miss. Code Ann. § 11-46-9(1)(c)*. *Morton v. City of Shelby*, 984 So. 2d 323 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

While Miss. Code Ann. § 37-7-321 and Miss. Code Ann. § 37-7-323 allowed schools to retain independent contractors to work as peace officers on school grounds, the legislature however did not provide an express grant of immunity to those independent contractors under Miss. Code Ann. § 19-19-5 or the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-9; accordingly, the trial court erred in finding that the security contractor was immune to suit by virtue of the MTCA. *Knight v. Terrell*, 961 So. 2d 30 (Miss. 2007).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were acting in their official roles in enforcing a facially valid Virginia custody order

granting custody of children to the children's mother, immunity under Miss. Code Ann. § 11-46-7(2) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c) for the decedent's death, and therefore it was properly granted summary judgment because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. *Willing v. Estate of Benz*, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q) for the decedent's death, and therefore it was properly granted summary judgment because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch. *Willing v. Estate of Benz*, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

Judgment was properly entered for a city in a personal injury case based on sovereign immunity under Miss. Code Ann. § 11-46-9(1)(c) because an officer did not act with reckless disregard when she pursued a suspect with outstanding warrants since she saw an open container in his car and suspected he was driving under the influence. *Broome v. City of Columbia*, 952 So. 2d 1050 (Miss. Ct. App. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his

patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. *Chapman v. City of Quitman*, 954 So. 2d 468 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a city in a negligence case because it was immune under Miss. Code Ann. § 11-46-9(1)(c) since an officer was not acting with reckless disregard when she pursued a suspect while trying to serve outstanding domestic warrants; the officer suspected he was driving under the influence and saw an open container. *Broome v. City of Columbia*, — So. 2d —, 2006 Miss. App. LEXIS 762 (Miss. Ct. App. Oct. 17, 2006), substituted opinion at, opinion withdrawn by 952 So. 2d 1050, 2007 Miss. App. LEXIS 190 (Miss. Ct. App. 2007).

Record showed that the police officers did not exercise reckless disregard when they chose to charge the victim's murderer with simple assault where the police officer was apparently unaware that an aggressor may be charged with domestic violence if that person commits an assault upon one with whom they formerly resided; the administratrix also failed to present any evidence to show how the town acted in a willful, wanton, or wrongful manner in failing to relay a detailed account of the assault to the murderer's parole officer or by not informing the municipal judge of the murderer's prior aggravated assault conviction. *Fair v. Town of Friars Point*, 930 So. 2d 467 (Miss. Ct. App. 2006).

Defendants were properly granted judgment on plaintiffs' personal injury claims because defendant police officer's conduct during a vehicle pursuit did not rise to the level of reckless disregard, which was required by Miss. Code Ann. § 11-46-9(1)(c) for a finding of liability; the officer took specific steps in an attempt to safeguard other vehicles that may have entered the intersection where the accident occurred, including, *inter alia*, sounding his air horn and reducing his speed. *Cole v. Miss. Dep't*

of Pub. Safety, 930 So. 2d 472 (Miss. Ct. App. 2006).

University police corps provided local law enforcement with college-educated, specialized, quasi-military trained police officers to assist in protecting against violent crime; therefore, it was related to police protection and satisfied the government/proprietary distinction, as police training was a governmental function. *Hayes v. Univ. of Southern Miss.*, 952 So. 2d 261 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 190 (Miss. 2007).

Directed verdict in favor of the sheriff and county in the family's action alleging reckless disregard by an auxiliary deputy sheriff concerning an accident involving the deputy and their son was appropriate under Miss. Code Ann. § 11-46-9(1)(c) because the deputy's actions, at the most, amounted to negligence; the deputy was traveling no more than five miles over the speed limit and Miss. Code Ann. § 63-3-517 permitted him to do so because he was responding to an accident. *Peebles v. Winston County*, 929 So. 2d 385 (Miss. Ct. App. 2006).

Record revealed immense suffering by the resident and his wife and children due to the resident's arrest for a crime which he unquestionably did not commit, and the cellular phone company paid for transposing numbers that led to the resident's arrest; the city police officers were at the most, negligent, they did not act in reckless disregard of the safety and well-being of the resident or any other citizen, and pursuant to Miss. Code Ann. § 11-46-9(1)(c), the city was exempt from liability. *City of Greenville v. Jones*, 925 So. 2d 106 (Miss. 2006).

In plaintiff's personal injury action against a police officer, court did not err in finding that the officer was immune from liability under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), because the officer was justified in drawing his gun upon stopping plaintiff's car; officer had received call that two cars were speeding and that shots had been fired. *Smith v. Brookhaven*, 914 So. 2d 180 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 750 (Miss. 2005).



Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under the exception of Miss. Code Ann. § 11-46-9(1)(c). *Keen v. Simpson County*, 904 So. 2d 1157 (Miss. Ct. App. 2004).

In a mother's suit against a police officer and the department of public safety when her son was killed in a car accident while riding with his father soon after the officer had given the father a speeding ticket, judgment in the officer's favor was proper as his failure to check the father's sobriety did not rise to the level of reckless disregard required for the mother to recover against the State. *Thomas ex rel. Thomas v. Miss. Dep't of Pub. Safety*, 882 So. 2d 789 (Miss. Ct. App. 2004).

Evidence showed the officer was traveling approximately 37 miles per hour with lights and sirens activated, there was nothing obstructing the view of either the person later injured or the officer, and the greater weight of evidence also proved that the person's left turn signal was not activated. In addition, the officer had consciously stopped at the previous two intersections because the officer considered both of those to be blind intersections, and therefore, the officer's behavior supported the finding that the officer appreciated the risk involved in approaching the intersection and did not act with reckless disregard. *Davis v. Latch*, 873 So. 2d 1059 (Miss. Ct. App. 2004).

In the context of actions pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 to 11-46-23, the common thread running through cases where an officer acts with reckless disregard in operating a motor vehicle is an appreciation of the unreasonable risk of danger involved coupled with a conscious indifference to the consequences that are certain to follow. *Davis v. Latch*, 873 So. 2d 1059 (Miss. Ct. App. 2004).

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2) barred plaintiff's state law claims against the police chief and the officer because the wrongful arrest of plaintiff occurred in the scope and course of their employment, but did not bar the state law claims against the city under Miss. Code Ann. § 11-46-9(1)(c) because the officer was acting within the scope of his employment when he acted with reckless disregard in the arrest of the mother. *Craddock v. Hicks*, 314 F. Supp. 2d 648 (N.D. Miss. 2003).

Department of Public Safety was not immune from liability in a suit by a driver. A state trooper, who was speeding excessively and acted in reckless disregard of the driver's safety; the fact that the driver made a left turn did not matter, as this was not criminal activity. *Miss. Dep't of Pub. Safety v. Durn*, 861 So. 2d 990 (Miss. 2003).

As a decedent was engaged in criminal activity (drunk driving) and there was a causal nexus between that activity and his death in a collision with a fire truck, the city was immune from a wrongful death suit under Miss. Code Ann. § 11-46-9(1)(c). *Estate of Williams v. City of Jackson*, 844 So. 2d 1161 (Miss. 2003).

Operating a vehicle involves both the moving and the stopping of a vehicle, and when these are done under the influence of alcohol, it is considered criminal activity which operates to limit the duty owed by police and fire personnel under Miss. Code Ann. § 11-46-9(1)(c); however, in order for recovery from a governmental entity to be barred, the criminal activity has to have some causal nexus to the wrongdoing of the tortfeasor. *Estate of Williams v. City of Jackson*, 844 So. 2d 1161 (Miss. 2003).

Dismissal of the driver and passengers' action against the city and police officer after they were struck by the officer's vehicle was proper where the officer's action evinced no recklessness, Miss. Code Ann. § 11-46-9(1)(c); he was remiss in paying attention to traffic directly in his lane, but he was guilty of simple negligence and nothing more. *Joseph v. City of Moss Point*, 856 So. 2d 548 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).



Where conflicting evidence was presented as to whether the police officer, who was engaged in a high speed chase when the officer struck the decedent, had the officer's blue lights flashing, summary judgment pursuant to Miss. R. Civ. P. 56 was improperly granted in favor of the city in the wrongful death action; the conflicting testimony raised an issue of material fact as to whether the officer's behavior constituted reckless disregard under Miss. Code Ann. § 11-46-9(1)(c). *Johnson v. City of Cleveland*, 846 So. 2d 1031 (Miss. 2003).

In a wrongful death suit against a town, the town was correctly granted summary judgment since there were no facts of record to support the allegation that the town acted with reckless disregard for the decedent's safety; only 13 minutes elapsed between the decedent's report to the police that he had been shot at and his fatal shooting, and the police acted responsibly and within their discretion. *Titus v. Williams*, 844 So. 2d 459 (Miss. 2003).

The "reckless disregard" exception to the Mississippi Tort Claims Act in Miss. Code Ann. § 11-46-9(1)(c) was not applicable to the homeowners' suit against county for delay in 911 response by police, which did not involve personal injury, but only loss of property. *Lee County v. Davis*, 838 So. 2d 243 (Miss. 2003).

Government and its employees acting within the course and scope of their employment are not liable for any claims arising out of an act or omission of the employee engaged in the performance of execution of duties or activities relating to police or fire protection, unless it is proven by a preponderance of the evidence that the employee was acting in a reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury; therefore, a trial court correctly determined that a city and its police officer waived immunity under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because an injured party established that the officer acted in reckless disregard of his safety when he answered a burglary call without activating his lights or siren. *City of Jackson v. Lipsey*, 834 So. 2d 687 (Miss. 2003).

Maintenance and inspection of police vehicles are activities related to police protection, so that a city and an officer were immune from liability arising out of negligence in the performance of either act under the police protection exemption of Miss. Code Ann. § 11-46-9(1)(c) when the brakes in a police car failed and the police car collided with another car. *McGrath v. City of Gautier*, 794 So. 2d 983 (Miss. 2001).

In an action in which the plaintiff alleged that he was injured by a security officer for a water supply district, the water supply district was not entitled to summary judgment as the record did not contain any evidence that the district engaged in a policy-oriented decision-making process concerning the supervision of its employees. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584 (Miss. 2001).

The criminal activity supporting the exemption for police or fire protection unless the government employee acted in reckless disregard of the safety of a person "not engaged in criminal activity at the time of injury" must be more than fortuitous, but need not rise to the level of a felony. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584 (Miss. 2001).

A governmental agency and its employees, acting within the course and scope of their official duties, and engaged in the performance or execution of duties relating to police or fire protection, will not be liable for any claim arising out of the performance or execution of those duties, unless it is proven, by a preponderance of the evidence, that the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury. *Simpson v. City of Pickens*, 761 So. 2d 855 (Miss. 2000).

A police officer and the city that employed him were not entitled to immunity with regard to a motor vehicle accident involving the officer since the evidence showed reckless disregard by the officer of the safety and well-being of others where (1) the officer testified to seeing the plaintiff's vehicle stopped at the a townhome complex, (2) the plaintiff attempted a left turn from the complex, (3) the officer was

driving at a minimum of 57 miles per hour in a posted 35 miles per hour zone and struck the plaintiff's vehicle in the driver's door knocking the vehicle 75 feet, and (4) the officer was in a non-emergency situation using neither sirens nor flashing lights and was going to meet fellow officers for dinner. *City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000).

The fact that the plaintiff was driving without a license at the time that his vehicle was struck by a police officer's vehicle being driven in a reckless manner did not bar his recovery for injuries sustained in the accident as the officer's conduct did not have anything to do with the plaintiff's criminal activity. *City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000).

A deputy sheriff acted with reckless disregard within the meaning of subsection (1)(c) of this section when he backed up the incline entrance to a parking lot knowing he could not be sure the area was clear. *Maye v. Pearl River County*, 758 So. 2d 391 (Miss. 1999).

In an action arising from a collision with a drunk driver in which the plaintiff alleged that, immediately prior to the accident, a city police officer had stopped the drunk driver for operating his vehicle in an erratic fashion and failing to have the vehicle's headlights on, but permitted the drunk driver to continue driving even though he knew the driver was intoxicated and incapable of driving in a safe and prudent manner, the trial court erred in holding that the complaint was insufficient because it did not allege that the officer intended to harm the plaintiff; the proper focus should have been whether the officer intended to do the act that caused harm to the plaintiff. *Turner v. City of Ruleville*, 735 So. 2d 226 (Miss. 1999).

Reckless disregard within the meaning of subsection (1)(c) of this section is synonymous with willfulness and wantonness. *Turner v. City of Ruleville*, 735 So. 2d 226 (Miss. 1999).

A police officer who detained the plaintiff when she went to the police station to inquire about an outstanding warrant for shoplifting did not act in reckless disregard for the plaintiff's safety and well-being since he was faced with an arrest

warrant that was valid on its face and had a duty to execute the warrant. *Foster v. Noel*, 715 So. 2d 174 (Miss. 1998).

### 8. Illustrative cases.

Mississippi Transportation Commission was immune under Miss. Code Ann. § 11-46-9(1)(d) from liability for injuries suffered by a driver from a dead tree that fell on his car. There was no evidence that the dead tree was known about prior to the accident, and there was no requirement for inspecting trees along the highway. *Farris v. Miss. Transp. Comm'n*, 63 So. 3d 1241 (Miss. Ct. App. 2011).

City was immune from homeowners' claims arising from sewer back-ups as a result of a city ordinance requiring larger sewer lines than were present on the homeowners' property because Jackson, Miss., Ordinances art. II, § 205(4) exempted the homeowners' subdivision from the ordinance, so the ordinance did not cause the city's maintenance of the city's sewage system to be a ministerial function. *Fortenberry v. City of Jackson*, 71 So. 3d 1196 (Miss. 2011).

City was immune from homeowners' claims arising from sewer back-ups because, if the city was otherwise liable for a discretionary decision resulting in damage, Miss. Code Ann. § 11-46-9(1)(d) shielded the city from liability. *Fortenberry v. City of Jackson*, 71 So. 3d 1196 (Miss. 2011).

Judgment dismissing appellant's negligence case under the Mississippi Tort Claims Act against the county was affirmed where (1) the County did provide adequate warning that the bridge was out; and (2) in addition to being under the influence of alcohol, appellant was an adult who knew the bridge was out prior to that date, and knowingly proceeded past warning signs and dirt barriers. *Martin v. Franklin County*, 29 So. 3d 862 (Miss. Ct. App. 2010).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(v), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because under § 11-46-9(1)(v), there was no liability for accidents caused by a dangerous condition



that was open and obvious to one exercising due care, and the increased risk of hydroplaning in inclement weather was such an open and obvious risk. *Lee v. Miss. DOT*, 37 So. 3d 73 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(q), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because under § 11-46-9(1)(q), there was no liability for accidents arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways, and the accident was solely caused by the inclement weather. *Lee v. Miss. DOT*, 37 So. 3d 73 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010).

Legislature determined that it is necessary to protect governmental entities and their employees from liability for the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury, but the Legislature has not burdened non-governmental entities and private persons with liability for personal injuries sustained by an employee of a governmental entity when that person's actions fall somewhere in between simple negligence and the reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Trial court did not apply an incorrect standard of care for comparative negligence when it failed to require an employee to show that a county sheriff's deputy acted with reckless disregard because the deputy was not afforded the protection provided by Miss. Code Ann. § 11-46-9(1)(c) when his personal injury suit against the employer, a non-governmental entity, was not a claim as defined

under Miss. Code Ann. § 11-46-1(a); § 11-46-9(1)(c) limits liability, not fault, when a plaintiff files suit against a governmental entity, and there was no reason why it should prohibit the allocation of fault when an employee of the governmental entity files suit against a non-governmental entity. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Where an inmate sued prison officials for allegedly denying his visitation privileges, Miss. Code Ann. § 11-46-9(1)(m) provided the officials with immunity from the inmate's claim for monetary damages; however, the prison officials were not immune from the inmate's request for injunctive relief. The trial court erred by dismissing that claim under the Mississippi Tort Claims Act. *Roland v. Epps*, 10 So. 3d 972 (Miss. Ct. App. 2009).

City and gym were immune under Miss. Code Ann. § 11-46-9 with regard to a mother's personal injury action arising out of the injuries of a minor child who fell through a ceiling at the gym because the mother failed to prove that the child's injury was caused by dangerous condition, to show that the city or the gym had actual or constructive notice that the child had climbed into the false ceiling and was in danger of falling to the floor, or to show that there was adequate time to protect or warn against danger. *Kaigler v. City of Bay St. Louis*, 12 So. 3d 577 (Miss. Ct. App. 2009).

Where an inmate sued prison officials for allegedly denying his visitation privileges, Miss. Code Ann. § 11-46-9(1)(m) provided the officials with immunity from the inmate's claim for monetary damages; however, the prison officials were not immune from the inmate's request for injunctive relief. The trial court erred by dismissing that claim under the Mississippi Tort Claims Act. *Roland v. Epps*, 10 So. 3d 972 (Miss. Ct. App. 2009).

Officer's behavior did not constitute reckless disregard under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), where the officer's actions would not have been reasonably foreseeable by the owner; based on the totality of the circumstances, the officer's conduct was a



reasonable reaction to what he perceived to be a potentially dangerous situation, and the finding that the officer's conduct failed to rise to the level of reckless disregard was sufficient to dispose of the resident's contentions that the officer's actions were unwarranted and excessive. *Scott v. City of Goodman*, 997 So. 2d 270 (Miss. Ct. App. 2008).

Dismissal of an inmate's case arising from an assault by a fellow prisoner was proper because there was immunity under Miss. Code Ann. § 11-46-9(1)(m), and there was no showing of deliberate indifference in relation to claims of an alleged failure to protect and an alleged failure to provide adequate medical treatment. No hearing was warranted because it was clear from the record that the inmate was not entitled to any relief. *Clay v. Epps*, 19 So. 3d 743 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 158 (Miss. 2009).

Trial court properly dismissed a student's negligence action against a school system for failure to protect the student from harassment by fellow students where the system exercised ordinary care and conducted a reasonable investigation into the alleged incidents of harassment; hence, the system was immune from any liability pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(b). *Beacham v. City of Starkville Sch. Sys.*, 984 So. 2d 1073 (Miss. Ct. App. 2008).

With respect to an accident victim's Mississippi Tort Claims Act suit against a county arising from an automobile accident with a county sheriff's deputy, a trial court properly granted summary judgment to the county because the victim failed to establish that the deputy acted recklessly, rather than negligently, when backing his vehicle out of a parking space. *Vo v. Hancock County*, 989 So. 2d 414 (Miss. Ct. App. 2008).

Mississippi Department of Transportation (MDOT) was entitled to summary judgment in the injured driver's suit for damages arising out of a car accident that occurred while the highway was being refurbished. The injured driver did not put forward evidence that MDOT had notice of any defective condition; there-

fore, MDOT was immune from liability under Miss. Code Ann. § 11-46-9. *Frazier v. Miss. DOT*, 970 So. 2d 221 (Miss. Ct. App. 2007).

Inmate was incarcerated when the inmate filed a complaint against numerous governmental entities and employees; those governmental entities and employees were immune from the inmate's lawsuit and the chancellor properly dismissed the inmate's complaint. *Bessent v. Clark*, 974 So. 2d 928 (Miss. Ct. App. 2007).

In a 42 U.S.C.S. § 1983 case against a city that also alleged state tort claims, since the facts as set forth in the complaint did not rise to level of reckless disregard, a city was not liable under the Mississippi Tort Claims Act. *Bynum v. City of Magee*, 507 F. Supp. 2d 627 (S.D. Miss. 2007).

In a child's suit against the Mississippi Department of Human Services (DHS), failure to investigate a child's allegations of sexual abuse by an employee of a youth care facility was a ministerial act for which DHS could be held liable. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253 (Miss. Ct. App. 2007).

Trial court erred in granting a sheriff, county, and surety summary judgment on an individual's claims of false imprisonment and negligence where the individual raised issues of fact as to whether the sheriff or his deputies complied with their duties in accepting surrender from a bail bondsman, and whether they evinced a reckless disregard for the individual's safety and well-being in accepting his surrender. *Brooks v. Pennington*, 995 So. 2d 733 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Trial court erred by holding that the city was immune from liability under Miss. Code Ann. § 11-46-9(1)(d), and therefore it erred by granting the city summary judgment because the trial court failed to consider the second prong of the public policy test, which required that the choice involved social, economic, or political policy. *Willing v. Estate of Benz*, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was entitled to immunity under the mob exemption under Miss. Code Ann.

§ 11-46-9(1)(u), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because: (1) the actions of the angry crowd of teenagers constituted a riot, as the party guest testified that there were at least 15 people assembled on the night in question, all angry with the party guest and attempting to seriously injure or kill him by wielding knives and throwing sticks and bricks at him; and (2) the bystander who stole the officer patrol car and struck the party guest with it was part of the rioting mob, and therefore the party guest's claim arose out of and resulted from the riot. *Chapman v. City of Quitman*, 954 So. 2d 468 (Miss. Ct. App. 2007).

Trial court erred by granting the city summary judgment under the discretionary function exemption under Miss. Code Ann. § 11-46-9(1)(d) because the trial court applied only the first prong of the public policy function test rather than both prongs. *Chapman v. City of Quitman*, 954 So. 2d 468 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a county based on sovereign immunity under Miss. Code Ann. § 11-46-9(1)(d) because the decision to backfill a road instead of paving it after the upgrade or installation of a culvert was a discretionary function; even though the failure to place a warning sign was a ministerial function, there was no liability for the county because the condition of the roadway, and not the failure to place the sign, was the cause of the accident. *Barr v. Hancock County*, 950 So. 2d 254 (Miss. Ct. App. 2007).

Trial court properly granted summary judgment to a county constable under Miss. R. Civ. P. 56 in a personal injury suit because the constable had immunity, under Miss. Code Ann. § 11-46-9(1)(c), for injuries to a father, which occurred when the constable's car collided with his four-wheeler, because there was significant evidence that the father was engaged in criminal activity that had a causal nexus to the accident; the father was driving on a suspended license and pled guilty to reckless driving, however summary judgment against the father's sons was improper because genuine issues of fact ex-

isted as to whether the sons were engaged in criminal activity, whether any criminal activity on the part of the sons had a causal nexus to the accident, and whether the constable acted with reckless disregard in his pursuit of appellants. *Giles v. Brown*, 962 So. 2d 612 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 477 (Miss. 2007).

Summary judgment was properly granted to a city in a negligence case based on a fall from a raised sidewalk crack because the city had immunity under Miss. Code Ann. § 11-46-9(1)(v); the city did not have a duty to maintain the sidewalks in a perfect condition, it did not have notice, and the open and obvious defense applied. *Howard v. City of Biloxi*, 943 So. 2d 751 (Miss. Ct. App. 2006).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q), and therefore it was properly granted summary judgment in the family's wrongful death action, because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch on the highway. *Willing v. Benz*, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c), and therefore it was properly granted summary judgment in the family's wrongful death action, because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. *Willing v. Benz*, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under



the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. *City of Jackson v. Presley*, 942 So. 2d 777 (Miss. 2006).

Trial court did not err in finding that the Mississippi Department of Transportation (MDOT) was immune from liability for a traffic accident pursuant to Miss. Code Ann. § 11-46-9(1) as credible evidence supported the court's finding that the parents of an infant who died from the injuries she received in the collision had failed to prove that the MDOT had had notice of a dangerous condition at the intersection, at least prior to the instant accident. *Reeves v. Miss. DOT*, 941 So. 2d 884 (Miss. Ct. App. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium was appropriate pursuant to Miss. Code Ann. § 11-46-9(1)(v) because the coal grate at issue was a dangerous condition. *City of Natchez v. Jackson*, 941 So. 2d 865 (Miss. Ct. App. 2006).

Department of mental health was found liable for negligence because a psychiatric hospital owed a duty of care to, inter alia, monitor the patient, and an injury during an escape was foreseeable. Immunity under Miss. Code Ann. § 11-46-9(d) did not apply either because the duties owed were not discretionary based on Miss. Code Ann. § 41-21-102(6). *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the court could not find that the officer recklessly disregarded the passengers' safety when considering the totality of the circumstances; evidence showed, inter alia, that: (1) the driver's flight from the police lasted for a matter of minutes over five miles; (2) the flight did not occur on a residential street or within a residential neighbor-

hood; (3) there was little or no testimony regarding the characteristics of the streets on which the flight took place; (4) traffic was light; (5) the weather was sunny and clear; and (6) the driver was operating a stolen vehicle with a suspended license and the officer noticed him because of his excessive speed and reckless driving. *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the passengers were engaged in criminal activity, as there was no dispute that they knew that the car was stolen and that they encouraged the driver to flee from the police, in violation of Miss. Code Ann. § 97-35-7(2). *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a county and a city were properly granted summary judgment because neither were involved in the pursuit. *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Dismissal of the decedent's mother's and a student's action against a state university resulting from a shooting on campus was appropriate under Miss. Code Ann. § 11-46-9(1)(v) where the underlying act of the claims was the fact that the gunman shot the victims; they cited no authority suggesting that the university, through an employee, had a duty to warn the victims of the dangerous conditions of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398 (Miss. Ct. App. 2006).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred



due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity as Miss. Code Ann. § 11-46-5(1) permitted school districts to be sued. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006).

Summary judgment was properly awarded to a county medical center in plaintiff's negligence action where the medical center was immune from liability under Miss. Code Ann. § 11-46-9(1)(v); there was no evidence that the medical center caused the dangerous condition of a chair-bed that collapsed when plaintiff sat on it. *Hodges v. Madison County Med. Ctr.*, 929 So. 2d 381 (Miss. Ct. App. 2006).

Summary judgment was granted to a police officer and a city in a personal injury case arising from an arrest because the evidence did not show that the officer acted with reckless disregard under Miss. Code Ann. § 11-46-9(1)(c); an arrestee only complained once that handcuffs were too tight, and there was no evidence of medical bills or lost wages. *Bradley v. McAllister*, 929 So. 2d 377 (Miss. Ct. App. 2006).

Mississippi Department of Wildlife, Fisheries, and Parks should have been granted immunity under Miss. Code Ann. § 11-46-9(1)(v) because there was insufficient evidence to establish that there was a dangerous condition on the Department's property of which it had constructive notice and time to correct or warn against. There was no evidence that the Department had prior notice of the drop-off where the visitor fell, which the trial court found was covered by leaves and pine straw; there was no evidence that the Department failed to exercise reasonable care in its inspections of the roadways, as a risk management supervisor testified

that he inspected the park about a month before the visitor's fall and found no drop-offs that needed to be corrected. *Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon*, 943 So. 2d 53 (Miss. Ct. App. 2006).

Appellate court affirmed the grant of summary judgment in favor of a county in wrongful death action brought by the personal representative of the decedent who was an inmate when he was killed in an accident after having volunteered for garbage detail because Miss. Code Ann. § 11-46-9(1)(m) specifically precluded state tort claims by inmates. *Powell v. Clay County Bd. of Supervisors*, 924 So. 2d 523 (Miss. 2006).

Judgment was properly awarded to the Mississippi Transportation Commission (MTC) in plaintiff's negligence action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9, where substantial evidence showed that the MTC had no notice of a defective shoulder, plaintiff produced no evidence showing that the defect was noticeable upon passing, and there was no evidence that any verbal or written complaints were filed prior to plaintiff's collision with another vehicle. *Jones v. Miss. Transp. Comm'n*, 920 So. 2d 516 (Miss. Ct. App. 2006).

Summary judgment was granted in favor of defendant city and police officers in a 42 U.S.C.S. § 1983 suit alleging false arrest and imprisonment, malicious prosecution, and intentional and/or negligent infliction of emotional distress filed by two citizens arrested for an arson/murder but later exonerated; although the officers could have done a more thorough investigation at the scene, they did not act recklessly under Miss. Code Ann. § 11-46-9(1)(c). *Mitchell v. City of Jackson*, 481 F. Supp. 2d 586 (S.D. Miss. 2006), affirmed by 223 Fed. Appx. 411, 2007 U.S. App. LEXIS 6889 (5th Cir. Miss. 2007).

Where an assistant district attorney was acting in the scope of her employment by providing police with identifying information regarding a person who had committed the crime of false pretenses, even though the information was incorrect, there was no liability under Miss. Code Ann. § 11-46-9(1)(d). *Stewart v. DA*, 923 So. 2d 1017 (Miss. Ct. App. 2005), writ of

certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

Bridge contractor was hired by Mississippi Department of Transportation as an independent contractor, and under the language of the contract, said contractor bore responsibility for the signage at the construction site; however, under the Mississippi Torts Claim Act, Miss. Code Ann. § 11-46-1 et seq., MDOT could have still been liable under the narrow exceptions of Miss. Code Ann. § 11-46-9(1)(p) and (v), if MDOT had notice of the dangerous condition, and MDOT had adequate opportunity to protect or warn against the dangerous condition; in the latter respect, in the case at bar, MDOT's liability for the lack of warning signs and other measures at the bridge construction site was a question of fact, where it was clear that an MDOT representative made frequent visits to the construction site, and it was clear that at least on one occasion, MDOT requested that the contractor install additional warning devices. *Chisolm v. Miss. DOT*, 942 So. 2d 165 (Miss. Ct. App. 2005), reversed by 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Under Miss. Code Ann. § 11-46-9(1)(v), the Mississippi Department of Transportation (MDOT) and its employees could not be liable for any claim resulting from a dangerous condition on the State's property if: (1) that condition was not caused by the negligence or wrongful conduct of the employee, or (2) MDOT lacked notice and an adequate opportunity to warn of the dangerous condition. However, in the case at bar, based on testimony of MDOT employees, the appellate court found that there were clearly issues of fact for the jury as far as MDOT's notice of a dangerous condition at the bridge construction site, and MDOT's opportunity to have warned or protected against the condition; thus, in the suit by the heirs of the decedent who was killed at said construction site, summary judgment for the MDOT was improper. *Chisolm v. Miss. DOT*, 942 So. 2d 165 (Miss. Ct. App. 2005), reversed by 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Mississippi county was fraudulently joined in a suit, arising out of a fatal car accident because: (1) the county did not

have any legal responsibility with regard to the posting of a stop sign at the intersection where the accident occurred, (2) Miss. Code Ann. § 63-3-305 granted discretionary authority to the county to place and maintain traffic control devices upon highways within the county, (3) under Miss. Code Ann. § 11-46-9(1)(d), the county could not be held liable for its exercise of discretionary power under Miss. Code Ann. § 63-3-305, even if an abuse of discretion was shown, and (4) although there was precedent under Mississippi law to hold municipalities liable, either under Miss. Code Ann. § 11-46-9(1)(b) or (1)(w), for failing to warn about known dangerous conditions on roads, no reasonable factfinder would find that the motorist who caused the accident was not adequately warned about the approaching intersection. *Dozier v. Hinds County*, 379 F. Supp. 2d 834 (S.D. Miss. 2005).

Trial court had not committed reversible error by failing to find it immune from liability under Miss. Code Ann. § 11-46-9(1)(c) because the person who brought a suit against the city and police officers was contemporaneously engaged in criminal activity because the crimes for which he was charged and convicted ceased prior to the delivery of the offensive blows by the officers. His attempt to resist arrest ended, at the latest under the facts of the instant case, when he was handcuffed. *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005).

Appellate court affirmed grant of summary judgment in favor of the county



because the testimony of the individual and a third party was sufficient to establish that dense fog was the sole proximate cause of the accident, and thus, the county was entitled to immunity under Miss. Code Ann. § 11-46-9 (1)(q). *Hayes v. Greene County*, 932 So. 2d 831 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 521 (Miss. 2006).

Teacher's aide was walking side-by-side with an autistic child when the child had an anxiety attack, and during said anxiety attacks, it was common for the child to become violent with other children and to hit them. During the particular anxiety attack, the child was running into walls and tables, and for those reasons, the aide was required to act quickly in order to prevent the child from hurting himself or others; under those circumstances, the aide took reasonable steps to minimize the risk of harm to the child who suffered bruises during the incident and the child's parents were not entitled to damages on grounds of school district negligence. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

When a teacher's aide was escorting the autistic child to his classroom, the child became agitated while he aide continued to move him through the hallway. The child suffered bruises as a result of the teacher's aide's fully sensible attempts to restrain him, and no treatment or medication was warranted or prescribed for said bruises; the aide's restraint of the child constituted control and discipline under Miss. Code Ann. § 37-11-57, and the circuit court properly applied Miss. Code Ann. § 11-46-9(1)(x) in finding that said actions did not constitute wanton and willful conduct to allow the parents to recover damages. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

Paramedic testified that the "hallmark signs" of a placental abruption, excruciating pain and excessive bleeding, were not present, and both paramedics testified that they did not see blood. The pregnant

employee testified that blood was not found because her co-workers had wiped the blood from the floor, but the trial court properly found that since neither paramedic testified that they saw blood, then it could only find such a decision to be discretionary; therefore, given that the employee's condition was abnormal, whether to have treated the situation as a "load and go" required the paramedics to use their own judgment, the trial court correctly deemed the paramedic's decision as discretionary, and it correctly granted the city's motion to dismiss the wrongful death action under Miss. R. Civ. P. 41(b). *Sanders v. Riverboat Corp.*, 913 So. 2d 351 (Miss. Ct. App. 2005).

Husband's claims against his employer's personnel officers were properly dismissed because officers, as employees of a state prison, were acting within the scope of their employment when they collected insurance premiums while wife's life insurance application, which was ultimately denied, was pending. *Smith v. Med. Life Ins. Co.*, 910 So. 2d 48 (Miss. Ct. App. 2005).

Absent evidence showing otherwise, state environmental agencies and their employee were immune to landowners' claims of tortious interference with contract and business relations concerning the development of protected wetlands that belonged to the landowners. *Dunston v. Miss. Dep't of Marine Res.*, 892 So. 2d 837 (Miss. Ct. App. 2005).

In a citizen's excessive force action, substantial evidence supported the circuit court's finding that the city was liable for the citizen's injuries pursuant to Miss. Code Ann. § 11-46-9(1)(c) because the police officers' actions were not reasonable or in good faith, and the citizen was not engaged in criminal conduct at the time of his injuries. The record showed that the citizen had been arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and that one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. *City of Jackson v. Calcote*, 910 So. 2d 1103 (Miss. Ct. App. 2005).

In a family's suit following a car accident, summary judgment in favor of the department of transportation, the county,



and the engineer was proper as the family failed to produce sufficient evidence to establish that the last inspection by the department was negligently performed, or that the county or the engineer negligently inspected and maintained the culvert. *Jenkins v. Miss. DOT*, 904 So. 2d 1207 (Miss. Ct. App. 2004).

Contractor had not presented any evidence that the Mississippi Department of Transportation (MDOT) was entitled to immunity from liability based upon the exemption set forth in Miss. Code Ann. § 11-46-9, and MDOT could not be deemed to have been fraudulently joined in the action based upon an alleged exemption under § 11-46-9. *Johnson v. James Constr. Group, LLC*, 306 F. Supp. 2d 654 (S.D. Miss. 2004).

Dismissal of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., 11-46-9(1)(m). *Whitt v. Gordon*, 872 So. 2d 71 (Miss. Ct. App. 2004).

Deputy responding to a call from a fellow officer was not speeding and did not sound a siren because the deputy did not want there to be any accidents resulting from motorists coming to an abrupt stop, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. *Kelley v. Grenada County*, 859 So. 2d 1049 (Miss. Ct. App. 2003).

In a slip and fall case, the trial court erred in not granting the city immunity under Miss. Code Ann. § 11-46-9(1)(v) as the injured patient admitted that the steps and ramp outside the municipal building where he fell were covered with enough snow and ice for anyone to see and that he wasn't paying attention as he left the building holding his money and a receipt. *City of Clinton v. Smith*, 861 So. 2d 323 (Miss. 2003).

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies while in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2003). *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Before municipal officials could be found negligent, thereby entitling a plaintiff to recover, the plaintiff had to show the existence of a legal duty owed to him by the municipal officials; any assertion that the municipal officials breached a duty to the decedent because they failed to guarantee his safety and well-being was unrealistic and untenable, given that the municipal officials were not present when the threat on the decedent's life was made, and the municipal officials, acting in their individual capacity, owed no duty to the decedent. *Dependants of Reid v. City of Canton*, 858 So. 2d 163 (Miss. Ct. App. 2003).

Trial court properly ruled that the Mississippi Department of Transportation (MDOT) was not immune from suit under Miss. Code Ann. § 11-46-9, as it found that, while MDOT's duty to inspect and maintain a highway where plaintiff's accident occurred was discretionary, it failed to exercise a minimum standard of ordinary care when it did not give notice of the dangerous condition of the highway. *Miss. DOT v. Cargile*, 847 So. 2d 258 (Miss. 2003).

Though the Mississippi Department of Transportation was not immune from suit, as the trial court properly found that a five to six inch drop-off on the shoulder of a road was a dangerous condition that was not obvious, which was created by the negligence of the Department and of which the Department knew but failed to warn against, the trial court erred by not assessing some degree of fault to plaintiff

driver, who had been obliged to exercise vigilant caution when she learned the road was under construction. *Miss. DOT v. Trosclair*, 851 So. 2d 408 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, each factual allegation made by the individual to support the individual's claim of breach of contract amounted to mere negligence; the individual did not claim the Bureau acted with "dishonest purpose or moral obliquity," but claimed the Bureau made a series of bad choices, and that was insufficient on its face to constitute a breach of an implied covenant of good faith and fair dealing. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, all the individual was able to show with regard to his negligence claim, was that the Bureau and its agents made a series of challengeable choices, from the level of training before sending an officer on a drug buy, to the directions given that officer; bad judgment, however, was insufficient for liability where the individual offered no evidence to meet the evidentiary burden of the reckless disregard standard. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465 (Miss. Ct. App. 2003).

Parolee fell under Miss. Code Ann. § 47-7-71(1) of the Uniform Act for Out-of-State Parolee Supervision because the parolee's parents lived in the state and the parolee indicated that parolee had a job in the state, and thus the State's acceptance of the parolee under the Act was proper and mandatory; because there was nothing in the Act or the state corrections department regulations that required a field officer to revoke one's parole, the officer's decision not to revoke the parole after the parolee failed to timely report was an exercise of discretion, and because (1) there was no evidence of a gross, reckless, or wanton failure in the State's supervision of the parolee, and (2) there was

no sufficient causal connection or element of foreseeability between the alleged violated statutory duty and the injuries sustained by the victim when raped by a parolee, the State maintained the benefit of immunity under Miss. Code Ann. § 11-46-9(1) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., and the State was properly granted summary judgment in the victim's action for damages. *Connell v. State*, 841 So. 2d 1127 (Miss. 2003).

Victim's one-year window under Miss. Code Ann. § 11-46-11(3) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to et seq., to file a notice of claim against the State for damages related to the victim's rape by a parolee did not begin to run until the day the victim was raped, and the victim's notice of claim and complaint were timely filed, although the court ultimately found the State immune from liability under Miss. Code Ann. § 11-46-9(1). *Connell v. State*, 841 So. 2d 1127 (Miss. 2003).

City was liable for the wrongful death of a driver under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because several officers acted in reckless disregard of the safety of the driver when they initiated a police chase in violation of department policy. *City of Jackson v. Brister*, 838 So. 2d 274 (Miss. 2003).

Where driver merely alleged a police officer negligently collided with her vehicle, it was insufficient to defeat an immunity-based defense on summary judgment under Mississippi tort claims act because the driver failed to prove the act was willful or wanton or otherwise exhibited a reckless disregard for the safety and well being of others. *Bonner v. McCormick*, 827 So. 2d 39 (Miss. Ct. App. 2002).

In an action arising from an injury sustained by the plaintiff when a fight broke out at a high school basketball game, remand to the trial court was necessary because the trial court made no reference to ordinary care in its findings of fact and conclusions of law as to whether the defendant school district was immune from liability. *Pearl Pub. Sch. Dist. v. Groner*, 784 So. 2d 911 (Miss. 2001).

The defendant city and police officers were immune from liability for injuries



sustained by the plaintiff when he lost control of his vehicle while being pursued by police officers for traffic violations since it did not appear that the officers intentionally chased after the plaintiff in such a way as to frighten him and cause him to wreck his vehicle and since the plaintiff was engaged in criminal activity at the time of his accident, based on his possible speeding, his failure to yield to the blue lights, and his driving with a suspended license. *Topps v. City of Hollandale*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 9925 (N.D. Miss. June 30, 2000).

A county may be held liable under subsection (1)(h) for damages for issuing a permit to perform work when it knows that the applicant who proposes to do the work is not duly licensed to perform the work in question since such conduct is arbitrary and capricious conduct violative of a statutory mandate. *Lowe v. Lowndes County Bldg. Inspection Dep't*, 760 So. 2d 711 (Miss. 2000).

A police officer who was struck by an automobile while riding a motorcycle and

leading a funeral procession was barred from bringing suit against the defendant city and the defendant automobile driver (who was another police officer) as he was employed by a governmental entity and received worker's compensation benefits provided by that entity. *Leslie v. City of Biloxi*, 758 So. 2d 430 (Miss. 2000).

Sovereign immunity was not an absolute bar to an action against a defendant school district for failing to act after a student told a teacher of a threat by another student; public schools have a ministerial responsibility to insure a safe school environment under § 37-9-69 and should take reasonable steps to minimize risks to students. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31, 1999), *subst. op.*, 754 So. 2d 1136 (Miss. 1999).

The purchase of insurance by a school district under § 11-46-17(4) does not limit the exclusions or exemptions enumerated in this section. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136 (Miss. 1999).

### ATTORNEY GENERAL OPINIONS

Municipality does not have authority to waive immunity set forth in Section 11-46-1, *et seq.*, by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify railroad for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and vegetation on private property, such as railroad right-of-way. *Scott* Nov. 3, 1993, A.G. Op. #93-0727.

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course and scope of their duties on Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. *Tardy*, Jan. 5, 1994, A.G. Op. #93-0972.

Section 11-46-9 would bar payment of damages to property seized unless the detention of the property was arbitrary or capricious. In addition, there is a one year

statute of limitations under Section 11-46-11. *Walters*, March 29, 1996, A.G. Op. #96-0146.

Section 11-46-9(1) provides that a governmental entity and its employees shall not be liable for any claim "arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work." An adjudication of delinquency by the Youth Court might not rise to the level of a criminal conviction. *Trapp*, July 8, 1996, A.G. Op. #96-0398.

Municipalities may insure themselves only for claims for which they are liable; the police and fire protection exemption specifically bars claims against municipalities and the city of Jackson may not gratuitously provide coverage. *Tedder*, March 13, 1998, A.G. Op. #98-0133.

If the Mississippi Department of Transportation denies an access permit to a state highway under its police power and the denial effectively prohibits ingress



and egress to the individual requesting the permit, an aggrieved individual may seek judicial review of the denial of the permit; however, absent malicious, arbitrary, or capricious conduct, the denial of a permit is a legitimate exercise of police power by the Mississippi Department of Transportation. Brown, Mar. 22, 2002, A.G. Op. #02-0121.

Damages will not ordinarily lie against the Mississippi Department of Transportation or their employees for the denial of a permit for ingress and egress in cases to a state highway where there is no pre-existing right. Brown, Mar. 22, 2002, A.G. Op. #02-0121.

Employees acting within the scope and course of their employment are covered by the Tort Claims Act for breaches of fiduciary or administrative duties sounding in

tort that are discretionary in nature; the same is not true regarding ministerial acts. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The sheriff of the county of conviction, and/or where an inmate will be during temporary leave is exempt under the Mississippi Tort Claims Act from any legal liability as long as the sheriff is acting in the scope of his duties and shows no reckless disregard of the safety and well-being of any person not engaged in criminal activity. Trowbridge, Nov. 14, 2005, A.G. Op. 05-0472.

The basic common law immunity from liability for good faith actions still exists, except where modified by the Tort Claims Act. Mitchell, Sept. 29, 2006, A.G. Op. 06-0454.

## RESEARCH REFERENCES

**ALR.** Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of federal tort claims act (28 U.S.C.A. § 2680(a)). 167 A.L.R. Fed. 1.

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to Federal Tort Claims Act. 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Federal Tort Claims Act (28 U.S.C.A. § 2680(a)). 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of dis-

charge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to Federal Tort Claims Act. 171 A.L.R. Fed. 655.

Claims arising from conduct of governmental employer in administering or failing to administer medical care as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.A. § 2680(a)). 172 A.L.R. Fed. 407.

Liability of United States, under Federal Tort Claims Act (28 U.S.C.A. §/ 1346, 2680), for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications. 173 A.L.R. Fed. 431.

Construction and application of Federal Tort Claims Act (FTCA) exception in 28 U.S.C.A. § 3680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer. 173 A.L.R. Fed. 465.

**Am Jur.** 2A Am. Jur. Pl & Pr Forms (Rev), Assault and Battery, Form 72.1 (Complaint, petition, or declaration-Assault and battery — Plaintiff shot by police officer during arrest).

19A Am. Jur. Pl & Pr Forms (Rev), Penal and Correctional Institutions, Form

5.1 (Complaint, petition, or declaration — Against municipal corporation — Failure to prevent suicide of jail inmate — Survival and wrongful death action).

41 Am. Jur. Trials 1, Social Worker Malpractice for Failure to Protect Foster Children.

**Law Reviews.** 1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

1985 Mississippi Supreme Court Review — Administrative Law. 55 Miss. L. J. 735, December 1985.

The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Litigation in Mississippi Today: A Symposium: Comment: Mississippi Tort Claims Act: Is Discretionary Immunity Useless?, 71 Miss. L.J. 695, Winter, 2002.

Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions, 76 Miss. L.J. 973, Spring, 2007.

## **§ 11-46-11. Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind.**

(1) After all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

(2)(a) Service of notice of claim shall be made as follows:

(i) For local governments:

1. If the governmental entity is a county, then upon the chancery clerk of the county sued;

2. If the governmental entity is a municipality, then upon the city clerk.

(ii) If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), or is a political subdivision other than a county or municipality, service of notice of claim shall be had only upon that entity's or political subdivision's chief executive officer. The chief executive officer of a governmental entity participating in a plan administered by the board pursuant to Section 11-46-7(3) shall notify the board of any claims filed within five (5) days after receipt thereof.

(b) Every notice of claim shall:

(i) Be in writing;

(ii) Be delivered in person or by registered or certified United States mail; and

(iii) Contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.

(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

(d)(i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.

(ii) The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

**SOURCES:** Laws, 1984, ch. 495, § 7; reenacted without change, Laws, 1985, ch. 474, § 6; Laws, 1987, ch. 483, § 6; Laws, 1988, ch. 479, § 3; Laws, 1993, ch. 476, § 5; Laws, 1999, ch. 469, § 1; Laws, 2000, ch. 315, § 1; Laws, 2002, ch. 380, § 1; Laws, 2012, ch. 513, § 1, eff from and after July 1, 2012.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the fifth sentence of (3), as amended by Laws, 1999, ch. 469, § 1. The words “denial of notice of claim” were changed to “notice of denial of claim”. The Joint Committee ratified the correction at its April 28, 1999 meeting.

**Editor’s Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”



**Amendment Notes** — The 2012 amendment rewrote the section.

## JUDICIAL DECISIONS

1. In general.
2. Constitutionality.
3. Legislative intent.
4. Applicability.
5. "Chief executive officer."
6. Form of notice.
7. Written notice.
8. Sufficiency of notice.
9. Time to file action.
10. Discovery rule.
11. Estoppel to assert statute of limitations.
12. Tolling of limitation period.
13. Minor Savings Clause.
- 14.. Intervention.
15. Illustrative cases.

### 1. In general.

Court upheld a ruling against a medical center in a medical malpractice action under the Mississippi Tort Claims Act because substantial evidence supported the judgment; although the expert testimony was conflicting, there was ample evidence for a finding that the patient had pneumonia while she was in the hospital and that the hospital staff failed to diagnose her. *Univ. of Miss. Med. Ctr. v. Johnson*, 977 So. 2d 1145 (Miss. Ct. App. 2007).

Allowing a plaintiff to file suit before 90 days have passed since noticing the claim is tantamount to reading out the notice provisions of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, and gross disregard for the notice provisions is not considered substantial compliance. *Wright v. Quesnel*, 876 So. 2d 362 (Miss. 2004).

The statute applied to a case where the event giving rise to the action occurred on June 1, 1994, clearly after the Act went into effect. *Henderson v. Un-Named Emergency Room*, 758 So. 2d 422 (Miss. 2000).

A notice of claim delivered to the administrator of a subsidiary hospital may be held to constitute valid notice upon the subsidiary's parent hospital chain; however, the record in the present case was too sparse to make a final determination in such regard and, therefore, the trial

court's ruling dismissing the case would be reversed and the matter would be remanded for additional findings. *Humphrey v. Ocean Springs Hosp.*, 749 So. 2d 1044 (Miss. 1999).

The effective date of this section was April 1, 1993. *Pickens v. Donaldson*, 748 So. 2d 684 (Miss. 1999).

A school district was not entitled to dismissal on the basis of noncompliance with the statute where there was evidence that there were some negotiations between the school district's insurance carrier and the plaintiff and that there was a letter sent from the insurance carrier to the plaintiff, confirming a previous conversation between the plaintiff and the carrier, initiated by the carrier, which indicated evidence that the carrier was notified of the claim by someone from the school district. *Smith County Sch. Dist. v. McNeil*, 743 So. 2d 376 (Miss. 1999).

Plaintiff's claim was barred by the applicable one-year statute of limitation where the complaint was filed nearly two years and five months after the accident at issue. *State v. Dampeer*, 744 So. 2d 754 (Miss. 1999).

In order to carry out the legislative purpose of providing relief to injured citizens, the court held that substantial compliance with the notice provisions of this section is sufficient. *Reaves by & Through Rouse v. Randall*, — So. 2d —, 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999).

This section does not require notice be filed with a governmental entity's insurance company. *Brewer v. Burdette*, 1999 Miss. LEXIS 150 (Miss. Apr. 15, 1999), subst. op., 768 So. 2d 920 (Miss. 2000).

A substantial compliance standard applies with respect to the notice of claim requirements of this section., overruled to the extent that this case characterizes the notice requirements set out in § 11-46-11 as jurisdictional requirements, *Stuart v. Univ. of Miss. Med. Ctr*, [1] So. 3d [1], 2009 Miss. LEXIS 396 (Miss Aug. 20, 2009) *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179 (Miss. 1997), overruled in part, *Carr v. Town of Shubutu*, 733 So. 2d 261 (Miss. 1999), overruled to the extent that these cases characterize the notice requirements set out in § 11-46-11 as jurisdictional requirements, *Stuart v. Univ. of Miss. Med. Ctr.*, 2009 Miss. LEXIS 396 (Miss. Aug. 20, 2009) *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

Uninsured motorist carrier's third party subrogation claim against city accrued, and one-year statute of limitations began to run, on date of accident. *Coleman v. American Mfrs. Mut. Ins. Co.*, 930 F. Supp. 255 (N.D. Miss. 1996).

In a personal injury action against a city and city officials, the 6-year statute of limitations set forth in § 15-1-49, rather than the 2-year statute of limitations set forth in § 11-46-11(3) of the Tort Claims Act, applied since the Tort Claims Act had not yet taken effect. *Starnes v. City of Vardaman*, 580 So. 2d 733 (Miss. 1991).

## 2. Constitutionality.

Supreme Court of Mississippi holds that the March 2002 amendment to Miss. Code Ann. § 11-46-11(4) is unconstitutional to the extent that it makes the savings clause applicable to all claims since April 1, 1993. However, the savings clause as first enacted in April of 2000 is valid and enforceable, and those claims in existence on May 15, 2000, are subject to the savings clause. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337 (Miss. 2004).

The one-year statute of limitations in the Mississippi Tort Claims Act is rationally related to a proper legislative purpose, i.e., protecting the state's interest in conserving government funds and protecting the public health and welfare at the earliest possible moment, and, therefore, is constitutional. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999).

The notice provision of this section does not violate the equal protection clause of the federal constitution, notwithstanding that it requires a person to give 90 days notice to the head of a governmental entity before suing that entity, whereas this type of notice is not required when suing an individual. *Vortice v. Fordice*, 711 So. 2d 894 (Miss. 1998).

## 3. Legislative intent.

Court erred in dismissing a student's personal injury lawsuit against a university and two of its police officers on the ground that the action was barred by the statute of limitations; applying Miss. Code Ann. § 11-46-11 as written, the student timely filed lawsuit. It was the intention of the Legislature to toll the statutory period, meaning to suspend temporarily, and to grant claimants 90 days in addition to the one year in which to file their lawsuits. *Page v. Univ. of S. Miss.*, 878 So. 2d 1003 (Miss. 2004).

The legislature intended for the statute to take effect from and after April 1, 1993, its date of passage. *Chamberlin v. City of Hernando*, 716 So. 2d 596 (Miss. 1998).

## 4. Applicability.

Trial court, on remand, had to determine whether at the time of the alleged negligent conduct, the doctor was an employee of a state entity covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1; if so, the trial court had to further determine whether the statute of limitations had run as to the doctor as prescribed by Miss. Code Ann. § 11-46-11. *McClain v. Clark*, 992 So. 2d 636 (Miss. 2008).

Suit against the state transportation commission, alleging a taking without just compensation in violation of Miss. Const. Art. 3, § 17, need not have been brought under the Mississippi Tort Claims Act, and thus was not time-barred under Miss. Code Ann. § 11-46-11(3), because the constitutional provision was self-executing. *McLemore v. Miss. Transp. Comm'n*, 992 So. 2d 1107 (Miss. 2008).

Tax sale purchasers' entire suit against the chancery clerk for failing to reimburse them for the 1994 taxes they paid when the prior owner redeemed the property for 1993 unpaid taxes was not governed by



Miss. Code Ann. § 11-46-11 because the purchasers had raised claims in law for damages and in equity for recovery of land, which were not tort claims. *Alexander v. Taylor*, 928 So. 2d 992 (Miss. Ct. App. 2006).

Decedent's estate's negligence action against the circuit court clerks for failing to enroll a foreign judgment was barred by the one-year statute of limitations in the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-11, because the complaint alleged that the court clerks were negligent in performing their official duties and the addition of the sureties as parties did not change the action into a contract action. Also, the action accrued when the estate learned that judgment had not been enrolled and not when the judgment debtor later filed bankruptcy, and the bankruptcy court held that the judgment was unenforceable in Mississippi. *Estate of Spiegel v. Western Sur. Co.*, 908 So. 2d 859 (Miss. Ct. App. 2005).

Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., applied to the university professor's attempt to recover tort damages; the alleged wrongful conduct by the university and individuals was the tortious failure to give her a new contract, and since the professor's claim of tortious interference was a tort claim and not a contract claim, she could only pursue that claim against the State using the Tort Claims Act. *Black v. Ansah*, 876 So. 2d 395 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, — So. 2d —, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), opinion withdrawn by, substituted opinion at 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

Statute did not apply to medical malpractice action because the tortious act occurred three years before the statute came into effect, thus the general medical malpractice statute, Miss. Code Ann. § 15-1-36 applied and allowed a patient two years to file suit. *Bailey v. Almefty*, 807 So. 2d 1203 (Miss. 2001).

When the simple requirements of the act have been substantially complied with, jurisdiction will attach for the purposes of the act. *Reaves ex rel. Rouse v. Randall*, 729 So. 2d 1237 (Miss. 1998).

#### 5. "Chief executive officer."

Department of Human Services was a state "department," as such, proper service would be had on the chief executive officer of DHS; nothing in the record showed there was even an attempt by the father to serve DHS's chief executive officer, or anyone at DHS. *Little v. Miss. Dep't of Human Servs.*, 835 So. 2d 9 (Miss. 2002), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142 (2003).

The term "chief executive officer" may be read to include any of the following: president of the board, chairman of the board, any board member, or such other person employed in an executive capacity by a board or commission who can be reasonably expected to notify the governmental entity of its potential liability. *Reaves ex rel. Rouse v. Randall*, 729 So. 2d 1237 (Miss. 1998).

#### 6. Form of notice.

Grant of summary judgment in favor of the employee's employer was proper where the employee failed to substantially comply with the notice provisions of the Mississippi Tort Claim Act's, Miss. Code Ann. § 11-46-1 et seq., Miss. Code Ann. § 11-46-11. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970 (Miss. 2004).

Negligence complaint against a sheriff's deputy was properly dismissed in a case where no notice of action was given to the deputy until a full two years after the alleged negligent conduct occurred. *Conrod v. Holder*, 825 So. 2d 16 (Miss. 2002).

A failure to comply with the requirement that a notice of claim be mailed by registered or certified mail will not serve as a basis to dismiss an action; in cases in



which notice is sent by first class mail, a governmental entity must demonstrate actual prejudice resulting from the failure to comply with the registered or certified mail requirement in order to be entitled to a dismissal on this basis. *Thornburg v. Magnolia Regional Health Ctr.*, 741 So. 2d 220 (Miss. 1999).

The statutory language implies that the required notice should be a single document which must in fact be sent by the claimant. *Soileau v. Mississippi Coast Coliseum Comm'n*, 730 So. 2d 101 (Miss. Ct. App. 1998).

### 7. Written notice.

Regardless of whether the individual complied with the notice requirement under Miss. Code Ann. § 11-46-11, the conversion claim failed because the individual had not shown any ownership interest in anything she claims was wrongfully converted. *Zumwalt v. Jones County Bd. of Supervisors*, 19 So. 3d 672 (Miss. 2009).

In a case in which a professor asserted a claim for intentional infliction of emotional distress against a state university, the university was entitled to summary judgment on that claim since the professor had not complied with the notice requirement in the Mississippi Tort Claims Act. *Gentry v. Jackson State Univ.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 35271 (S.D. Miss. Apr. 17, 2009).

In an employment discrimination case in which a former teacher had not complied with the notice requirement in Miss. Code Ann. § 11-46-11, pursuant to the Mississippi Supreme Court, the failure to provide the 90 days' notice was grounds for summary judgment. *Burnworth v. Vicksburg Warren Sch. Dist.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 57434 (S.D. Miss. July 24, 2008).

Building owner's claims against a city for money had and received and unjust enrichment constituted implied-in-law contract causes of action and were covered by the Mississippi Tort Claims Act; the owner's failure to submit a notice of claim prior to commencing the suit meant its claims were barred under Miss. Code Ann. § 11-46-11(1). *1704 21st Ave., Ltd v. City of Gulfport*, 988 So. 2d 412 (Miss. Ct. App. 2008).

Finding against the employee in his action after he was terminated was proper because although he filed his suit against the sheriff's department and the sheriff within the statutorily prescribed period in Miss. Code Ann. § 11-46-11(3), he still failed to comply with the Mississippi Tort Claims Act since he filed his complaint 37 days before he filed his notice of claim with the sheriff's department. *Clanton v. DeSoto County Sheriff's Dep't*, 963 So. 2d 560 (Miss. Ct. App. 2007).

Although Miss. Code Ann. § 11-46-11 requires a plaintiff to file a notice of claim as a condition precedent to seeking damages from a municipal entity, it does not require the entity to respond to the notice of claim in order to preserve the defense of immunity. *Mitchell v. City of Jackson*, 481 F. Supp. 2d 586 (S.D. Miss. 2006), affirmed by 223 Fed. Appx. 411, 2007 U.S. App. LEXIS 6889 (5th Cir. Miss. 2007).

There is no provision in the statute for actual or constructive notice, and a requirement of written notice is expressly stated. *Holmes v. Defer*, 722 So. 2d 624 (Miss. 1998). But see *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

### 8. Sufficiency of notice.

Notice-of-claim letter a daughter gave a state-sponsored hospital complied fully with the requirements of Miss. Code Ann. § 11-46-11(2) because the written notice-of-claim letter sent contained a statement of the facts upon which the claim was based, including the circumstances that brought about a father's injuries and the time, place, and extent of those injuries, including the father's alleged wrongful death; the notice also included the names of all persons known to be involved, it specified the amount of money damages the daughter sought, and the letter gave the residence address of one of the persons making the claim and the person who sent the notice. *Saul ex rel. All Wrongful Death Heirs of Cook v. South Central Reg'l Med. Ctr., Inc.*, 25 So. 3d 1037 (Miss. 2010).

In a case in which a circuit court dismissed a mother's medical negligence claim against a hospital because she had not complied with the 90-day notice requirement Miss. Code Ann. § 11-46-11(1) and the mother raised constitutional challenges to the Mississippi Tort Claims Act

for the first time on appeal, it was clear that she resorted to those novel claims on appeal because there was no error on the part of the circuit court. While the mother gave the hospital notice, she filed suit after only 85 days, and the 90-day requirement in § 11-46-11(1) was a mandatory rule which the courts strictly enforce. *Jones v. Laurel Family Clinic, P.A.*, 37 So. 3d 665 (Miss. Ct. App. 2010).

Order granting summary judgment in favor of a city with regard to a property owner's action under the Mississippi Tort Claims Act was affirmed because the owner failed to meet the notice requirements of Miss. Code Ann. § 11-46-11(2). The notice only contained the circumstances which brought about the owner's injury and the time and place of the injury, and failed to provide the extent of injury suffered, the names of all the persons known to be involved, the money damages sought, or the owner's residential address either at the time of the injury or at the time of the filing of the notice. *Webster v. City of D'Iberville City Council*, 6 So. 3d 448 (Miss. Ct. App. 2009).

Representative's first notice letter regarding a wrongful death claim complied with the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23; the notice was not statutorily insufficient simply because it did not specifically mention all of the claims ultimately raised in the complaint. The timing of the representative's second letter was irrelevant. *Briere v. S. Cent. Reg'l Med. Ctr.*, 3 So. 3d 126 (Miss. 2009).

Driver and passenger could not maintain their action against a county and a county employee because they failed to abide by the notice requirements of Miss. Code Ann. § 11-46-11(2); their letters to the county's insurance adjuster contained only scant information and did not provide information in each of the seven categories required in § 11-46-11(2). *Parker v. Harrison County Bd. of Supervisors*, 987 So. 2d 435 (Miss. 2008).

With regard to the ripeness of a Takings Clause claim, adequate state procedures include both administrative and state court remedies, and Mississippi has provided an adequate procedure for compen-

sation in the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11; however, merely sending a notice of claim letter is not sufficient for a plaintiff to avail himself of the adequate state judicial procedure provided in the Act. The entity receiving the letter is under no obligation to respond and may choose to remain silent, and once the plaintiff files a notice of claim and the defendant has been given an opportunity to respond, the plaintiff may then sue under the Act. *Waltman v. Payne*, 535 F.3d 342 (5th Cir. 2008).

Licensee's U.S. Const. Amend. V takings claim that a sheriff, thinking they were marijuana plants, destroyed kenaf plants that were growing on the land upon which the licensee held a hunting license was unripe because the licensee had not sought compensation under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11, by filing state court suit; the licensee's sending of a letter seeking compensation under § 11-46-11 was insufficient to exhaust the adequate remedies provided by Mississippi, and instead, the licensee should have filed a state court suit after receiving no response to his letter. *Waltman v. Payne*, 535 F.3d 342 (5th Cir. 2008).

In a patient's medical malpractice suit against a hospital and a limited liability company, diversity jurisdiction existed because the hospital was improperly joined since the patient provided deficient notice under the Mississippi Tort Claims Act because the notice contained no information regarding the amount of damages sought or the patient's residence at the time of injury or filing. *Harden v. Field Mem. Cmty. Hosp.*, 516 F. Supp. 2d 600 (S.D. Miss. 2007), affirmed by 265 Fed. Appx. 405, 2008 U.S. App. LEXIS 3524 (5th Cir. Miss. 2008).

In an employment dispute with the university, its former president, and its former vice-president of academic affairs, the former professor's state-law tort claims were barred for lack of jurisdiction under the Mississippi Tort Claims Act because the professor's grievance and letter of representation did not substantially comply with the notice requirements of Miss. Code Ann. § 11-46-11(2) since: (1) the grievance letter to the board of trustees



did not inform the university or the board of trustees of the professor's intent to file a claim in court; (2) the notice of claim was not filed after administrative remedies had been exhausted; (3) the notice of his claim was not served on the president of the university as required; (4) neither the letter nor the grievance stated an amount of damages sought or the extent of the alleged injury; and (5) the letter was not served upon the former president of the university. *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 150 (Miss. 2008).

Trial court erred in finding that the patient substantially complied with the notice provisions of Miss. Code Ann. § 11-46-11(2); due to the lack of any written notice, the patient failed to comply with the mandatory requirements of § 11-46-11(2) as none of the seven required categories of information were provided. *South Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252 (Miss. 2006).

Injured person's letter of notice was not sent to the county, but rather to an attorney. In addition, the letter: (1) was not sent by registered mail or certified mail, nor was it delivered in person; (2) did not contain a short and plain statement of the facts with regard to circumstance of injury; (3) did not give the extent of injuries; (4) did not give the name of all persons involved; (5) did not list the damages sought; and (6) did not give the residence of the claimant. Because there was a bare attempt at "minimal compliance," and certainly not "substantial compliance," summary judgment for the county was proper. *Fairley v. George County*, 871 So. 2d 713 (Miss. 2004).

Telephone calls to several supervisors and a letter directed to a county employee regarding a fall down a staircase in a courthouse was sufficient to comply with the notice requirements of Miss. Code Ann. § 11-46-11(2). *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003).

There was substantial compliance with the notice requirements where the city received a notice of claim letter and suffered no actual prejudice as a result of plaintiff's failure to include her own address, because plaintiff was represented

by an attorney at the time and his address was included. *Powell v. City of Pascagoula*, 752 So. 2d 999 (Miss. 1999).

The notice substantially complied with the requirements of the notice provisions of this section where it provided sufficient details regarding the incident at issue and was served on the city clerk and the city attorney. *City of Pascagoula v. Tomlinson*, 741 So. 2d 224 (Miss. 1999).

The plaintiff's notice of claim substantially complied with the statutory requirements where (1) the notice letter, sent to the defendant's Manager for Public Housing listed the persons involved in the accident, when the accident occurred, and the circumstances which brought about the injury, (2) the plaintiff's attorney contacted the defendant's offices to inquire as to who was the chief executive officer, (3) the plaintiff's attorney explained that the claim originated from the public housing division of the defendant, and (4) the Manager of Public Housing was employed by the defendant in an executive capacity and through the letter he received, the defendant's board of commissioners was put on notice of the claim. *Tennessee Valley Reg'l Hous. Auth. v. Bailey*, 740 So. 2d 869 (Miss. 1999).

The plaintiff's actions of communicating with the defendant board of supervisors equated to substantial compliance with the notice requirements of this section where (1) there was prolonged, continuous, and extensive communications between the parties, (2) as a result of these discussions, information regarding the plaintiff's claim was directed to and/or received by numerous people associated with the county, and (3) all of the parties involved in the settlement discussions were directly associated with the county and/or the board of supervisors. *Ferrer v. Jackson County Bd. of Supvrs.*, 741 So. 2d 216 (Miss. 1999).

The plaintiff substantially complied with the notice provisions of this section where her notice letter, sent to the superintendent of the defendant school district, listed the persons involved in the accident, when the accident occurred, where the accident occurred, and what vehicles were involved. *Reaves by & Through Rouse v. Randall*, — So. 2d —, 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999).



Notice of claim to the chairman of the Mississippi Gaming Commission is sufficient to satisfy the pre-suit notice of claim requirements under the substantial compliance doctrine of the Mississippi Tort Claims Act. *Alexander v. State Gaming Comm'n*, 735 So. 2d 360 (Miss. 1999).

The plaintiff substantially complied with the requirements for a notice of claim where she provided the defendant town with all of the required information except a liquidated amount of damages, although she stated the extent of her injuries in adequate detail; she was given the form by a city employee and assisted in completing the form; and once her damages were ascertainable, the insurance adjuster was made aware of same and actively pursued settlement with the plaintiff and her attorney. *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

The plaintiff substantially complied with the notice provisions of the act where her notice letter, sent to the school superintendent, listed the persons involved in the accident at issue, when the accident occurred, where the accident occurred, and what vehicles were involved; the superintendent was employed in an executive capacity by the school board and through this letter the board was put on notice of the claim. *Reaves ex rel. Rouse v. Randall*, 729 So. 2d 1237 (Miss. 1998).

An initial incident report, coupled with correspondence between the plaintiff's attorney, the defendant coliseum's attorney, and the coliseum's insurance adjuster did not constitute compliance with the notice provisions of the statute. *Soileau v. Mississippi Coast Coliseum Comm'n*, 730 So. 2d 101 (Miss. Ct. App. 1998).

The plaintiff failed to comply with the notice requirements of the statute where he maintained communication only with the insurance carrier of the defendant political subdivision and did not file a notice of claim with the superintendent of the school district as required under the strict compliance standard of the statute. *Watts v. Lafayette County Sch. Dist.*, 737 So. 2d 1019 (Miss. Ct. App. 1998).

### 9. Time to file action.

Estate's claims for loss of society and companionship were not untimely pursuant to the one-year statute of limitations.

While the claims the decedent could have brought had she not died were rendered untimely by application of the one-year statute of limitations, the estate's claims for loss of society and companionship did not accrue until her death. *Fedrick v. Quorum Health Res., Inc.*, 45 So. 3d 667 (Miss. Ct. App. 2009).

Miss. Code Ann. § 11-46-11(3) was clear that the patient should have filed her claim against the doctor for medical malpractice within one year of the alleged conduct; the patient did not exercise due diligence to discover the doctor's employment status, and there was no evidence that the doctor, hospital, or clinics concealed the doctor's status. *Stark v. Greenwood Leflore Hosp.*, 39 So. 3d 901 (Miss. Ct. App. 2009), writ of certiorari dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 22 (Miss. 2010).

Plaintiff may file a complaint without waiting the full 90 days under Miss. Code Ann. § 11-46-11(1) if the plaintiff receives a denial of notice of claim pursuant to § 11-46-11(3). *Lee v. Mem'l Hosp.*, 999 So. 2d 1263 (Miss. 2008).

Where summary judgment was granted in favor of a medical center based upon a wrongful death beneficiary's filing of his complaint only 41 days after he served the medical center with his notice of claim, the reviewing court rejected the argument that dismissal with prejudice was improper absent egregious circumstances warranting such a harsh sanction. While such a rule applied to the dismissal of medical malpractice actions for failure to comply with the 60-day notice provision of Miss. Code Ann. § 15-1-36(15), this case was governed by the Mississippi Tort Claims Act (MTCA), and the court was bound to adhere to the supreme court's precedent interpreting it. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 652 (Miss. Ct. App. 2008), reversed by, remanded by 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Estate's doctor's affidavit did not allege any negligent conduct by the nursing home or its manager within one year of the notice of the estate's wrongful death claim; there was no genuine issue of material fact regarding whether the doctor raised a timely allegation of negligence.

Estate of Fedrick v. Quorum Health Res., Inc., — So. 2d —, 2008 Miss. App. LEXIS 672 (Miss. Ct. App. Nov. 4, 2008), opinion withdrawn by, substituted opinion at 45 So. 3d 667, 2009 Miss. App. LEXIS 926 (Miss. Ct. App. 2009), reversed by, remanded by 45 So. 3d 641, 2010 Miss. LEXIS 363 (Miss. 2010).

Mississippi Supreme Court's 2006 decision requiring strict compliance with the Mississippi Tort Claims Act's 90-day notice requirement had to be applied retroactively to a case pending at the time of the 2006 decision because the supreme court did not specifically state that its 2006 holding applied prospectively only. *Stuart v. Univ. of Miss. Med. Ctr.*, — So. 2d —, 2008 Miss. App. LEXIS 379 (Miss. Ct. App. June 24, 2008), opinion withdrawn by, substituted opinion at 21 So. 3d 652, 2008 Miss. App. LEXIS 774 (Miss. Ct. App. 2008).

Patient's medical malpractice case against a regional medical center was properly dismissed where the patient failed to strictly comply with the notice provisions of Miss. Code Ann. § 11-46-11(1). The patient filed his notice of claim with the center and then filed suit less than a week later, although the patient should have waited 90 days before filing suit. *Brown v. Southwest Miss. Reg'l Med. Ctr.*, 989 So. 2d 933 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 434 (Miss. 2008).

Patient's medical malpractice suit against a medical center was properly dismissed with prejudice because the patient failed to timely file suit within the one-year statute of limitations. *Johnson v. Rao*, 952 So. 2d 151 (Miss. 2007).

Patient's medical malpractice and wrongful death action against the Mississippi Department of Health (MDH) was time-barred under Miss. Code Ann. § 11-46-11(3) because the alleged improper prenatal care occurred no later than August 6, 1999, the last date the patient was treated at the clinic, the statute of limitations expired no later than August 6, 2000, and MDH did not receive notice of claim until October 24, 2000. *Pounds v. Miss. Dep't of Health*, 946 So. 2d 413 (Miss. Ct. App. 2006).

Record was clear that the patient's complaint against the hospital was filed fifty-

five days after the accident occurred, and the hospital was served four days later; therefore, even though no written notice was contained in the record, the patient clearly did not wait the statutory ninety days under Miss. Code Ann. § 11-46-11(1) before commencing the action against the hospital. *South Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252 (Miss. 2006).

Pursuant to Miss. Code Ann. § 11-46-11(3), a resident's negligence complaint against the county was timely; he filed his complaint on January 16, 2002, and assuming that he gave notice on August 7, 2000, the statute of limitations was tolled for 120 days or until December 5, 2000; after the tolling period ended, the one-year statute commenced running, and the deadline for filing was March 5, 2002. *Farmer v. Bolivar County*, 910 So. 2d 671 (Miss. Ct. App. 2005).

Dismissal of the individual's action against the city, fire department, fire department employee, and municipal services company after she was injured when the employee backed a fire truck into the individual's car was appropriate pursuant to Miss. Code Ann. § 11-46-11 since her complaint was filed beyond the one-year statute of limitations and she did not establish that the company's conduct was fraudulent, or that the company prevented her from filing her complaint on time. *Patrick v. Shields*, 912 So. 2d 1114 (Miss. Ct. App. 2005).

County board of supervisors and engineers were not entitled to dismissal of landowners' claims for damages allegedly sustained as a result of the board's and engineers' negligence in designing, approving, and constructing a subdivision that flooded, on the ground that the claims were barred by the one-year statute of limitations in Miss. Code Ann. § 11-46-11(3), because the statute of limitations began to run when the subdivision flooded or the landowners discovered that the flooding resulted from the design of the subdivision and the landowners' notices of claim, which tolled the statute of limitations, was filed within a year of both. *Scheinblum v. Lauderdale County Bd. of Supervisors*, 350 F. Supp. 2d 743 (S.D. Miss. 2004).

Trial court properly granted summary judgment in favor of county hospital



where an individual did not file suit against the hospital until more than two years after tripping on its sidewalk; the hospital's contract with a private management company to run the hospital did not exempt it from the Mississippi Tort Claims Act. *Allstadt v. Baptist Mem. Hosp.*, — So. 2d —, 2004 Miss. App. LEXIS 847 (Miss. Ct. App. Aug. 24, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. *Davis v. Hoss*, 869 So. 2d 397 (Miss. 2004).

District court did not err in dismissing a claim filed against a county under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the claim was filed after the one-year statute of limitations had expired; an injured party did not receive extra time to file the claim under Miss. Code Ann. § 11-46-11(3) after the time period had run because both tolling periods had run prior to the expiration of the one-year period. *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003).

Professor did not timely file her claim under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. where the professor knew of her claim when or soon after she received the May 1999 notice that her contract would not be renewed; at no time in the proceedings did the professor allege that she had failed to realize the connection she presently claimed between her whistleblowing and the refusal to renew her contract. *Black v. Ansah*, 876 So. 2d 395 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Victim's one-year window under Miss. Code Ann. § 11-46-11(3) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., to file a notice of claim against the State for damages related to

the victim's rape by a parolee did not begin to run until the day the victim was raped, and the victim's notice of claim and complaint were timely filed, although the court ultimately found the State immune from liability under Miss. Code Ann. § 11-46-9(1). *Connell v. State*, 841 So. 2d 1127 (Miss. 2003).

Although the tort claims act allowed 90 days after the running of the one-year statute of limitations for filing of a claim, a widow's claim against the county for the death of her husband was time barred because she filed it 94 days after the statute had run. *Marshall v. Warren County Bd. of Supvrs.*, 831 So. 2d 1211 (Miss. Ct. App. 2002).

Discovery rule applied to the Mississippi Tort Claim Act's statute of limitations; the circuit court erred in holding that the parents' claim against the hospital was untimely filed because it calculated the time in which to file the complaint by using the old 95-day period for filing a notice of claim instead of the amendment's 120-day period. *Moore v. Mem'l Hosp.*, 825 So. 2d 658 (Miss. 2002).

Trial court did not err in granting summary judgment to a hospital that was a governmental entity under Miss. Code Ann. § 11-46-11(1), where the parents on behalf of their minor child failed to file their suit for negligent care and treatment against the hospital within the one-year limitation period under the Mississippi Tort Claims Act at Miss. Code Ann. § 11-46-11(3). *Moore v. Mem'l Hosp.*, — So. 2d —, 2002 Miss. LEXIS 134 (Miss. Apr. 11, 2002), opinion withdrawn by, substituted opinion at 825 So. 2d 658, 2002 Miss. LEXIS 279 (Miss. 2002).

Amendment to statute was retroactive as claims pending at the time of the statute's amendment and not barred by its previous limitation gave them the benefit of the longer limitations period. *Hollingsworth v. City of Laurel*, 808 So. 2d 950 (Miss. 2002).

Mother's suit against the chancery court clerk for failure to timely disburse funds from another suit was properly dismissed where the complaint was barred by the one-year statute of limitations of Miss. Code Ann. § 11-46-11(3) on tort claims brought against public officials.



The claim accrued when the court clerk received the funds in late 1997, to reimburse the mother for medical bills she paid arising out of her daughter's automobile accident, but the mother's suit was not filed until December 6, 1999. *Young v. Benson*, 828 So. 2d 821 (Miss. Ct. App. 2002), cert. denied, 829 So. 2d 1245 (Miss. 2002).

The trial court erred when it dismissed a personal injury action against a city on the ground that the plaintiff did not wait 90 days after filing his notice of claim to commence the action; the appropriate remedy would have been for the court to issue an order staying the lawsuit until such time as the city had been given the benefit of the waiting period. *Jackson v. City of Wiggins*, 760 So. 2d 694 (Miss. 2000).

A notice of claim that included a settlement offer that would expire in 20 days did not violate the 90 day waiting period for filing an action. *Thornburg v. Magnolia Regional Health Ctr.*, 741 So. 2d 220 (Miss. 1999).

Although a party must wait 90 days from the providing of notice to file a lawsuit, the dismissal of a lawsuit based on a failure to comply with the waiting period is a disproportionate remedy; instead, a governmental entity should request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period, and the governmental entity should be permitted to recover any expenses, including court costs and attorney's fees, which it incurs in obtaining a stay of the proceedings. *City of Pascagoula v. Tomlinson*, 741 So. 2d 224 (Miss. 1999).

#### 10. Discovery rule.

Circuit court erred in granting a hospital's motion to dismiss a daughter's wrongful-death action on the ground that the one-year statute of limitations, Miss. Code Ann. § 11-46-11(3) barred her claims because the wrongful-death claims were timely brought, and the discovery rule applied to her survival-type claims; however, it could not be determined whether the daughter's survival-type claims were timely brought because the record did not indicate whether, before the father died, he "discovered" the act or

omission by the hospital that allegedly caused his injuries, and whether he did or not, and whether the daughter's survival-type claims were timely brought, had to be decided by the fact-finder. *Saul ex rel. All Wrongful Death Heirs of Cook v. South Central Reg'l Med. Ctr., Inc.*, 25 So. 3d 1037 (Miss. 2010).

Order granting a medical center's motion for summary judgment in a patient's medical malpractice action on the ground that the patient filed her complaint outside the limitations period set forth in the Mississippi Tort Claims Act's (MTCA), Miss. Code Ann. § 11-46-11, was reversed, and the case was remanded for a determination of when the patient, by exercise of reasonable diligence, did or should have known of her alleged injury and the acts or omissions because in its order granting the motion for summary judgment, the trial court specifically relied upon a supreme court decision and correctly determined that it applied retroactively to the patient's claim; however, since a second supreme court decision revived the discovery rule and mandated that the MTCA's one-year statute of limitations began to run when the patient knew, or by exercise of reasonable diligence should know, of both the damage or injury, the operative question was whether statutory notice was provided within a year next following the earliest date the patient, by exercise of reasonable diligence, should have known of the injury and the acts or omission that caused them. *Weary v. Blake*, 17 So. 3d 635 (Miss. Ct. App. 2009).

Trial court erred in ruling that a widow's claims for wrongful death/medical malpractice were barred based on the statute of limitations because a widow could not have known both the damage or injury and the act or omission until at least the date the decedent vomited blood and died later that day. *Naomi Ruth McDonald v. Mem'l Hosp.*, 8 So. 3d 175 (Miss. 2009).

By reenacting Miss. Code Ann. § 11-46-11(3) without addressing or countermanding the Mississippi Supreme Court's decision in *Barnes*, the Legislature acquiesced and tacitly approved and incorporated into the statute a discovery rule as announced in *Barnes*. Pursuant to the doc-

trine of stare decisis, the discovery rule was recognized as to § 11-46-11(3). *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008).

Summary judgment was improperly granted to several health care providers in a medical negligence case because the limitations period in Miss. Code Ann. § 11-46-11 did not bar the claim; a discovery rule was recognized for claims filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23. *Caves v. Yarbrough*, — So. 2d —, 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007), opinion withdrawn by, substituted opinion at, remanded by 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

One-year statute of limitations under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, begins to run when a claimant knows, or by exercise of reasonable diligence should know, of both the damage or injury, and the act or omission which proximately caused it. The finder of fact must decide when those requirements are satisfied. *Caves v. Yarbrough*, — So. 2d —, 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007), opinion withdrawn by, substituted opinion at, remanded by 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

By reenacting Miss. Code Ann. § 11-46-11(3) without addressing or countermanding the Mississippi Supreme Court's decision in *Barnes v. Singing River Hosp.*, 733 So. 2d 199 (Miss. 1999), the Mississippi Legislature has acquiesced and tacitly approved and incorporated into § 11-46-11(3) a discovery rule as announced in *Barnes*. Pursuant to the doctrine of stare decisis, the Mississippi Supreme Court shall continue to recognize a discovery rule with respect to § 11-46-11(3). *Caves v. Yarbrough*, — So. 2d —, 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007), opinion withdrawn by, substituted opinion at, remanded by 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Supreme Court of Kansas overrules *Barnes v. Singing River Hosp.*, 733 So. 2d 199, 205 (Miss. 1999), and its progeny, insofar as they judicially amended the statutes of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 et seq., by supplying a discovery rule tolling the MTCA's one-year statute of repose.

*Caves v. Yarbrough*, — So. 2d —, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007).

Husband's medical malpractice and wrongful death claim against the hospital was not barred under Miss. Code Ann. § 11-46-11(3) where there was sufficient evidence to show that the husband was reasonably diligent in investigating the cause of his wife's death; there were numerous requests made for medical records and the husband submitted a notice of claim and filed suit shortly after the expert witness determined that the records indicated wrongful conduct; the husband could not have known of the alleged wrongdoing until he had access to the necessary medical records. *Forrest County General Hosp. v. Kelley*, 914 So. 2d 242 (Miss. Ct. App. 2005).

When the patient discovered that the patient's child had died in the womb, the patient should have known that there was some causal connection between the death and the doctor's treatment. Moreover, even if the patient did not recognize the causal connection at the time of death, there was absolutely no indication that the patient made any attempts to determine the cause of the patient's child's death until after one year had elapsed; thus, there was no issue of fact with respect to whether the discovery rule tolled the statute of limitations, and accordingly, the state hospital and its doctor were entitled to summary judgment. *Wright v. Quesnel*, 876 So. 2d 362 (Miss. 2004).

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper where the general hospital was entitled to venue in the county in which the principal offices were located; further, the decedent's heirs were not reasonably diligent in investigating the cause of her injuries, the discovery rule did not apply in the case, and the claims against the medical center and treating physicians were, therefore, time-barred, Miss. Code Ann. § 11-46-11 (Rev. 2002). *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997 (Miss. 2004).

Libel claims against a county filed more than one year after the last publication of



allegedly defamatory statements by a coroner about the cause of death of a convalescent center patient were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred because the discovery rule did not apply to libel actions under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3). *River Oaks Convalescent Ctr., Inc. v. Coahoma County*, 280 F. Supp. 2d 565 (N.D. Miss. 2003).

Trial court erred in dismissing the money damages portion of the landowner's complaint against the county as time barred; the second flood on the landowner's property occurred just six months before the third flood and his learning of bridge alterations by the county, due to which his property was damaged; within six months after the third flood, the landowner learned of the alleged cause, and six months was a reasonable period in which to discover the alleged cause of the harm. *Punzo v. Jackson County*, 861 So. 2d 340 (Miss. 2003).

Action for wrongful death should not be given the benefit of the discovery rule; thus, a decedent's heirs' medical malpractice action against a hospital and three physicians was time-barred because it was brought over two years after the decedent's death, which was beyond the one-year statute of limitations of the Mississippi Tort Claims Act. *Wayne Gen. Hosp. v. Hayes*, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Although the discovery rule applied to claims filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, involving latent injuries, it did not operate to toll the statute of limitations because an injured party was aware of an injury after a fall down a staircase, despite the fact that the full extent of the injuries was not apparent. *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003).

The discovery rule does not apply to toll the accrual of a libel claim and to prevent the running of the one year statute of limitations under the statute. *Ellisville State Sch. v. Merrill*, 732 So. 2d 198 (Miss. 1999).

The discovery rule did not apply to an action for burns sustained by a quadriplegic when hot packs were placed on the backs of his legs during physical therapy treatments, notwithstanding his contention that he was unaware of the cause of action until he received correspondence from a physician stating the cause of the injuries; the plaintiff knew of his injuries at the time they occurred, since his burns were treated that day and for months afterwards, and he threatened legal action the next day. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204 (Miss. 1999).

The discovery rule applies to Tort Claims Act actions involving latent injuries. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204 (Miss. 1999).

Despite the absence of specific discovery language in this section, the discovery rule applies to subsection (3) of this section in actions involving latent injuries. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999).

The discovery rule did not apply to an action in which the plaintiff alleged that the volunteer director/emergency medical technician for a city ambulance service negligently contributed to the death of her husband since the death of her husband was not a latent injury. *Chamberlin v. City of Hernando*, 716 So. 2d 596 (Miss. 1998).

#### **11. Estoppel to assert statute of limitations.**

County was not estopped from asserting the statute of limitations defense in a case involving a claim filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the statements of a county employee regarding the payment of medical bills were not fraudulent since an injured party failed to submit any valid medical claims; therefore, a trial court did not err in dismissing the case for failing to state a cause of action. *Williams v. Clay County*, 861 So. 2d 953 (Miss. 2003).

The defendant was not estopped from asserting the statute of limitations since, although settlement negotiations were ongoing between the parties, there was never any representation by the defendant that the statute of limitations was tolled, and the plaintiff did not allege that



the defendant led him to believe that he need not comply with the statute. *Mississippi Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662 (Miss. 1999).

The defendant town and its insurer were estopped from asserting that the plaintiff failed to strictly comply with the notice of claim requirements where (1) the notice of claim form did not provide a blank for liquidated damages other than for an estimate for property damage; (2) the completed form disclosed the date and time of the accident, the nature/cause of the accident, persons/witnesses involved, and the exact location of the accident; (3) the insurer was given a medical release to obtain the plaintiff's medical records and did obtain those records in a timely fashion; (4) the plaintiff and her attorney cooperated fully with the city and its insurer throughout the investigation and settlement discussions; (5) the plaintiff and her attorney were contacted directly by the insurer and dealt almost exclusively with the insurer; and (6) the town and its insurer only asserted the plaintiff's failure to strictly comply after settlement negotiations broke down approximately one year and 90 days after the fall and after the plaintiff filed suit and discovery was completed. *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

## 12. Tolling of limitation period.

Where a court declined to exercise supplemental jurisdiction over the Mississippi Tort Claims Act (MTCA) claims of an arrestee and her children after their federal 42 U.S.C.S. § 1983 claims were dismissed with prejudice, those MTCA claims were dismissed without prejudice to refiling in state court, and the limitations period in Miss. Code Ann. § 11-46-11 was deemed tolled during the pendency of the case in federal court. *Smith v. Turner*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 101175 (N.D. Miss. Dec. 15, 2008).

Where plaintiff, the deceased patient's daughter, brought a medical malpractice suit against the University of Mississippi Medical Center, the statute of limitations for the wrongful-death claim began to run on December 19, 2004 when the patient died; since plaintiff's notice of claim letter was received on November 28, 2005, it was timely given within the one-year of

the date of death as required by Miss. Code Ann. § 11-46-11(3). The statute of limitations was tolled for ninety-five days from the date of the notice, and plaintiff timely brought suit on February 21, 2006. *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837 (Miss. 2008).

Supreme Court of Mississippi held that the March 2002 amendment to Miss. Code Ann. § 11-46-11(4) was unconstitutional to the extent that it made the savings clause for minors' claims under the Miss. Tort Claims Act applicable to all claims since April 1, 1993, as doing so could revive claims that previously been barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337 (Miss. 2004).

Pursuant to Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, and Miss. Code Ann. § 15-1-1, Miss. Code Ann. § 15-1-69 did not apply to the MTCA, and it is worth noting that non-tort claims act cases are not controlling as to the applicability of § 15-1-69, and because the MTCA has a one-year statute of limitation that is significantly shorter than the catchall three-year statute of limitation, the one-year statute of limitation found in Miss. Code Ann. § 11-46-11 is controlling; thus, the court rejected the parents' claim that Miss. Code Ann. § 15-1-69 applied to the MTCA to toll the statute of limitations under Miss. Code Ann. § 11-46-11. *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2003).

Injured party's suit against a school district was timely filed; the injured party gave notice of her claim to the district within the one-year statutory time period, and she filed her suit within the subsequent 90-day period available for filing suit. *Roberts v. New Albany Separate Sch. Dist.*, 813 So. 2d 729 (Miss. 2002).

Statutory amendments were prospective only and not retroactive; where plaintiff filed a suit under the amended statute, the claim could not be applied retroactively and the pre-amendment statute dictated the outcome of the case. *Roberts v. New Albany Separate Sch. Dist.*, — So. 2d —, 2001 Miss. LEXIS 230 (Miss. Sept. 13, 2001), opinion withdrawn by, substituted opinion at 813 So. 2d 729, 2002 Miss. LEXIS 131 (Miss. 2002).

The one (1) year statute of limitations of the Mississippi Tort Claims Act set forth in this section is not tolled by the minors' savings clause in § 15-1-59. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144 (Miss. 1999).

The minor savings clause in § 15-1-59 only applies to periods of limitation within that chapter and not to the Mississippi Tort Claims Act, and plaintiff failed to file her claim under the MTCA within the prescribed limitations period. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144 (Miss. 1999).

The Mississippi Tort Claims Act's one year statute of limitations expressed in this section is not tolled by the "minor savings clause" of § 15-1-59 until the minor achieves majority. *Marcum v. Hancock County Sch. Dist.*, 741 So. 2d 234 (Miss. 1999).

The statute of limitations was not tolled by fraud with regard to a medical malpractice claim where (1) the first request for the plaintiff's medical records was made on November 13, 1995, (2) when he did not receive the record by January 29, 1996, plaintiff's attorney contacted the hospital and was informed of the fee for copying the file, and (3) after plaintiff's attorney paid the copying fee, the medical records were delivered sometime in mid-February of 1996. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999).

### 13. Minor Savings Clause.

Minor savings clause added to the Mississippi Tort Claims Act in 2000 did not apply retroactively to a medical negligence claim that accrued in 1997. *Blailock v. Hubbs*, 919 So. 2d 126 (Miss. 2005).

### 14.. Intervention.

In an action arising out of an automobile accident in which five persons and five others were injured, it was error for the court to permit the representatives of two of the deceased persons to intervene in an action filed against the defendant city where the motion for intervention was not filed until after the expiration of the notice of claim and statute of limitations provisions of this section. *City of Tupelo v. Martin*, 747 So. 2d 822 (Miss. 1999).

### 15. Illustrative cases.

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying

school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired under Miss. Code Ann. § 11-46-11(3), and the complaint was subject to dismissal with prejudice. *Copiah County Sch. Dist. v. Buckner*, 61 So. 3d 162 (Miss. 2011).

Personal-injury action did not need to be remanded for a determination of the mother's competency under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because the son did not request a determination of unsoundness of mind from the trial court and issues not raised in the trial court were barred from consideration at the appellate level. Further, because the son brought the action on behalf of his mother and she was not the plaintiff in the case, her competence to assert her rights in the lawsuit was not at issue, Miss. Code Ann. § 11-46-11(4). *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941 (Miss. 2011).

Driver and center did not waive their defenses under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Although there was an approximately 11-month delay in the case, during the delay no party took any action to advance the litigation and during the delay, the center and driver pursued their affirmative defenses by informing the mother's son of their intent to seek a hearing on the motion to dismiss, Miss. Code Ann. § 11-46-11(3). *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941 (Miss. 2011).

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contractual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., that all ad-



ministrative remedies be exhausted prior to filing suit. *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907 (Miss. 2011).

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her 10-month-old son. *Gorton v. Rance*, 52 So. 3d 351 (Miss. 2011).

Trial court erred by denying the community hospital's motion for summary judgment because: (1) the community hospital was a political subdivision of the State under Miss. Code Ann. § 11-46-1(i), and therefore the son was subject to the notice requirements and statutes of limitations of Miss. Code Ann. § 11-46-11(1); (2) under § 11-46-11(1), proper service of notice to the hospital would be on the CEO of the hospital, and not the county; (3) the trial court erred by concluding that substantial compliance with § 11-46-11(1) in regard to whom the notice was sent was erroneous; and (4) because the son never filed the statutorily required notice with the hospital's CEO, the hospital's sovereign immunity from suit was intact. *Tallahatchie Gen. Hosp. v. Howe*, 49 So. 3d 86 (Miss. 2010).

*Jackson v. Lumpkin*, 697 So. 2d 1179, 1181 (Miss. 1997) and *Carr v. Town of Shubuta*, 733 So. 2d 261, 265 (Miss. 1999) and their progeny are overruled to the extent that these cases characterize the notice requirements set out in the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-11 (Rev. 2002), as jurisdictional requirements because the notice requirements in the MTCA are substantive requirements, which are no more or less important than a statute of limitations; the notice requirements in the MTCA are not jurisdictional, but they are nonjurisdictional and, therefore, waivable. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544 (Miss. 2009).

Medical center's motion for summary judgment should have been denied in a beneficiary's wrongful-death action because the medical center waived its objection to the beneficiary's noncompliance with the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(1), when it participated in the lawsuit and failed to raise the beneficiary's noncompliance with the ninety-day-notice requirement until two-and-a-half years after the suit was filed; at no point throughout the trial and appellate processes did the medical center provide an explanation for why it waited two-and-a-half years from the filing of the complaint to actually pursue a defense that was available to it from the moment the beneficiary filed the complaint, and waiting for that length of time and doing nothing to prevent the case from proceeding was unreasonable and inexcusable. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544 (Miss. 2009).

Where a wrongful death beneficiary served a notice of claim upon a medical center and filed a wrongful death claim 41 days later, the medical center was entitled to summary judgment because the complaint was filed in violation of the 90-day notice requirement of Miss. Code Ann. § 11-46-11(1), which courts were bound to strictly enforce. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 652 (Miss. Ct. App. 2008), reversed by, remanded by 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Where the deceased patient's daughter brought a medical malpractice suit against the University of Mississippi Medical Center after it was discovered that a sponge was left in the patient's body during a surgery performed on September 1, 2004, plaintiff sent a notice-of-claim letter to the medical center on November 21, 2005 and filed a medical negligence suit on February 21, 2006. The Supreme Court of Mississippi held that plaintiff's survival claim based on the negligent act of leaving the sponge in the patient accrued more than one year prior to providing notice; thus, that claim was barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837 (Miss. 2008).

In a medical malpractice case, a hospital patient substantially complied with Miss. Code Ann. § 11-46-11(2)'s require-



ment that she list all persons known to be involved by stating multiple hospital employees caused her injuries. If the identity of these persons was not known, the patient, who was unconscious a majority of her time at the hospital, was not required to provide their names. *Lee v. Mem'l Hosp.*, 999 So. 2d 1263 (Miss. 2008).

Ninety-day notice requirement of Miss. Code Ann. § 11-46-11 was to be strictly enforced by the courts; where plaintiffs in an automobile negligence action against a governmental agency and its employee failed to strictly comply with the 90-day pre-suit notice requirement of Miss. Code Ann. § 11-46-11(1) and filed their complaint only seven days after sending their notice letter, the circuit court never obtained jurisdiction over their complaint and therefore erred in denying the government agency's motion to dismiss. *Bunton v. King*, 995 So. 2d 694 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. To be in compliance with the MTCA, plaintiff would have had to sue the partnership, joining the doctor under Miss. Code Ann. § 11-46-7(2) in his representative capacity only, and would have been required to provide ninety-day notice pursuant to Miss. Code Ann. § 11-46-11(1). *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008).

Wife's medical malpractice action against a hospital and a physician for her husband's death was untimely under Miss. Code Ann. § 11-46-11(3), and therefore the trial court properly granted the hospital and physician summary judgment, where her husband died on April 17, 2000, and her notice of claim was not provided to the hospital until February 13, 2002, and was never provided to the physician. *Caves v. Yarbrough*, — So. 2d —, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007).

Where plaintiff fireman filed claims against defendants, a city, its mayor, and an alderman for wrongful demotion, because the fireman failed to provide the pre litigation notice as required by Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, a wrongful demotion tort claim was barred. *Montgomery v. Mississippi*, 498 F. Supp. 2d 892 (S.D. Miss. 2007).

Appellate court reversed the denial of a university medical center's motion for summary judgment because plaintiff failed to comply with the ninety-day notice requirement under Miss. Code Ann. § 11-46-11(1). Judgment was entered for the medical center. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815 (Miss. 2006), writ of certiorari denied by 549 U.S. 995, 127 S. Ct. 549, 166 L. Ed. 2d 369, 2006 U.S. LEXIS 8061, 75 U.S.L.W. 3233 (2006).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625 (Miss. Ct. App. 2005).

Government hospital was properly dismissed from a medical negligence suit; the parents of a child with cerebral palsy did not sue the hospital within the one-year limitation set forth in the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3). The discovery rule did not apply, because the child's injuries were apparent at birth. *Blailock v. Hubbs*, 919 So. 2d 126 (Miss. 2005).

Even if the language in the contract had been convincing enough to create a private entity and the county hospital had been deemed private, the injured person's claim remained one of premises liability. The agreement did not alter the fact that the county remained the owner of the physical property that comprised the hospital, and that includes the sidewalk outside the hospital where the injured person tripped and fell; thus, the trial court did

not err in granting summary judgment in favor of the county hospital due to the injured person's claim being filed outside the one-year statute of limitations under Miss. Code Ann. Section 11-46-11(3). *Allstadt v. Baptist Mem'l Hosp.*, 893 So. 2d 1083 (Miss. Ct. App. 2005), appeal dismissed by 2005 Miss. LEXIS 767 (Miss. Oct. 20, 2005).

Trial court erred in denying the medical center's summary judgment claim. The statute of limitations barred the minor's claim in 1996 and Miss. Code Ann. 11-46-11(4) unconstitutional to the extent that it revived claims that had previously been barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337 (Miss. 2004).

Even though a man, who qualified as an "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that he was a county employee, because the individual failed to establish that the county withheld information regarding the employee's work status, did not show that the county had provided the individual with misleading or inaccurate information, and did not exercise due diligence in determining the true parties to the lawsuit or in determining the man's work status, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the employee, man on the grounds that the individual had failed to substantially comply with the notice requirements of the MTCA, and, that therefore, the statute of limitations had expired. *Ray v. Keith*, 859 So. 2d 995 (Miss. 2003).

Trial court did not err when, pursuant to Miss. R. Civ. P. 12(b)(6), a patient's complaint against a state hospital and physicians for failure to comply with Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act; the court found that (1) the record did not reflect that the patient had complied with the notice of claim requirements under § 11-46-11(3), and (2) the patient waited for over two years to file his action, which fell outside of the limitations period. *Southern v. Miss. State Hosp.*, 853 So. 2d 1212 (Miss. 2003).

Because a citizen failed to file a notice of claim against the city pursuant to Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, and because a document agreed to between the citizen and the city four years earlier did not serve as proper notice, the citizen failed to comply with the Act and the action was properly dismissed under Miss. R. Civ. P. 12(b)(6). *Black v. City of Tupelo*, 853 So. 2d 1221 (Miss. 2003).

Because parents waited over one year after their son's death to file an action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, against the State and state agencies, and nothing operated to toll the statute of limitations under Miss. Code Ann. § 11-46-11, the action was time-barred and properly dismissed pursuant to Miss. R. Civ. P. 12(b)(6). *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2003).

Patient in medical malpractice action who underwent surgery, was aware the next day that she had suffered a stroke, and two years after the surgery hand-delivered a letter to two of her treating physicians, as well as filed her initial complaint against a third physician was time-barred from bringing her medical malpractice action. *Gilchrist v. Veach*, 807 So. 2d 485 (Miss. Ct. App. 2002).

A notice of claim was sufficient with regard to a constable, notwithstanding that it misidentified the county for which he was a constable, where the notice of claim was delivered to the county administrator for the county that employed the constable, the constable had been employed by the county for several years, and it was clear that the county administrator knew of the existence of the constable. *Williams v. Toliver*, 759 So. 2d 1195 (Miss. 2000).

The trial court was correct in determining that two residents were employees of a state university hospital and that the plaintiff's failure to comply with the resulted in their dismissal since both doctors were student doctors where one was an intern in his first year of residency and the other was a resident physician in training there; however, the dismissal of a third doctor was premature and further discovery was required to determine



whether he was an employee of the hospital or an independent contractor. *Owens v. Thomae*, 759 So. 2d 1117 (Miss. 1999).

The plaintiff substantially complied with the notice requirements of this section, notwithstanding that the notice of claim was not personally delivered or sent by registered or certified mail, since the defendant school district was not prejudiced by the plaintiff's failure to send her letter in the manner prescribed by statute; the superintendent of the school district was aware of the claim and the matter was already in the hands of the school district's insurance company. *Overstreet v. George County Sch. Dist.*, 741 So. 2d 965 (Miss. Ct. App. 1999).

Despite the fact that the plaintiff's notice of claim letter was sent to the wrong person and sent via an improper route, she substantially satisfied the notice requirements of this section since she made a reasonable, good faith effort to comply with this section's requirements, the defendant received actual notice of her

claim, and the defendant suffered no actual prejudice as a result of the plaintiff's failure to comply with the statute. *McNair v. University of Miss. Med. Ctr.*, 742 So. 2d 1078 (Miss. 1999).

Where the plaintiff served the mayor of the defendant city with a complaint on April 2, 1997 and with a notice of claim on November 12, 1997 and where the complaint and the notice of claim taken together as a whole outlined each and every aspect required by the statute, she substantially complied with the notice requirement. *Jackson v. City of Booneville*, 738 So. 2d 1241 (Miss. 1999).

The court refused to lift statutory immunity in medical malpractice cases against state hospitals, notwithstanding the argument that hospitals should be prevented from claiming immunity merely because they're owned by a governmental entity unless acting in some governmental capacity. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999).

### ATTORNEY GENERAL OPINIONS

The president of the board of supervisors is the chief executive officer for the county for the purpose of giving notice of

claim under the statute. *Creekmore*, August 21, 1998, A.G. Op. #98-0478.

### RESEARCH REFERENCES

**ALR.** Insufficiency of notice of claim against municipality as regards statement of place where accident occurred. 69 A.L.R.4th 484.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Person or entities upon whom notice of injury or claim against state or state agencies may or must be served. 45 A.L.R.5th 173.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

Sufficiency of notice of claim against local political entity as regards time when accident occurred. 57 A.L.R.5th 689.

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

Frasier III, A Review of Issues Presented by § 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations. 65 Miss L. J. 643, Spring 1996.

Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions, 76 Miss. L.J. 973, Spring, 2007.



## § 11-46-13. Jurisdiction; appeals; venue.

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

**SOURCES:** Laws, 1984, ch. 495, § 8; reenacted without change, Laws, 1985, ch. 474, § 7; Laws, 1987, ch. 483, § 7; Laws, 1992, ch. 491 § 1; Laws, 1993, ch. 476, § 10, eff from and after passage (approved April 1, 1993).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

## JUDICIAL DECISIONS

1. Applicability.
2. Venue.
3. Jury trial.

### 1. Applicability.

In a wrongful death action where the decedent died prior to the enactment of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-13 was not applicable because the statute did not contain plain and clearly expressed language that it was to be retroactive. *Boston v. Hartford Accident & Indem. Co.*, 822 So. 2d 239 (Miss. 2002).

### 2. Venue.

Miss. Code Ann. § 11-46-13 applied, where the city, a subdivision of the State of Mississippi, was a defendant and, therefore, § 11-46-13 was the controlling venue statute; because the city was wholly

situated in Lauderdale County, venue was only proper in Lauderdale County and not in Hinds County, and the suit should have been transferred. *United States Fid. & Guar. Co. v. Moss*, 873 So. 2d 76 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion

withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

In an action against the state and two counties to recover for the death of a prisoner who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and proper venue was the county in which the prisoner hanged himself. *Estate of Jones v. Quinn*, 716 So. 2d 624 (Miss. 1998).

### 3. Jury trial.

Where an appellate court determined that a deputy who assaulted an individual

in attempting to force the individual to sit for a casino security photograph, was acting for the casino, and not in his official capacity for the county, the deputy was not entitled to immunity and the individual was entitled to a jury trial. *Kirk v. Crump*, 886 So. 2d 741 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

There is no right to a jury trial under the Tort Claims Act. *Simpson v. City of Pickens*, 761 So. 2d 855 (Miss. 2000).

## RESEARCH REFERENCES

**Law Reviews.** The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

### § 11-46-15. Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award.

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars (\$50,000.00);

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00);

(c) For claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of Five Hundred Thousand Dollars (\$500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

**SOURCES:** Laws, 1984, ch. 495, § 9; reenacted without change, Laws, 1985, ch. 474, § 8; Laws, 1987, ch. 483, § 8; Laws, 1988, ch. 442, § 5; Laws, 1989, ch. 537, § 5; Laws, 1990, ch. 518, § 5; Laws, 1991, ch. 618, § 5; Laws, 1992, ch. 491 § 2, eff from and after passage (approved May 12, 1992).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

**Cross References** — Definition of “employee,” see § 11-46-1.

Waiver of immunity, see § 11-46-5.

Provisions relative to insurance coverage in excess of the maximum liability set forth in this section and waiver of such maximum, see § 11-46-17.

Limitations of liability provided herein also available to emergency 911 telephone service suppliers operating within state, see § 19-5-361.

## JUDICIAL DECISIONS

1. Interest.
2. Interpretation.
3. Joint liability.
3. Governmental immunity.
5. Determination of damages.

### 1. Interest.

In a medical malpractice case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., both parties agreed that pre-judgment interest was improperly awarded under Miss. Code Ann. § 11-46-15. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141 (Miss. 2007).

### 2. Interpretation.

Post-judgment interest over and above the statutory cap may be awarded against a governmental entity because such is not excluded under Miss. Code Ann. § 11-46-15(2). *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006).

A thorough review of Miss. Code Ann. § 1-3-33 and the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., revealed that there was no contrary intent manifested by the Legislature that meant that the MTCA should be interpreted only in the singular manner; Miss. Code Ann. § 11-46-15(1) was interpreted by using singular or plural language. *Miss. DOT v. Allred*, 928 So. 2d 152 (Miss. 2006).

This section does not bar the award of postjudgment interest against a govern-

mental entity. *City of Jackson v. Williamson*, 740 So. 2d 818 (Miss. 1999).

### 3. Joint liability.

In an action against a city and the plaintiff's underinsured motorist carrier arising from a motor vehicle accident involving a police officer, since the maximum amount recoverable from the defendant city was \$50,000, a judgment in excess of \$100,000 was reformed to provide that the insurance carrier was liable for its \$50,000 policy and that the city was liable for \$50,000. *City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000).

### 3. Governmental immunity.

A review of the agreement between the non-governmental entity and the community hospital indicated that the entity was an instrumentality of the nursing home. As an “instrumentality” of a community hospital, the entity was entitled to the protections, limitations, and immunities of the Mississippi Tort Claims Act. *Fedrick v. Quorum Health Res., Inc.*, 45 So. 3d 667 (Miss. Ct. App. 2009).

In plaintiff's 42 U.S.C.S. § 1983 suit, plaintiff's claims for punitive damages failed under Miss. Code Ann. § 11-46-15(2) and because the 42 U.S.C.S. § 1983 claims against the county failed as a matter of law. *Grosch v. Tunica County*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12736 (N.D. Miss. Feb. 4, 2008).



Medical center was an instrumentality of the community hospital as the hospital had nearly total interest in the income and losses of the medical center and majority control over the center's Executive Committee membership, which clearly qualified the hospital as an intermediary or agent through which certain functions of the hospital were accomplished; therefore, the medical center was an instrumentality of the hospital and as an instrumentality, the center was entitled to the protections, limitations and immunities of the Mississippi Tort Claims Act. *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So. 2d 1222 (Miss. 2006).

Mississippi is a single occurrence state where liability per occurrence is limited to a statutory amount or the policy limits for any excess coverage purchased to cover such claims; therefore the district court did not err in enjoining the driver to abandon further efforts to recover from appellees after \$50,000 was interpled into the court's registry. *Allred v. Yarborough*, 843 So. 2d 727 (Miss. 2003).

Miss. Code Ann. § 11-46-15, provides that no governmental body, or employee thereof, may be held liable for punitive damages in any action in the courts of the

State of Mississippi; thus, a resident's claims for punitive damages from a county were barred. *Madison v. Desoto County*, 822 So. 2d 306 (Miss. Ct. App. 2002).

#### 5. Determination of damages.

There was sufficient evidence to support a wrongful death judgment against a hospital under the Mississippi Tort Claims Act based on medical malpractice where an expert testified that the hospital failed to turn the patient, failed to properly treat a decubitus ulcer, and failed to make sure the patient had proper nutrition and hydration; moreover, the expert testified that sepsis from the ulcer was the cause of death, and considering the size of the wound and the amount of pain and suffering, a million dollar judgment was not outrageous. *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500 (Miss. 2007).

In a child's suit against the Mississippi DHS, the record failed to indicate how a trial court reached the figure of \$750,000 damage award; the trial judge found that DHS had breached duties towards the child, but there was no finding in the record as to what damages were attributable to which breach. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253 (Miss. Ct. App. 2007).

### ATTORNEY GENERAL OPINIONS

County boards of supervisors may, within limits prescribed by Section 11-46-15, settle claims for property damage and injuries sustained from accidents involving county owned and operated equipment without necessity for enactment of local and private legislation by Legislature. *Compretta*, Feb. 16, 1994, A.G. Op. #94-0058.

A private insurer should not be called upon to pay any judgment in excess of the amount established by Section 11-46-15, as no such judgment will survive the mandated judicial intervention. *Hardy*, February 16, 1996, A.G. Op. #96-0053.

The Pat Harrison Waterway District is immune from any liability exceeding the statutory maximum provided for by this section for negligent acts, although the question of whether ticket purchases may

create contractual liability that would not be limited by sovereign immunity remains open to future interpretation. *Matthews*, July 18, 1997, A.G. Op. #97-0391.

Provided the mandates of the Tort Claims Act have been met and upon the advice and consent of its insurance carrier, or administrator if self-insured, a county school board may settle valid claims for property damage and personal injury upon proper resolution spread on the minutes. *Adams*, Mar. 8, 2002, A.G. Op. #02-0087.

The Mississippi Military Department is authorized to purchase liability insurance to cover claims in excess of the amounts provided in the Tort Claims Act, as long as the purchase of such coverage is made in accordance with the provisions of the Act. *Majors*, Sept. 29, 2006, A.G. Op. 06-0484.

## RESEARCH REFERENCES

**Law Reviews.** 1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.      The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

**§ 11-46-16. Expired.**

Expired by operation of law, eff from and after July 1, 1993 as to the state, and from and after October 1, 1995 as to political subdivisions.

[Laws, 1990, ch. 518, § 6; Laws, 1992, ch. 491 § 7; Laws, 1992 Special Session, ch. 3, § 3, eff from and after passage (approved September 16, 1992).]

**Editor's Note** — Former § 11-46-16 pertained to authority of governmental entities to purchase liability insurance, and immunity from liability to the extent of such coverage.

This section expired pursuant to the terms of former subsection (4), which provided that "this section shall be of no force or effect from and after July 1, 1993, as to the state and from and after October 1, 1993, shall be of no force or effect as to political subdivisions."

**§ 11-46-17. Creation of Tort Claims Fund; liability insurance.**

(1) There is hereby created in the State Treasury a special fund to be known as the "Tort Claims Fund."

All such monies as the Department of Finance and Administration shall receive and collect under the provisions of subsection (2) of this section and all such funds as the Legislature may appropriate for use by the board in administering the provisions of this chapter shall be deposited in such fund. All monies in the fund may be expended by the board for any and all purposes for which the board is authorized to expend funds under the provisions of this chapter. All interest earned from the investment of monies in the fund shall be credited to the fund. Monies remaining in such fund at the end of a fiscal year shall not lapse into the State General Fund.

(2) From and after July 1, 1993, each governmental entity other than political subdivisions shall participate in a comprehensive plan of self-insurance and/or one or more policies of liability insurance administered by the Department of Finance and Administration. Such plan shall provide coverage to each of such governmental entities for every risk for which the board determines the respective governmental entities to be liable in the event of a claim or suit for injuries under the provisions of this chapter, including claims or suits for injuries from the use or operation of motor vehicles; provided, however, that the board may allow such plan to contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to governmental entities. In addition to the coverage authorized in the preceding sentence, the plan may provide coverage for liabilities outside the provisions of this chapter, including, but not limited to, liabilities arising from Sections 1983 through 1987 of Title 42 of the United States Code and

liabilities from actions brought in foreign jurisdictions, and the board shall establish limits of coverage for such liabilities. Each governmental entity participating in the plan shall make payments to the board in such amounts, times and manner determined by the board as the board deems necessary to provide sufficient funds to be available for payment by the board of such costs as it incurs in providing coverage for the governmental entity. Each governmental entity of the state other than the political subdivisions thereof participating in the plan procured by the board shall be issued by the board a certificate of coverage whose form and content shall be determined by the board but which shall have the effect of certifying that in the opinion of the board each of such governmental entities is adequately insured.

Prior to July 1, 1993, the Board of Trustees of State Institutions of Higher Learning may provide such liability coverage for each university, department, trustee, employee, volunteer, facility and activity as the board of trustees, in its discretion, shall determine advisable. If liability coverage, either through insurance policies or self-insurance retention is in effect, immunity from suit shall be waived only to the limit of liability established by such insurance or self-insurance program. From and after July 1, 1993, such liability coverage established by the board of trustees must conform to the provisions of this section and must receive approval from the board. Should the board reject such plan, the board of trustees shall participate in the liability program for state agencies established by the board.

(3) All political subdivisions shall, from and after October 1, 1993, obtain such policy or policies of insurance, establish such self-insurance reserves, or provide a combination of such insurance and reserves as necessary to cover all risks of claims and suits for which political subdivisions may be liable under this chapter; except any political subdivision shall not be required to obtain pollution liability insurance. However, this shall not limit any cause of action against such political subdivision relative to limits of liability under the Tort Claims Act. Such policy or policies of insurance or such self-insurance may contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to political subdivisions. All such plans of insurance and/or reserves shall be submitted for approval to the board. The board shall issue a certificate of coverage to each political subdivision whose plan of insurance and/or reserves it approves in the same manner as provided in subsection (2) of this section. Whenever any political subdivision fails to obtain the board's approval of any plan of insurance and/or reserves, the political subdivision shall act in accordance with the rules and regulations of the board and obtain a satisfactory plan of insurance and/or reserves to be approved by the board.

(4) Any governmental entity of the state may purchase liability insurance to cover claims in excess of the amounts provided for in Section 11-46-15 and may be sued by anyone in excess of the amounts provided for in Section 11-46-15 to the extent of such excess insurance carried; provided, however, that the immunity from suit above the amounts provided for in Section 11-46-15 shall be waived only to the extent of such excess liability insurance carried.



(5) Any two (2) or more political subdivisions are hereby authorized to enter into agreement and to contract between and among themselves for the purpose of pooling their liabilities as a group under this chapter. Such pooling agreements and contracts may provide for the purchase of one or more policies of liability insurance and/or the establishment of self-insurance reserves and shall be subject to approval by the board in the manner provided in subsections (2) and (3) of this section.

(6) The board shall have subrogation rights against a third party for amounts paid out of any plan of self-insurance administered by such board pursuant to this section in behalf of a governmental entity as a result of damages caused under circumstances creating a cause of action in favor of such governmental entity against a third party. The board shall deposit in the Tort Claims Fund all monies received in connection with the settlement or payment of any claim, including proceeds from the sale of salvage.

**SOURCES:** Laws, 1984, ch. 495; reenacted and amended, Laws, 1985, ch. 474, § 9; reenacted and amended, Laws, 1986, ch. 438, § 4; Laws, 1987, ch. 483, § 9; Laws, 1988, ch. 442, § 6; Laws, 1988, ch. 479, § 4; Laws, 1989, ch. 537, § 6; Laws, 1990, ch. 518, § 7; Laws, 1991, ch. 618, § 7; Laws, 1992, ch. 491 § 8; Laws, 1993, ch. 476, § 6; Laws, 1995, ch. 568, § 1; Laws, 1996, ch. 377, § 1; Laws, 1998, ch. 496, § 1, eff from and after passage (approved March 26, 1998).

**Editor's Note** — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.” \*

**Cross References** — Duty of government entity to indemnify and/or defend claim on behalf of employee where such entity has certificate of coverage issued under this section, see § 11-46-7.

Reduction of verdicts which, together with costs and fees, exceed \$500,000, see § 11-46-15.

Survey of political subdivisions that might be interested in a comprehensive plan liability insurance, see § 11-46-19.

Hiring of administrator for comprehensive plan of self-insurance and/or policies of liability insurance, see § 11-46-19.

Power and duty of Executive Director of Department of Finance and Administration to coordinate and administer liability plans authorized in this section, see § 27-104-31.

Liability insurance for community hospitals, see § 41-13-11.

**Federal Aspects** — Federal laws pertaining to actions for violations of certain laws and deprivation of civil rights, see 42 USCS §§ 1983-1987.

## JUDICIAL DECISIONS

1. In general.
2. Construction with other laws.
3. Waiver for excess liability.

### 1. In general.

Where plaintiff parent sued defendant school district in state court alleging her

child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584 (5th Cir. 2006).

The purchase of insurance by a school district under subsection (4) of this section does not limit the exclusions or exemptions enumerated in § 11-46-9. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136 (Miss. 1999).

The purchase of insurance waives sovereign immunity to extent of the policy. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31,

1999), subst. op., 754 So. 2d 1136 (Miss. 1999).

Mississippi Municipal Liability Plan of self-insurance, authorized by § 11-46-17(5), is not "insurance" within meaning of § 83-11-103(c)(i), which defines uninsured motor vehicle to include vehicle to which there is no bodily injury liability insurance. *Coleman v. American Mfrs. Mut. Ins. Co.*, 930 F. Supp. 255 (N.D. Miss. 1996).

## **2. Construction with other laws.**

The purchase of liability insurance by a governmental entity under this section does not does not limit the exclusions or exemptions enumerated in § 11-46-9. *Leslie v. City of Biloxi*, 758 So. 2d 430 (Miss. 2000).

## **3. Waiver for excess liability.**

Mississippi Municipality Liability Plan (MMLP) could not be liable to the individuals bringing tort claims for injuries, incurred in an auto accident with a city police officer, of up to the \$500,000 policy limits in the city's policy, where participation in the MMLP was considered to be participation in a risk-sharing pool and was not, under Miss. Code Ann. § 11-46-17(4), the same as obtaining liability insurance. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934 (Miss. 2003).

# **ATTORNEY GENERAL OPINIONS**

Mississippi Industries for the Blind is state agency and therefore is subject to Tort Claims Act. *Williams*, Jan. 24, 1994, A.G. Op. #93-0984.

Decision by state agency to discontinue excess insurance is an "administrative call". *Williams*, Jan. 24, 1994, A.G. Op. #93-0984.

The District Attorney may use bad check funds to purchase insurance covering his office for liability for such federal law claims not covered by the Tort Claims Fund. *Harkey*, April 27, 1995, A.G. Op. #95-0130.

Planning and development districts do not constitute political subdivisions for purposes of the Tort Claims Act. *Hardy*, Nov. 7, 1997, A.G. Op. #97-0701.

Municipalities may insure themselves only for claims for which they are liable; the police and fire protection exemption

under Section 11-46-9 specifically bars claims against municipalities and the city of Jackson may not gratuitously provide coverage. *Tedder*, March 13, 1998, A.G. Op. #98-0133.

A water supply district is required by subsection (2) to participate in a plan of self-insurance or to purchase liability insurance, both as administered by the Tort Claims Board. *Tohill*, Nov. 19, 1999, A.G. Op. #99-0621.

A water supply district has the authority to purchase excess liability insurance with a deductible per occurrence in the amount of the current statutory limitation of liability. *Tohill*, Nov. 19, 1999, A.G. Op. #99-0621.

A regional medical center, a public hospital owned by a county, is covered under the Tort Claims Act. *Brown*, Apr. 26, 2002, A.G. Op. #02-0211.

Members or employees of the Pat Harrison Waterway District acting in the course and scope of their employment in federal actions sounding in tort subject to the current liability cap provided by this section. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The Pat Harrison Waterway District may not purchase liability insurance to cover tort claims for amounts under the statutory cap, but may purchase excess liability policies to cover federal actions or other claims sounding in tort that exceed the liability cap. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The Northeast Mississippi Solid Waste Management Authority must provide coverage for the Authority and hence the Authority's Board of Commissioners pursuant to this section. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

Existing public liability coverage of the elected officials who are representatives of their particular bodies on the Board of Commissioners does not suffice for public official liability for the Northeast Missis-

sippi Solid Waste Management Authority. The Authority must provide coverage under the Tort Claims Act for the Authority and for those officials as Commissioners. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

The Northeast Mississippi Solid Waste Management Authority may not drop the required tort claims coverage for any of its commissioners. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

Where an "insurance" pool paid an amount to the claimant, and the claimant accepted that payment, and executed a release or waiver in favor of the city, once such a settlement was accepted, the claimant was barred from making any additional claim for damages. To preserve the right to pursue the full amount claimed, the claimant should have refused the settlement tendered by the pool. Thus, as there remains no further legal obligation, the city cannot now supplement the amount accepted by the claimant from the insurance pool in settlement of the claim. McLaurin, July 16, 2004, A.G. Op.04-0251.

## RESEARCH REFERENCES

**ALR.** Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 A.L.R.4th 998.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Duty of liability insurer to initiate settlement negotiations. 51 A.L.R.5th 701.

Requirement that multicoverage umbrella insurance policy offer uninsured-or underinsured-motorist coverage equal to liability limits under umbrella provisions. 52 A.L.R.5th 451.

### **§ 11-46-18. Mississippi Tort Claims Board; membership; payment of expenses; officers; meetings.**

(1) There is created a board which shall be known as the Mississippi Tort Claims Board. The board shall consist of seven (7) members as follows:

(a) The Governor, subject to the advice and consent of the Senate, shall appoint one (1) member who shall serve at the will and pleasure of the Governor and who shall serve as chairman of the board.

(b) The Director of the Department of Environmental Quality shall be a member of the board.

(c) The Commissioner of Insurance shall be a member of the board.

(d) The Director of the Department of Finance and Administration shall be a member of the board, shall serve as the executive director to the board, and shall be authorized to conduct the administrative affairs of the board.

(e) The Attorney General shall be a member of the board.



(f) The Commissioner of Public Safety shall be a member of the board.

(g) The State Treasurer shall be a member of the board.

(2) The member of the board appointed by the Governor shall receive per diem as provided by Section 25-3-69 and reimbursement of travel expenses as provided in Section 25-3-41 for expenses incurred in carrying out his duties as a member of the Mississippi Tort Claims Board.

(3) The board, by majority vote, shall determine the place and time of its meetings and shall spread the same on its minutes. A majority of the members shall constitute a quorum, and final action of the board shall require the affirmative vote of a majority of those present and voting. The board shall elect a vice chairman who shall preside in the absence or incapacity of the chairman and such other officers as it deems necessary and as established by its rules of order. Extraordinary meetings may be held upon call of the chairman or upon petition of any four (4) members of the board should the chairman refuse to call a meeting. The initial meeting of the board shall convene upon call of the chairman.

(4) The Lieutenant Governor may designate one (1) Senator and the Speaker of the House of Representatives may designate one (1) Representative to attend any meeting of the Tort Claims Board. The appointing authorities may designate alternate members from their respective houses to serve when the regular designees are unable to attend such meetings of the board. Such legislative designees shall have no jurisdiction or vote on any matter within the jurisdiction of the board. For attending meetings of the board, such legislators shall receive per diem and expenses which shall be paid from the contingent expense funds of their respective houses in the same amounts as provided for committee meetings when the Legislature is not in session; however, no per diem and expenses for attending meetings of the board will be paid while the Legislature is in session. No per diem and expenses will be paid, except for attending meetings of the board, without prior approval of the proper committee in their respective houses.

**SOURCES:** Laws, 1993, ch. 476, § 7; Laws, 1994, ch. 568, § 2, eff from and after passage (approved April 7, 1994).

## § 11-46-19. Powers and duties of board.

(1) The board shall have the following powers:

- (a) To provide oversight over the Tort Claims Fund;
- (b) To approve any award made from the Tort Claims Fund;
- (c) To pay all necessary expenses attributable to the operation of the Tort Claims Fund from such fund;

(d) To assign litigated claims against governmental entities other than political subdivisions to competent attorneys unless such governmental entity has a staff attorney who is competent to represent the governmental entity and is approved by the board; the board shall give primary consideration to attorneys practicing in the jurisdiction where the claim arose in assigning cases; attorneys hired to represent a governmental entity other

than a political subdivision shall be paid according to the department fee schedule;

(e) To approve all claimants' attorney fees in claims against the state;

(f) To employ on a full-time basis a staff attorney who shall possess the minimum qualifications required to be a member of The Mississippi Bar, and such other staff as it may deem necessary to carry out the purposes of this chapter; the employees in the positions approved by the board shall be hired by the director, shall be employees of the department, and shall be compensated from the Tort Claims Fund;

(g) To contract with one or more reputable insurance consulting firms as may be necessary;

(h) To purchase any policies of liability insurance and to administer any plan of self-insurance or policies of liability insurance required for the protection of the state against claims and suits brought under this chapter;

(i) To expend money from the Tort Claims Fund for the purchase of any policies of liability insurance and the payment of any award or settlement of a claim against the state under the provisions of this chapter or of a claim against any school district, junior college or community college district, or state agency, arising from the operation of school buses or other vehicles, under the provisions of Section 37-41-42;

(j) To cancel, modify or replace any policy or policies of liability insurance procured by the board;

(k) To issue certificates of coverage to governmental entities, including any political subdivision participating in any plan of liability protection approved by the board;

(l) To review and approve or reject any plan of liability insurance or self-insurance reserves proposed or provided by political subdivisions if such plan is intended to serve as security for risks of claims and suits against them for which immunity has been waived under this chapter;

(m) To administer disposition of claims against the Tort Claims Fund;

(n) To withhold issuance of any warrants payable from funds of a participating state entity should such entity fail to make required contributions to the Tort Claims Fund in the time and manner prescribed by the board;

(o) To develop a comprehensive statewide list of attorneys who are qualified to represent the state and any employee thereof named as a defendant in a claim brought under this chapter against the state or such employee;

(p) To develop a schedule of fees for paying attorneys defending claims against the state or an employee thereof;

(q) To adopt and promulgate such reasonable rules and regulations and to do and perform all such acts as are necessary to carry out its powers and duties under this chapter;

(r) To establish and assess premiums to be paid by governmental entities required to participate in the Tort Claims Fund;

(s) To contract with a third-party administrator to process claims against the state under this chapter;

(t) To annually submit its budget request to the Legislature as a state agency;

(u) To dispose of salvage obtained in settlement or payment of any claim at fair market value by such means and upon such terms as the board may think best; and

(v) [Repealed]

(2) Policies of liability insurance purchased for the protection of governmental entities against claims and suits brought under this chapter shall be purchased pursuant to the competitive bidding procedures set forth in Section 31-7-13.

(3) The department shall have the following powers and duties:

(a) To annually report to the Legislature concerning each comprehensive plan of liability protection established pursuant to Section 11-46-17(2). Such report shall include a comprehensive analysis of the cost of the plan, a breakdown of the cost to participating state entities, and such other information as the department may deem necessary.

(b) To provide the board with any staff and meeting facilities as may be necessary to carry out the duties of the board as provided in this chapter.

(c) To submit the board's budget request for the initial year of operation of the board in order to authorize expenditures for the 1993-1994 fiscal year and for the appropriation of such general funds as shall be required for the commencement of its activities.

**SOURCES:** Laws, 1984, ch. 495, § 11; reenacted and amended, Laws, 1985, ch. 474, § 10; Laws, 1987, ch. 483, § 10; Laws, 1988, ch. 442, § 7; Laws, 1988, ch. 479, § 5; Laws, 1993, ch. 476, § 8; Laws, 1995, ch. 568, § 2; Laws, 1996, ch. 428, § 2; Laws, 2003, ch. 560, § 5; reenacted and amended, Laws, 2005, ch. 539, § 5; Laws, 2006, ch. 567, § 6, eff from and after passage (approved Apr. 24, 2006.)

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the introductory language and former second version of this section. The words “Until July 1, 2005, this section shall read as follows:” was deleted and also the second tier of the section was deleted. The Joint Committee ratified the correction at its July 8, 2004, meeting.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference at the end of (1)(v). The Section “83-48-6(i)” was changed to “83-48-5(6)(i).” The Joint Committee ratified the correction at its May 31, 2006, meeting.

**Editor's Note** — Section 37-41-42 referred to in (1)(i) was repealed by Laws of 1996, ch. 428, § 1, eff June 30, 1997.

Subsection (1)(v), which authorized the board to administer the Medical Malpractice Insurance Availability Plan, was repealed by its own terms effective July 1, 2008.

Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”



**Cross References** — Medical Malpractice Insurance Availability Act, see §§ 83-48-1 et seq.

### RESEARCH REFERENCES

**ALR.** Duty of liability insurer to initiate settlement negotiations. 51 A.L.R.5th 701.

## **§ 11-46-20. Tort Claims Board; regulation of liability coverage of governmental entities; annual review of insurance plans; other powers; fees.**

(1) The Tort Claims Board shall be charged with the responsibility to regulate all liability coverage of governmental entities required to have certificates of coverage under this chapter which elect to provide the same through a public entity group or individual self-insurance program. This regulation shall be accomplished through an initial approval as provided in Section 11-46-17 and by ongoing or annual review. Each self-insurance program shall annually submit to the Tort Claims Board the following items within ninety (90) days from the end of the group year:

- (a) An audited financial statement;
- (b) An actuarial valuation;
- (c) Contracts with third-party administrators (if any);
- (d) Excess insurance policies;
- (e) A list of members and premiums due from and collected from each member; and

(f) Other data as may be required by the Tort Claims Board.

(2) Areas of regulation under this section shall include, but not be limited to, the following:

- (a) Financial solvency;
- (b) Rating plans, rates and rating basis;
- (c) Assessment plans of public entity groups;
- (d) Coverages offered and excluded;
- (e) Deductibles and deductible credits;
- (f) Proper purchase of excess insurance or reinsurance; and
- (g) Review of losses, reserves and expenses annually.

(3) Individual self-insurers and group public entity self-insurers must provide the data requested for the purposes of this section in order to receive continuing approval of the Tort Claims Board and issuance of annual certificates of coverage to the governmental entities involved.

(4) The Tort Claims Board is authorized to assess and charge appropriate fees for the costs of regulation, as determined by the board, to the individual self-insurers and group public entity self-insurers being regulated.

(5) The Tort Claims Board is empowered to:

- (a) Issue cease and desist orders;
- (b) Require rate increases or decreases;
- (c) Require assessments of members of group public entity self-insurers in such amounts as are authorized and required by the board;

- (d) Require changes in excess insurance or reinsurance; or
- (e) Take such other actions as deemed necessary by the board to carry out the provisions of this chapter.

**SOURCES:** Laws, 1994, ch. 568, § 1, eff from and after passage (approved April 7, 1994).

#### RESEARCH REFERENCES

**ALR.** Requirement that multicoverage umbrella insurance policy offer uninsured-or underinsured-motorist coverage equal to liability limits under umbrella provisions. 52 A.L.R.5th 451.

#### § 11-46-21. Repealed.

Repealed by Laws of 1996, ch. 428, § 3, eff from and after passage (approved March 25, 1996).

[Laws, 1984, ch. 495, § 12; Laws, 1985, ch. 474, § 11; Laws, 1986, ch. 438, § 5; Laws, 1987, ch. 483, § 11; Laws, 1988, ch. 442, § 8; Laws, 1989, ch. 537, § 7; Laws, 1990, ch. 518, § 8; Laws, 1992, ch. 491 § 9; Laws, 1993, ch. 476, § 9; Laws, 1994, ch. 617, § 2]

**Editor's Note** — Former § 11-46-21 was entitled: Transfer of funds from Accident Contingent Fund and Tort Claims Fund to Accident Contingent Tort Fund.

#### § 11-46-23. Provisions of chapter independent and severable.

If any provision or clause of Chapter 46, Title 11, Mississippi Code of 1972, or application thereof is held invalid or unenforceable for any reason, such holding shall have no effect on any other provisions or applications of Chapter 46, Title 11, Mississippi Code of 1972, and to this end the provisions of Chapter 46, Title 11, Mississippi Code of 1972, are declared to be severable.

**SOURCES:** Laws, 1993, ch. 476, § 11, eff from and after passage (approved April 1, 1993).

## CHAPTER 47

### Lis Pendens

SEC.

- 11-47-1. Record to be kept by chancery clerk.
- 11-47-3. Notice of suit affecting real estate recorded.
- 11-47-5. Notice by officer levying on real estate.
- 11-47-7. Clerk to index the record.
- 11-47-9. Effect of failure to enter notice.
- 11-47-11. Result of proceeding entered.
- 11-47-13. Liability of a clerk, sheriff, or other officer.
- 11-47-15. Form of the docket.

#### § 11-47-1. Record to be kept by chancery clerk.

The clerk of the chancery court shall keep in his office, as a public record, a suitable book, to be called the "Lis Pendens Record."

**SOURCES:** Codes 1892, § 2782; 1906, § 3147; Hemingway's 1917, § 2498; 1930, § 2324; 1942, § 754.

**Cross References** — Fees for chancery clerk, see §§ 25-7-9, 25-7-13.

Complaints and orders filed in slum clearance proceedings, see § 43-35-109.

Soil conservation contracts, see § 69-27-207.

Lien claims for labor and materials on realty, see §§ 85-7-197 to 85-7-201.

Notice by unsecured creditors to subject decedent's realty to liability, see § 91-7-91.

#### RESEARCH REFERENCES

**ALR.** Duration of operation of lis pendens as dependent upon diligent prosecution of suit. 8 A.L.R.2d 986.

Lis pendens suit to compel stock transfer. 48 A.L.R.4th 731.

Propriety of filing of lis pendens in action affecting leasehold interest. 67 A.L.R.3d 747.

#### § 11-47-3. Notice of suit affecting real estate recorded.

When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record, and note on it, and in the record, the hour and day of filing and recording.



**SOURCES:** Codes, 1892, § 2783; 1906, § 3148; Hemingway's 1917, § 2499; 1930, § 2325; 1942, § 755.

**Cross References** — Filing lis pendens notice in eminent domain proceedings, see § 11-27-7.

Lien of laborers, materialmen, architects, engineers, etc. see §§ 85-7-131 et seq.

Filing of evidence of claim by laborers, materialmen, or architects, see § 85-7-197.

## JUDICIAL DECISIONS

1. In general.
2. Notice in general.
3. —Description of realty.
4. Encumbrancers and purchasers pending suit.
5. Rights and liabilities of purchasers pending suit.

### 1. In general.

Filing of lis pendens notice was privileged communication and therefore not actionable for slander of title, where chancellor expressly found that persons alleging easement rights in underground conduit that drained their land had right to assert such interest. *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112 (Miss. 1987).

An action to set aside a deed on certain property on the basis of fraud under Code § 11-5-75 was not barred by a former action to place a lis pendens notice on the same property pursuant to Code § 11-47-3, where not only were these two causes of action grounded in different statutes but they also involved entirely different classes of litigants, inasmuch as the lis pendens statute was enacted for those who claimed to rightfully own an interest in the property and the statute permitting an attack on fraudulent conveyances was devised for the protection of creditors who had no specific interest in the land. *Dunaway v. W.H. Hopper & Assocs.*, 422 So. 2d 749 (Miss. 1982).

In an action by the purchaser of a house for specific performance or a money decree arising out of the failure of the corporate defendant to complete the house and premises as agreed, the chancellor erred in his final decree in failing to expunge a lis pendens notice placed on property owned by the corporation and located beside that owned by the plaintiffs where the next-door property was not involved in

the money decree against the corporate defendant. *W.H. Hopper & Assocs. v. Dunaway*, 396 So. 2d 43 (Miss. 1981).

Notice of pendency of foreclosure suit will be imputed to assignee of judgment against mortgagor before Code 1892 became operative, without lis pendens notice. *Smith v. Munger*, 93 Miss. 627, 47 So. 676 (1908).

Pendency of suit to foreclose mortgage is constructive notice to all parties. *Alabama & V. Ry. Co. v. Thomas*, 86 Miss. 27, 38 So. 770 (1905).

Code 1892, § 503, pertaining to creditors' bills to vacate fraudulent conveyances and providing for a lien in favor of creditor upon the filing of a bill except as to bona fide purchasers before service of process on defendant, is not affected by the chapter on lis pendens. *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502 (1904).

Prior to this act, mere pendency of suit concerning land was noticed to a purchaser of the timber thereon of the rights of complainant. *Alliance Trust Co. v. Nettleton Hardwood Co.*, 74 Miss. 584, 21 So. 396, 60 Am. St. R. 531 (1897).

Doctrine of lis pendens does not apply so far as to defeat title acquired under the statute of limitations. *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487 (1895).

### 2. Notice in general.

In an action alleging breach of contract, breach of fiduciary duty, unjust enrichment, tortious breach of contract, and requesting imposition of a constructive trust and equitable lien upon property owned by the defendants, the court removed a lis pendens, but allowed the plaintiffs' claims to proceed to trial, since (1) the currently existing status quo caused the defendants irreparable injury and threatened them with the necessity of

filing for bankruptcy, and (2) removing the lis pendens would cause little injury to the plaintiffs and would not disserve the public interest. *Marett v. Scott*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5356 (N.D. Miss. Apr. 7, 2000).

The filing of a notice of lis pendens in an action before the recordation of a prior deed is effective to make a judgment recovered against the grantor after such recordation a lien on the property conveyed. *Jones v. Jones*, 249 Miss. 322, 161 So. 2d 640 (1964).

Filing of lis pendens notice giving names of parties to suit and description of land, with statement that by suit it is sought to fix and enforce lien against land in order to effect sale thereof and application of proceeds of sale to payment of complainant's claim, is insufficient to create lien on land. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

Lis pendens notice is not a restraining process and damages are not allowable on affirmance of decree dismissing complaint for specific performance, with direction to note disposition in lis pendens record. *Bancroft v. Martin*, 144 Miss. 384, 109 So. 859 (1926), error overruled, 144 Miss. 390, 111 So. 434 (1927).

Where lis pendens notice is filed, judgment obtained thereafter in the suit takes effect as of the date of filing notice. *Bank of Tupelo v. Motley*, 127 Miss. 674, 90 So. 438 (1922).

Where bill alleged that defendant vendor owned land or an interest therein, and that defendant buyer had property belonging to vendor, dismissal of bill as to defendant buyer left it still pending as to the other defendant, and lis pendens notice on land sold should not be cancelled. *Slattery v. P.L. Renoudet Lumber Co.*, 120 Miss. 621, 82 So. 332 (1919).

### 3. —Description of realty.

Where lis pendens notice misdescribes the land, there is not constructive notice. *McDaniel v. Latham*, 143 Miss. 672, 109 So. 671 (1926).

### 4. Encumbrancers and purchasers pending suit.

Wife's right to alimony constitutes such an interest in her husband's real estate as that she may take advantage of the lis

pendens statute to protect such interest as a vested right to maintenance therefrom. *Felder v. Felder's Estate*, 195 Miss. 326, 13 So. 2d 823 (1943).

Assignee of mortgagee held entitled to priority over judgment lien of materialman filing petition against mortgagor to enforce lien against house prior to execution of trust deed, where materialman failed to file lis pendens notice and there was no written contract on file, in absence of knowledge by mortgagee of proceedings. *Swift & Co. v. Everett*, 171 Miss. 410, 157 So. 476 (1934).

Where wife obtains a decree for alimony, declared a lien on land, she acquires a lien superior to a deed of trust executed by the husband alone after filing of lis pendens notice. *W.H. Gallaspy Sons Co. v. Massey*, 99 Miss. 208, 54 So. 805, *Am. Ann. Cas.* 1913D,947 (1911).

Lis pendens notice must be given in mechanic's lien proceedings against realty to affect bona fide purchasers without notice. *McKenzie v. Fellows*, 97 Miss. 31, 52 So. 628 (1910).

### 5. Rights and liabilities of purchasers pending suit.

When a construction money lender foreclosed its deed of trust on a shopping center and purchased the property at the trustee's sale, it took title pendente lite, subject to the contingency that laborers' and materialmen's liens were valid, where the laborers and materialmen had filed their claims more than six months before the trustee's sale was advertised, and where the materialmen and laborers brought suit to enforce their liens one day before the sale and filed notice of the suit on the lis pendens record; as between the lender and the landowners, who filed suit to enforce their liens and filed a lis pendens notice two days before the trustee's sale, the lender took title subject to the outcome of the landowners' suit and could not defeat their claim by foreclosing its deed of trust. *Guaranty Mtg. Co. v. Seitz*, 367 So. 2d 438 (Miss. 1979).

Where lis pendens notice is filed, purchaser of the land takes it subject only to the right of plaintiff to have it sold pursuant to judgment. *Glattli v. Bradford*, 105 Miss. 573, 62 So. 643 (1913).

Bona fide purchaser from a non-resident defendant without actual notice of suit, before completion of publication and mailing of process, will be protected in his title, though lis pendens notice was filed. *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502 (1904).

In a suit to enforce a lien upon machinery, the lien was effectual from the time of

bringing suit, and dismissal on demurrer did not affect it prior to taking appeal, and one who purchased the property under a deed of trust given by defendant, between the time of the dismissal and plaintiff's appeal was a purchaser pendente lite and purchased subject to the lien. *Smith & Vaile Co. v. Burns*, 72 Miss. 966, 18 So. 483 (1895).

## RESEARCH REFERENCES

**ALR.** Claim barred by limitation as subject to setoff, counterclaim, recoupment, cross bill, or cross action. 1 A.L.R.2d 630.

Propriety of filing of lis pendens in action affecting leasehold interest. 67 A.L.R.3d 747.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay. 49 A.L.R.4th 242.

Lis pendens as applicable to suit for separation or dissolution of marriage. 65 A.L.R.4th 522.

**Am Jur.** 51 Am. Jur. 2d (Rev), Lis Pendens §§ 1-10, 20, 46-50.

Notice of lis pendens, 17 Am. Jur. Pl & Pr Forms (Rev), Lis Pendens, Forms 3-7.

18 Am. Jur. Pl & Pr Forms (Rev), Mortgages, Form 152.1 (Notice — Lis Pendens — Foreclosure).

**CJS.** 54 C.J.S., Lis Pendens §§ 2-11.

## § 11-47-5. Notice by officer levying on real estate.

When the sheriff, United States marshal, or other officer, shall levy upon real estate by virtue of any process, unless it be in execution upon a judgment which is duly enrolled in the county where the real estate is situated, he shall file with the clerk of the chancery court of each county in which the real estate, or any part thereof, is situated, a notice of the levy, containing the names of the parties to the proceedings, the kind of process, and a description of the real estate levied on. The clerk shall file, record and note upon the notice and record, as required in Section 11-47-3.

**SOURCES:** Codes, 1892, § 2784; 1906, § 3149; Hemingway's 1917, § 2500; 1930, § 2326; 1942, § 756.

**Cross References** — Liability of officer for failing to file notice, see § 11-47-13. Writs of execution or attachment on land, see § 13-3-123.

## JUDICIAL DECISIONS

### 1. In general.

In attachment suit in chancery against land of nonresident, no lien is created until mandatory provisions of Code 1942, §§ 1904, 2731, and this section [Code 1942, § 756] are complied with by issuance and levy of writ of attachment and

filing of notice of levy, and mere filing of lis pendens notice is insufficient to create lien. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

In attachment suit in chancery against nonresident, alleged to own land in this state, for damages arising out of breach of



warranty in sale of automobile, person claiming that lis pendens notice filed in suit creates cloud upon his superior interest in the land may become party to suit on motion for purpose of protecting his

interest and by his appearance in suit intervenor does not waive necessity of issuance and levy of writ of attachment. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

### § 11-47-7. Clerk to index the record.

The clerk, upon filing and recording each notice, shall index the same, both directly and indirectly, under the name of each party, each plaintiff or complainant, against each defendant, and each defendant at the suit of each plaintiff or complainant.

**SOURCES:** Codes, 1892, § 2785; 1906, § 3150; Hemingway's 1917, § 2501; 1930, § 2327; 1942, § 757.

**Cross References** — Indexing of instruments generally, see §§ 89-5-25, 89-5-33, 89-5-35.

## JUDICIAL DECISIONS

### 1. In general.

A lien on property is not obtained by the mere filing of a lis pendens notice. The legal function of lis pendens is to give notice to the world of an alleged claim or lien in the property; the notice itself does not constitute an independent basis for imposition of a lien. *Aldridge v. Aldridge*, 527 So. 2d 96 (Miss. 1988).

The purchasers of property were unaffected by any lien to which the property may have been subject, even though a lis pendens notice was filed prior to purchase of the property, where the Chancery Clerk failed to immediately record notice of the lis pendens. *Aldridge v. Aldridge*, 527 So. 2d 96 (Miss. 1988).

### § 11-47-9. Effect of failure to enter notice.

If a person beginning any such suit, by declaration, bill, or cross-complaint affecting real estate, or if an officer levying any process upon real estate, shall fail to have the required notice entered in the lis pendens record, such suit or levy shall not affect the rights of bona fide purchasers or incumbrancers of such real estate, unless they have actual notice of the suit or levy.

**SOURCES:** Codes, 1892, § 2786; 1906, § 3151; Hemingway's 1917, § 2502; 1930, § 2328; 1942, § 758.

## JUDICIAL DECISIONS

### 1. In general.

The purchasers of property were unaffected by any lien to which the property may have been subject, even though a lis pendens notice was filed prior to purchase of the property, where the Chancery Clerk failed to immediately record notice of the

lis pendens. *Aldridge v. Aldridge*, 527 So. 2d 96 (Miss. 1988).

Although the better practice is to join both co-beneficiaries of a deed of trust as parties defendant in an action involving their interests, it is not reversible error to join only one beneficiary when both have

actual notice of the pending suit. *Owens v. State*, 192 So. 2d 258 (Miss. 1966).

The bona fide purchasers protected by this section [Code 1942, § 758] are those who become such after the beginning of the suit or service of the writ. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633 (1948).

Where lis pendens notice misdescribes the land, there is not constructive notice.

*McDaniel v. Latham*, 143 Miss. 672, 109 So. 671 (1926).

Lis pendens notice must be given in mechanic's lien proceedings against realty to affect bona fide purchasers without notice. *McKenzie v. Fellows*, 97 Miss. 31, 52 So. 628 (1910).

## RESEARCH REFERENCES

**ALR.** Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay. 49 A.L.R.4th 242.

**Am Jur.** 51 Am. Jur. 2d(Rev), Lis Pendens § 49-50.

**CJS.** 54 C.J.S., Lis Pendens § 18.

### § 11-47-11. Result of proceeding entered.

Where the proceedings in or as to the suit or levy, notice of which has been entered in the lis pendens record, shall be terminated, whether on the merits or not, the court wherein the same were pending shall direct the clerk who has the record to make such entry therein as it shall prescribe, to give notice of the result of the proceedings and of the devolution of the real estate; and the clerk shall at once, on presentation thereof, file and record the prescribed entry and note the date of filing and recording on the record.

**SOURCES:** Codes, 1892, § 2787; 1906, § 3152; Hemingway's 1917, § 2503; 1930, § 2329; 1942, § 759.

**Cross References** — Notation of discharge of lien, see § 85-7-199.

### § 11-47-13. Liability of a clerk, sheriff, or other officer.

If any clerk fail to perform any of the duties herein required of him, he shall be liable on his official bond to any party injured for all damages he may have sustained. If any sheriff, marshal, or other officer, fail to file the notice provided for in this chapter, upon the levy by him of any process on real estate, he shall be liable on his bond for all damages resulting therefrom.

**SOURCES:** Codes, 1892, § 2788; 1906, § 3153; Hemingway's 1917, § 2504; 1930, § 2330; 1942, § 760.

**Cross References** — Notice by officer levying on real estate, see § 11-47-5.

### § 11-47-15. Form of the docket.

The lis pendens docket shall be ruled, and have printed at the top of the pages, or opposite page, the following headings for the columns, and the entries shall correspond with them, viz.: Names of plaintiffs; names of defendants;

kind of suit or writ; when suit instituted or writ levied; in, or from what court; nature of the suit or writ; description of the land involved or levied on; date of filing and recording lis pendens notice; result of the suit or levy; and remarks.

**SOURCES:** Codes, 1892, § 2789; 1906, § 3154; Hemingway's 1917, § 2505; 1930, § 2331; 1942, § 761.



## CHAPTER 49

### Rights and Duties of Attorneys, Generally

SEC.

- 11-49-1. Attorney to state residence of plaintiff.
- 11-49-3. Proceedings for money collected.
- 11-49-5. Attorney not to have pay as a witness.
- 11-49-7. Right to inspect papers.
- 11-49-9. Limitation of number to argue cause.
- 11-49-11. Notice to attorney as effectual as if to his client.

#### § 11-49-1. Attorney to state residence of plaintiff.

Any attorney whose name is subscribed to or indorsed on any declaration or bill or petition in chancery, shall, on demand in writing, made by or on behalf of the defendant, declare forthwith, in writing, whether the suit has been brought by him, or with his authority or privity, and also the place of abode of the plaintiff; and if such attorney shall state that the suit was not brought by him, or with his authority or privity, or shall refuse to declare the place of abode of the plaintiff, then no further proceedings shall be taken in the action without leave of the court.

**SOURCES:** Codes, 1880, § 1545; 1892, § 217; 1906, § 224; Hemingway's 1917, § 201; 1930, § 3704; 1942, § 8676.

**Cross References** — General rules of pleading, practice, and procedure in county courts, see § 11-9-1.

Procedures to discipline attorneys and to determine capacity to practice law, see §§ 73-3-301 et seq.

Rules governing the professional conduct of attorneys, see Miss. Rules of Professional Conduct 1.1 et seq.

#### § 11-49-3. Proceedings for money collected.

Every attorney or counselor at law receiving money for his client, and failing or refusing to pay the same when demanded, may be proceeded against in a summary way, by motion before the circuit court of the county where such attorney or counselor usually resides, or where he may be found, or before the court in which the money was collected, in the same manner that sheriffs are liable to be proceeded against for money collected on execution, five days' notice of such motion being given. In addition to the principal and legal interest, damages at ten per centum on the amount thereof shall be awarded. In case the failure to pay over said money shall appear to have been wilful and without reasonable excuse, the court shall fine and imprison such attorney or counselor as for a contempt and strike his name from the roll and revoke his license, or may suspend his right to practice until the money shall be paid over.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 26, art. 3 (9), art. 11; 1857, ch. 9, art. 10; 1871, § 2253; 1880, § 2405; 1892, § 218; 1906, § 225; *Hemingway's* 1917, § 202; 1930, § 3705; 1942, § 8677.

**Cross References** — Power of circuit court to hear and determine all motions against attorneys for money collected or received and not paid over on demand to party entitled thereto, see § 9-7-89.

Giving of notice in cases where motions are made against officers for neglect of official duties, see § 13-3-85.

Liability of sheriff for failing to pay over money collected on execution or attachment, see § 19-25-45.

## JUDICIAL DECISIONS

### 1. In general.

Summary remedy by motion against an attorney, authorized by this section [Code 1942, § 8677], can only be maintained by the client. *Sloan v. Johnson*, 14 Miss. (6 S. & M.) 47 (1850); *McCreary v. Hoopes*, 25 Miss. 428 (1852); *Brown v. Pool*, 127 Miss. 488, 90 So. 179 (1921).

Pleading of client which, while bearing many of the earmarks of a declaration, was found to be a substantial compliance with this section [Code 1942, § 8677], as a summary motion against attorney to pay over money collected for his client, was held to require an answer. *Spivey v. Rodgers*, 114 Miss. 639, 75 So. 444 (1917).

An attorney at law is liable for any breach of duty under his contract of employment; such liability attaches immediately upon the breach, and the statute of limitation begins to run from that time. *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885 (1896).

A decision in an attorney's favor because the motion was an improper remedy, does not bar a suit against him on the same case. *Coopwood v. Baldwin*, 25 Miss. 129 (1852).

It is no defense to the motion that the attorney has been notified by others, claiming the fund, not to pay; and the attorney's right of set-off is good only to the extent of his lien for his fees in that particular case. *Dunn v. Vannerson*, 8 Miss. (7 Howard) 579 (1843).

Notice must be given the attorney. *Ex parte Heyfron*, 8 Miss. (7 Howard) 127 (1843).

The statute gives the remedy, by motion, only where the attorney fails or refuses to pay over money actually collected. The statute must be strictly construed. *Lombard v. Whiting*, 1 Miss. (1 Walker) 229 (1826); *Banks v. Cage*, 2 Miss. (1 Howard) 293 (1836); *Sloan v. Johnson*, 14 Miss. (6 S. & M.) 47 (1850).

## RESEARCH REFERENCES

**ALR.** Power of court to order restitution to wronged client in disciplinary proceeding against attorney. 75 A.L.R.3d 307.

**Am Jur.** 7 Am. Jur. 2d, Attorneys at Law §§ 197-200.

Complaint, petition, or declaration-For conversion of funds belonging to client-

Money collected by attorney, 2 Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 271.

**CJS.** 7 C.J.S., Attorney and Client §§ 293, 260, 264.

### § 11-49-5. Attorney not to have pay as a witness.

An attorney or counselor at law shall not be allowed any compensation as a witness in any cause in which he shall be concerned as attorney or counsel.

**SOURCES:** Codes, Hutchinson's 1848, ch. 26, art. 3 (15); 1857, ch. 9, art. 9; 1871, § 2252; 1880, § 2406; 1892, § 219; 1906, § 226; Hemingway's 1917, § 203; 1930, § 3706; 1942, § 8678.

**Cross References** — Amount of witness fees generally, see § 25-7-47.

### RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d (Rev), Witnesses § 70, 71. **CJS.** 98 C.J.S., Witnesses § 120, 121, 142, 203.

## § 11-49-7. Right to inspect papers.

Every attorney or counselor at law, practicing in any court in this state, shall be allowed, at all reasonable times, to inspect the papers and records relating to any suit in such court in which he may be concerned as attorney or counsel, without being compelled to take copies thereof. A clerk of any court may permit an attorney to take out of the office the papers in which he is interested, under such regulations as the court or the law may prescribe.

**SOURCES:** Codes, Hutchinson's 1848, ch. 26, art. 3 (16); 1857, ch. 9, art. 8; 1871, § 2251; 1880, § 2407; 1892, § 220; 1906, § 227; Hemingway's 1917, § 204; 1930, § 3707; 1942, § 8679.

**Cross References** — Withdrawal of exhibits, maps, or other items of evidence belonging to party or witness before expiration of appeal period or determination of suit, see § 9-13-29.

Court order making available to opposite party copies of books, papers and other documents relating to merits of action or proceeding or of defense thereto, see § 11-1-51.

Furnishing of copy of indictment and list of special venire to persons indicted for capital crimes, see § 99-15-27.

### RESEARCH REFERENCES

**ALR.** Applicability of attorney-client privilege to communications relating to drafting of documents. 55 A.L.R.3d 1322. **Am Jur.** 41 Am. Jur. Trials 683, Computer Research for the Trial Lawyer.

## § 11-49-9. Limitation of number to argue cause.

A court shall not permit more than two attorneys to argue on one side, unless good cause be shown therefor.

**SOURCES:** Codes, Hutchinson's 1848, ch. 26, art. 3 (11); 1857, ch. 9, art. 11; 1871, § 2254; 1880, § 2408; 1892, § 221; 1906, § 228; Hemingway's 1917, § 205; 1930, § 3708; 1942, § 8680.

**Cross References** — Limitation on number of counsel to be heard in criminal cases, see § 99-17-11.

Oral arguments in supreme court, see Miss. R. App. P. 34.



## RESEARCH REFERENCES

**ALR.** Prejudicial effect, of trial court's denial, or equivalent, of counsel's right to argue case. 38 A.L.R.2d 1396.

**Am Jur.** 75 Am. Jur. 2d (Rev), Trial § 165.

**CJS.** 88 C.J.S., Trial § 258.

## § 11-49-11. Notice to attorney as effectual as if to his client.

Any notice required in the progress of a suit or action, in any court of this state, shall be as valid and effectual when served on the attorney or solicitor of the party in that cause as if served on the party himself.

**SOURCES:** Codes 1871, § 2255; 1880, § 2409; 1892, § 222; 1906, § 229; Hemingway's 1917, § 206; 1930, § 3709; 1942, § 8681.

**Cross References** — Service of notices in legal proceedings, see § 13-3-83.

## JUDICIAL DECISIONS

### 1. In general.

A three-day notice to counsel of a motion to correct the record of an appealed conviction is an adequate compliance with due process. *Polk v. State*, 247 Miss. 734, 156 So. 2d 592 (1963).

This section [Code 1942, § 8681] has reference to notice to an attorney during the progress of a trial until that particular litigation has been tried and judgment or decree rendered which is final until further order of the court upon proper service of process upon the litigant who is to be affected by such subsequent litigation. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330 (1957).

A letter, relied on as process in husband's action for modification of the provisions of a divorce decree, largely award-

ing custody of the children to the wife, served both upon the wife's attorney of record at the time of the former decree, and an attorney subsequently employed by the wife to negotiate with opposing counsel as to whether some different arrangement might be agreed upon as to the custody of the children, which did not advise wife's attorneys what modifications would be sought but merely notified that the husband would insist upon the wife obeying the terms of the former decree, did not constitute legal process upon the wife, who could not be found by the sheriff, so that a judgment awarding complete custody of the children to the father was void. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330 (1957).

## RESEARCH REFERENCES

**Am Jur.** 7 Am. Jur. 2d (Rev), Attorneys at Law § 138.

2 Am. Jur. Pl & Pr Forms (Rev), Attorneys At Law, Forms 1 et seq.

**CJS.** 7 C.J.S., Attorney and Client § 238.

## CHAPTER 51

### Appeals

SEC.

- 11-51-1. Repealed.
- 11-51-3. Appeals to Supreme Court.
- 11-51-5. Repealed.
- 11-51-7. Repealed.
- 11-51-9. Decrees in matters testamentary.
- 11-51-11. Appeal from judgment of criminal contempt.
- 11-51-12. Appeal from judgment of civil contempt.
- 11-51-13 through 11-51-15. Repealed.
- 11-51-17. One of several parties may appeal; failure to join appeal.
- 11-51-19. Repealed.
- 11-51-21. Bond to be given by parties who join in the appeal.
- 11-51-23. Execution when suspended as to some parties.
- 11-51-25. Repealed.
- 11-51-27. Terms for granting appeal.
- 11-51-29. Prepayment of costs in civil cases on appeal.
- 11-51-31. Bond for supersedeas.
- 11-51-33. Parties and sureties on bonds examined on oath.
- 11-51-35. Repealed.
- 11-51-37. Judgment on bond to supersede writ of possession.
- 11-51-39. Requirements of supersedeas bond where judgment appealed from directs sale or delivery of possession of real estate.
- 11-51-41. Repealed.
- 11-51-43. Supersedeas in cases not provided for.
- 11-51-45. When bond made payable to state.
- 11-51-47. Supersedeas bond signed by one appellant sufficient.
- 11-51-49. Bonds by corporations.
- 11-51-51 through 11-51-55. Repealed.
- 11-51-57. Appellee, nonresident or residence unknown.
- 11-51-59. Execution stayed by bond.
- 11-51-61 through 11-51-63. Repealed.
- 11-51-65. Record on second appeal.
- 11-51-67. Repealed.
- 11-51-69. Prepayment for costs certified on transcript.
- 11-51-71. Statement on transcript of payment of fee therefor.
- 11-51-73. Provision as to sending up bond directory.
- 11-51-75. Appeal to circuit court from board of supervisors, municipal authorities.
- 11-51-77. Appeal from assessment of taxes — Attorney General, district attorney, county attorney may appeal.
- 11-51-79. Appeals from the county court.
- 11-51-81. Appeals to the county court.
- 11-51-83. Appeals from unlawful entry and detainer court.
- 11-51-85. Appeals from judgment of justice court judge in civil cases.
- 11-51-87. Copy of record to be transmitted.
- 11-51-89. Justice, mayor, or police justice to deliver papers to circuit clerk.
- 11-51-91. Trial of cases on appeal from justice of the peace.
- 11-51-93. Certiorari proceedings in circuit court.
- 11-51-95. Certiorari to all other inferior tribunals.
- 11-51-97. New appeal bond.
- 11-51-99. How executors, administrators, guardians, and conservators appeal.
- 11-51-101. State, county, and municipality, and officials representing them, may

appeal without bond; prepayment of costs in lower court; costs of record of trial court.

11-51-103. Written demand for appeal in certain cases.

11-51-105 through 11-51-109. Repealed.

11-51-111. Taking of appeal from courts of separate judicial districts in Harrison County.

11-51-113. Repealed.

### § 11-51-1. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2308; 1892, § 31; 1906, § 32; Hemingway's 1917, § 7; 1930, § 12; 1942, § 1146]

**Editor's Note** — Former § 11-51-1 related to appeals to the supreme court; writs of error abolished.

### § 11-51-3. Appeals to Supreme Court.

An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree.

**SOURCES:** Codes, Hutchinson's 1848, ch. 54, art. 34; 1857, ch. 62, art. 103; 1871, § 410; 1880, § 2309; 1892, § 32; 1906, § 33; Hemingway's 1917, § 8; 1930, § 13; 1942, § 1147; Laws, 1991, ch. 573, § 79, eff from and after July 1, 1991.

**Editor's Note** — This section is modified or supplanted by Rule 8, Mississippi Rules of Appellate Procedure, as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

**Cross References** — Appellate jurisdiction of the supreme court, see § 9-3-9.

Jurisdiction of supreme court to try issues of fact on appeal, see § 9-3-37.

Appeal from circuit court orders in arbitration proceedings based on controversies arising from construction contracts or related agreements, see § 11-15-141.

Right of appeal in suits to confirm state land patents, see § 11-17-11.

Right of appeal from county court, see § 11-51-79.

Right of appeal in classification of sixteenth section school lands, see § 29-3-37.

Right of appeal in school-reopening proceeding, see § 37-65-129.

Right of appeal under Animal and Poultry Byproducts Disposal Law, see §§ 41-51-27, 41-51-29.

Right of appeal under Urban Flood and Drainage Control Law, see § 51-35-313.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Rules of practice and procedure before appellate courts, see Miss. R. App. P. 1 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Right to appeal.
3. —Effect of death of party.
4. —Estoppel.
5. Cross appeal.
6. Appeal bond.
7. Persons entitled to appeal.
8. Time for appeal.
9. Effect of appeal.
10. Decisions appealable in general.



11. —Omissions in record, effect of.
12. Finality of determination.
13. —Nature and character of final determination.
14. —Final judgments and decrees.
15. Matters presented for review.
16. Dismissal of appeal.
17. Statutory damages.
18. Limitations.

### 1. In general.

On appeal the failure of the appellee to file a brief is tantamount to a confession of error, and will be accepted as such, and the judgment of the court below will be reversed, since an answer to the appellant's brief cannot be made without the court doing that which the appellee should have done, that is brief the appellee's side of the case. *Charles F. Hayes & Assocs. v. Blue*, 233 So. 2d 127 (Miss. 1970).

Supersedeas in civil cases under this section [Code 1942, § 1147] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. City of Tupelo*, 241 Miss. 894, 133 So. 2d 531 (1961).

Statutes allowing a "person" to appeal give the right to one directly interested although not a party; those allowing a "party" to appeal limit the right to the original parties. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844 (1959).

Where a chancery court denies materialmen the right to intervene in a suit to recover contract price for erection of storage bins, the supreme court will affirm the decree on the ground that it was impossible to grant effective relief, where the materialmen appealed from the decree without supersedeas and did not appeal from the final decree in the main suit and the owner paid a judgment to the beneficiaries under a decree in the main suit. *Orgill Bros. & Co. v. Roddy*, 227 Miss. 291, 86 So. 2d 37 (1956).

Without a decree, no appeal will lie from chancery court to Supreme Court, and when there is no decree of any kind signed or filed in proper office, and no application for appeal, motion to dismiss appeal must be sustained although record discloses ad-

mission by parties that interlocutory decree had been entered by chancery court. *In re Graham's Estate*, 208 Miss. 857, 45 So. 2d 726 (1950).

In suit to quiet title, decree of chancellor that covenant in deed prohibiting use of property for any type of textile industry did not prohibit use of described property as place to manufacture garments or other similar articles of wearing apparel, given on conflicting evidence equally balanced, or nearly so, will be affirmed on appeal to Supreme Court. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

Although statute (Laws, 1944, ch 208, Code 1942 §§ 3825-01 et seq.), creating civil service commissions in certain municipalities, provides for appeal only to circuit court by discharged employees, appeal from circuit court to Supreme Court is authorized by this section [Code 1942, § 1147]. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).

An appeal is not a matter of right. *Jones v. Cashin*, 133 Miss. 585, 98 So. 98 (1923) but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

This section [Code 1942, § 1147] does not apply to appeals from justices of the peace. It applies only to appeals from circuit and chancery courts. *Neblett v. State*, 75 Miss. 105, 21 So. 799 (1897).

### 2. Right to appeal.

An indigent civil litigant may not appeal to the Supreme Court and proceed in forma pauperis. *Nelson v. Bank of Miss.*, 498 So. 2d 365 (Miss. 1986).

Where there is no order of the Chancery Court allowing an interlocutory appeal the Supreme Court has no jurisdiction to entertain an appeal until a final decree has been entered with reference to the release or discharge of a petitioner who intervened in the action. *Hendrick v. Bridges*, 211 So. 2d 544 (Miss. 1968).

Where all orders prior to the final order with reference to the custody of children were consented to by the parties to a divorce action, neither of the parties could appeal from the orders to which they had consented. *Anderson v. Watkins*, 208 So. 2d 573 (Miss. 1968).

An appeal cannot be taken from a consent decree or judgment of a trial court by one of the parties to the consent decree or judgment. *Potts v. Bryant*, 194 So. 2d 495 (Miss. 1967).

Appeals are not a matter of right except as given by statute. *State ex rel. Patterson v. Autry*, 236 Miss. 316, 110 So. 2d 377 (1959), overruled on other grounds, *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975), and see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

Husband had the right to appeal from a final decree directing him to make payments to his divorced wife in specified amounts as permanent alimony and for support of the parties' minor child, and his failure to pay in full the monthly instalments of alimony order to be paid, and which had matured while the appeal was pending, did not warrant a dismissal of the appeal. *Lowry v. Lowry*, 229 Miss. 376, 90 So. 2d 852 (1956).

Right of appeal from final decree is absolute, and no court order is necessary for that purpose. *Thompson v. Wilson*, 172 Miss. 766, 160 So. 388 (1935).

It is unnecessary with respect to the right of appeal to except to the final judgment. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780 (1915).

The trial court was without power to limit the right of appeal to a period of time less than that prescribed by statute. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780 (1915).

If decree appealed from is final and not interlocutory, leave to appeal is unnecessary. *Yazoo & Miss. V. Ry. v. James*, 108 Miss. 656, 67 So. 152 (1915).

### 3. —Effect of death of party.

In suit by State for use of another, death of use plaintiff after final judgment, but before appeal was taken, held not to abate right of appeal. *State ex rel. Russell v. McRae*, 169 Miss. 169, 152 So. 826 (1934).

### 4. —Estoppel.

Defendant may pay monetary judgment and afterwards appeal. *Currie v. Bennett*, 111 Miss. 228, 71 So. 324 (1916).

Where a creditor of a decedent's estate was a party to a suit by which the title to land was adjudged to have been in the decedent at the time of her death and to

the decree which ordered a sale thereof to pay debts, he was estopped to appeal therefrom after sale made, and, with his consent, confirmed, and he had received payment of the debt due him. *Parsons v. Rutherford*, 84 Miss. 70, 36 So. 187 (1904).

### 5. Cross appeal.

No cross-appeal lies from judgment by which appellee obtains in trial court amount demanded by his declaration. *Forrest County v. Thompson*, 204 Miss. 628, 37 So. 2d 787 (1948).

Attorney for party has right to take cross-appeal as to amount allowed for attorney's fees, he having filed in case proper assignment by party covering his fees. *Walsh Constr. Co. v. Davis*, 204 Miss. 509, 37 So. 2d 757 (1948).

Cross appeal may be taken by execution of bond therefor under the statute regulating appeals; but bond does not have to be given where the necessary record was brought to the Supreme Court by direct appeal. *Crawley v. Ivy*, 149 Miss. 764, 116 So. 90 (1928).

No cross-appeal is necessary to obtain judgment in Supreme Court for fees fixed by statute when amount approved by Supreme Court is less than amount awarded appellee in trial court. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801 (1923).

In absence of cross-appeal and appellee's declaration failing to demand full amount sheriff could have successfully sued for as fees for serving overseers' commissions, Supreme Court cannot increase judgment, but will affirm judgment recovered. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801 (1923).

One not defendant to motion against sheriff for failure to return execution cannot cross appeal to review questions arising on original judgment. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801 (1923).

### 6. Appeal bond.

On policeman's appeal from affirmance by circuit court of order of municipal civil service commission approving policeman's discharge, the obligee on the appeal bond should have been the municipality instead



of the civil service commission. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).

Defect in policeman's appeal bond, on appeal to the Supreme Court from affirmation by circuit court of order of municipal civil service commission approving policeman's discharge, in naming the civil service commission as the obligee rather than the city, was cured by Code 1942, § 1673, which provides that a bond executed in a legal proceeding shall inure to the person to whom it is designed by law as security irrespective of to whom it is made payable. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).

An appeal bond not stricken and the appeal dismissed because names of some of principals inserted without authority. *Avent v. Markette*, 109 Miss. 835, 69 So. 705 (1915).

Where on motion to dismiss appeal counsel admitted defect in appeal bond that it was signed only by one surety and requested leave to file a new bond, such request will be granted. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780 (1915).

### 7. Persons entitled to appeal.

Person seeking leave to gain amicus curiae status in Supreme Court should assert basis for request in petition and attach to petition proposed written brief in succinct and concise statement, but never to exceed page limitation allowed party to suit under Mississippi Supreme Court Rule 7; in addition, one seeking to become amicus must assert: (1) interest in some other pending case involving similar questions; (2) inadequacy of counsel for party or insufficiency brief; (3) facts, circumstances or laws in matters before court that may otherwise escape court's attention; or (4) substantial legitimate interest that will likely be affected by outcome of case and which interest will not adequately be protected by those already parties to case. *Taylor v. Roberts*, 475 So. 2d 150 (Miss. 1985).

Where the employer's petition for citation of contempt for violation of a temporary injunction charged that the labor union and its officials had failed and refused to direct the union members to cease participating in a work stoppage and to return to work, the charge was one of civil contempt and the employer was entitled

to appeal from a decree of the chancery court which found the defendants were not guilty. *Masonite Corp. v. International Woodworkers of Am.*, 206 So. 2d 171, 24 A.L.R.3d 632 (Miss. 1967).

An appeal may not be taken from the appointment of a guardian for an incompetent for the purpose of bringing a suit to set aside his conveyance, by the persons against whom such suit is to be brought. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844 (1959).

Husband had the right to appeal from a final decree directing him to make payments to his divorced wife for permanent alimony and for support of the parties' minor child, and his failure to pay in full the monthly instalments of alimony ordered to be paid, and which had matured while the appeal was pending, did not warrant a dismissal of the appeal. *Lowry v. Lowry*, 229 Miss. 376, 90 So. 2d 852 (1956).

Where a landlord brought an action against a tenant and others who were claiming to have an interest in lease for rent owing and possession of premises, and where a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829 (1955).

Attorney for party has right to take cross-appeal as to amount allowed for attorney's fees, he having filed in case proper assignment by party covering his fees. *Walsh Constr. Co. v. Davis*, 204 Miss. 509, 37 So. 2d 757 (1948).

Persons who are not parties to proceedings are not entitled to an appeal therefrom. *Hunter v. Stanford*, 198 Miss. 299, 22 So. 2d 166 (1945).

Guardian cannot appeal from an order which he petitioned the court to make and which, therefore, was by his consent. *Hunter v. Stanford*, 198 Miss. 299, 22 So. 2d 166 (1945).

Although nonresident defendants, against whom a decree pro confesso was taken upon their failure to answer by publication and summons, have right to apply to the court rendering the decree for a rehearing, they also have the right to



treat the decree as final and to appeal therefrom in order to avoid danger that the property might be sold to a purchaser in good faith pursuant to the decree. *Henderson v. Odom*, 198 Miss. 208, 22 So. 2d 159 (1945).

Where the judgment of the court complained of in a personal injury action was entered on the minutes of the court on September 8th, 1939, the court adjourned on September 22d, 1939, an appeal bond filed and approved on March 21, 1940, more than six months after the entry of judgment but less than six months after the adjournment of the court, was not filed within time, the six months' limitation on the time within which to appeal from the judgment beginning on the day after it was rendered. *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642 (1940).

A county having no right to institute a suit for mandamus in a manner affecting public interest had no such interest or right as would enable it to appeal from the order of the court below dismissing such proceeding. *Hancock County v. State Hwy. Comm'n*, 188 Miss. 158, 193 So. 808 (1940).

Where tax collector brought suit against taxpayer for taxes owed to taxing districts, including county, and cause proceeded to final decree from which no appeal was taken by tax collector, county was not entitled to appeal as party to final decree. *Gulley v. Denkmann Lumber Co.*, 177 Miss. 164, 170 So. 151 (1936).

Only those who are actually parties to the suit or who are privies or personal representatives may appeal. *Farmers & Merchants Bank v. Rushing*, 175 Miss. 826, 167 So. 784 (1936).

In suit by superintendent of banks, in charge of liquidation of bank, for collection of debt allegedly due the bank, superintendent held entitled to appeal from adverse decree without bond. *Love v. Mississippi Cottonseed Prods. Co.*, 174 Miss. 697, 159 So. 96 (1935).

An amicus curiae has no right to appeal from an adverse judgment. *Jones v. Cashin*, 133 Miss. 585, 98 So. 98 (1923) but see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Attorney-general may appeal from a decree in suit to collect taxes and damages and sell property of the railroad therefor. *State ex rel. Roberson v. Columbus & G.R.R.*, 129 Miss. 882, 93 So. 362 (1922).

Assignee of a chose in action may appeal to the Supreme Court in assignor's name, from a judgment in an action begun and prosecuted in the court below in the assignor's name. *Ridgeway v. Jones*, 122 Miss. 624, 84 So. 692 (1920).

Under Laws 1918 ch 238, the attorney-general may bring an appeal, though the judgments below were rendered prior to the passage of the statute. *Board of Supvrs. v. Guaranty Loan, Trust & Banking Co.*, 118 Miss. 600, 79 So. 802 (1918).

Laws 1912 ch 196 and Laws 1914 ch 270 do not give a drainage district a right to appeal from an order of a chancellor directing payment of damages for land appropriated. *Bogue Hasty Drainage Dist. v. Napanee Plantation Co.*, 118 Miss. 493, 78 So. 709 (1918).

Defendant may pay monetary judgment and afterwards appeal. *Currie v. Bennett*, 111 Miss. 228, 71 So. 324 (1916).

When one or more of the parties aggrieved by the decree may appeal, stated. *Avent v. Markette*, 109 Miss. 835, 69 So. 705 (1915).

County entitled to appeal from judgment of circuit court allowing a claim of \$40.00 against the county, the appeal being first from the Board of Supervisors. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007 (1906).

Where judgment in suit by a creditor is rendered against one surety and in favor of another, the surety held liable may appeal and contest the rightfulness of his cosurety's discharge. *Ruff v. Montgomery*, 83 Miss. 185, 36 So. 67 (1904).

Section 2 Act of 1894, amending § 2330 Code of 1892 (§ 2571 Code of 1906), does not prevent an appeal by an insurance company against which a judgment has been rendered. *Supreme Lodge, Knights of Honor, v. Fletcher*, 78 Miss. 377, 28 So. 872 (1900).

## 8. Time for appeal.

Appeal [April 3, 1985] from March 4, 1985 order denying motion to reconsider November 21, 1984 order, which was filed on [April 3, 1985], was timely. *Belhaven*

Imp. Ass'n v. City of Jackson, 507 So. 2d 41 (Miss. 1987).

In an action brought by a bank to foreclose its deed of trust executed by a corporation and secured by the personal guarantees of five of the corporation's stockholders, for an appeal under § 11-51-3 time runs from the entry of the decree ordering the sale rather than from the order confirming the sale, therefore, the appeal was untimely since it was not brought within statutory period. First Miss. Nat'l Bank v. S & K Enters., Inc., 460 So. 2d 839 (Miss. 1984).

Appeal may be prosecuted from judgment or decree final in its nature, immediately after its rendition and before the end of the term of the court at which it is rendered. Byrne, Vance & Co. v. Jeffries, 38 Miss. 533 (1860).

### 9. Effect of appeal.

Lower court without power to proceed further with trial until appeal is disposed of. Jennings v. Shapira, 131 Miss. 596, 95 So. 305 (1923).

Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where it is reasonably probable that the equitable interest of third persons will be prejudiced. Sivley v. Sivley, 96 Miss. 134, 50 So. 552 (1909).

### 10. Decisions appealable in general.

Appeal may be taken from an order denying a motion to compel arbitration. Tupelo Auto Sales, Ltd. v. Scott, 844 So. 2d 1167 (Miss. 2003).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. Common Cause v. Smith, 548 So. 2d 412 (Miss. 1989).

A judgment of nonsuit is a "final judgment" within the meaning of that term as contemplated by this section [Code 1942,

§ 1147], and is, therefore, a judgment from which an appeal can be prosecuted to the Supreme Court. Hattiesburg Butane Gas Co. v. Griffin, 206 So. 2d 845, 36 A.L.R.3d 1108 (Miss. 1968).

The plaintiff in a civil contempt proceeding has a right to appeal under this section [Code 1942, § 1147] which provides generally for appeals in civil cases. Masonite Corp. v. International Woodworkers of Am., 206 So. 2d 171, 24 A.L.R.3d 632 (Miss. 1967).

A decree entered by consent of the parties is not appealable. Legg v. Legg, 251 Miss. 12, 168 So. 2d 58 (1964).

Since the enactment of L. of 1956, ch. 230 (Code 1942, § 1536), an appeal lies from an order granting a new trial on the ground that the damages awarded are excessive. Strickland v. Mississippi State Hwy. Comm'n, 240 Miss. 7, 124 So. 2d 696 (1960).

Order granting plaintiff's motion for nonsuit requested after defendant had moved for directed verdict and court had indicated an intention to grant defendant's motion but before the peremptory instruction was given, is not appealable. Johns-Manville Prods. Corp. v. McClure, 209 Miss. 240, 46 So. 2d 538 (1950).

Order of dismissal as to resident defendant, by reason of which nonresident defendant was able to and did procure a removal to federal court, was appealable, since trial court was thereby prevented from proceeding to develop the entire case and to make a final decree as to all parties. Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Order removing case to Federal court at request of nonresident defendant, did not deprive Supreme Court of jurisdiction to entertain an appeal from order of dismissal as to a resident defendant made prior to the removal order, as the rule applied that transfer of a suit from state to Federal court does not vacate what was done in the state court prior to removal. Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Appeal may be taken from judgment on agreed state of facts without agreement as



to judgment to be rendered. *Thompson v. Hill*, 152 Miss. 388, 118 So. 895 (1928).

Supreme Court under no duty to consider appeal unless assignment of error and brief pointing out the matters relied upon are filed according to rules of the court. *Henson v. State*, 143 Miss. 199, 108 So. 719 (1926).

Appeal lies from a judgment establishing lost record. *Johnson v. Richey Land Imp. & Mfg. Co.*, 126 Miss. 240, 88 So. 634 (1921).

A judgment rendered on peremptory instruction granted at the request of both parties pursuant to an agreement between them is a "judgment by confession," and not appealable. *Grand Lodge Colored K.P. v. Barlow*, 108 Miss. 663, 67 So. 152 (1915).

An appeal will lie from a judgment rendered in the circuit court in a suit commenced therein though it does not exceed \$50.00. *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834 (1901).

Where the jury find a defendant not guilty on the ground of insanity at the time and certify that he is still insane and dangerous, the verdict is not reviewable on appeal. *Caffey v. State*, 78 Miss. 645, 29 So. 396 (1901).

When appeal is prosecuted from decision of the Board of Supervisors to the circuit court, and there decided, the party aggrieved may appeal to the Supreme Court; the statute is "from any final judgment," etc. *Crump v. Board of Supvrs.*, 52 Miss. 107 (1876).

### 11. —Omissions in record, effect of.

Appeal dismissed where the record contains no final judgment from which the appeal could have been prosecuted. *Nelson v. Henderson*, 16 So. 911 (Miss. 1895); *J.T. Gabbart & Co. v. Bauer*, 38 So. 548 (Miss. 1905); *Perkins v. Thompson*, 127 Miss. 864, 90 So. 710 (1921).

Where transcript on appeal fails to show that final judgment was rendered by the circuit court the appeal will be dismissed. *Brown v. State*, 95 Miss. 670, 49 So. 146 (1909).

### 12. Finality of determination.

Orders denying and subsequently granting a motion to recuse the trial judge in a legal malpractice case were in no way

final as to the issues in the case; as such, the appellate court had no jurisdiction to review the orders under Miss. Code Ann. § 11-51-3. *Turner v. Everett*, 13 So. 3d 311 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 356 (Miss. 2009).

Pursuant to Miss. Code Ann. § 11-51-3, the appellate court had jurisdiction to hear the father's appeal of the denial of his motion for modification of custody as it was an appeal from a final order. *Quadrini v. Spradley*, 964 So. 2d 576 (Miss. Ct. App. 2007).

Dismissal of a motion to require that the executrix of an estate post bond was an interlocutory order, not a final decree, and was not appealable under this section. *Gatzke v. Rosamond*, 326 So. 2d 465 (Miss. 1976).

An order sustaining a demurrer of one of plaintiffs to cross-bill of one of defendants, although final as to the party involved, is not a final order within the meaning of § 11-51-3, since to be a final decree appealable under that section, decree must be final as to all parties and all issues. *American Empire Life Ins. Co. v. Skil-Craft Bldrs., Inc.*, 291 So. 2d 735 (Miss. 1974).

Ordinarily rights and liabilities of several parties are so connected and interwoven that appeals by piecemeal should not be allowed; moreover, fragmented appeals result in needless delay and expense, and interfere with rights of other litigants to proceed with litigation. *American Empire Life Ins. Co. v. Skil-Craft Bldrs., Inc.*, 291 So. 2d 735 (Miss. 1974).

A judgment is not final which settles a case as to a part only of the defendants, and an order dismissing the suit as to one of several defendants, all of whom are charged to be jointly and severally liable, is not a final judgment from which an appeal will lie, while the case remains undisposed of in the lower court as to the other defendants. *Eubanks v. Aero Mayflower Transit Co.*, 253 Miss. 159, 175 So. 2d 169 (1965).

A decree confirming a sale on foreclosure is not a final decree and so not appealable under this section [Code 1942, § 1147]. *Worthy v. Graham*, 246 Miss. 358, 149 So. 2d 469 (1963).



No appeal is allowable from circuit court judgment unless judgment is in all respects final, and order ruling on demurrer, which goes no further than to rule on demurrer, is no final judgment. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5 (1949).

Appeals to Supreme Court from interlocutory orders or decrees apply only to cases in chancery courts. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5 (1949).

No appeal is allowable from circuit court judgment unless judgment is in all respects a final judgment. *State ex rel. Rice v. Large*, 171 Miss. 330, 157 So. 694 (1934).

### 13. —Nature and character of final determination.

It was not error for chancellor to amend oral pronouncement of alimony increase from \$500 per month to \$250 per month because oral pronouncement does not constitute final judgment. *Banks v. Banks*, 511 So. 2d 933 (Miss. 1987).

To be a final decree appealable under § 11-51-3, the decree must be final as to all parties and all issues. *American Empire Life Ins. Co. v. Skil-Craft Bldrs., Inc.*, 291 So. 2d 735 (Miss. 1974).

Although an appeal may be taken to the Supreme Court from any final judgment of the circuit court in a civil case under the provisions of Code 1942, § 1147, there is no interlocutory appeal from a judgment of the circuit court, except from an order for a new trial based on the excessiveness or inadequacy of damages; and a judgment of the circuit court is not final which does not settle the cause as to all of the parties or does not finally dispose of all the issues presented. *State Tax Comm'n v. Clinton*, 267 So. 2d 312 (Miss. 1972).

Where a decree set aside a prior decree admitting to probate in solemn form an alleged lost holographic will, but did not dismiss petition for probate of will, the decree was not a final decree from which an appeal could successfully be taken. In *re Hollensbee's Estate*, 218 Miss. 700, 67 So. 2d 275 (1953), set aside, 218 Miss. 700, 67 So. 2d 389 (1953).

Order of circuit court from which appeal was taken to effect that demurrer to petition was heard and considered and it is

ordered that demurrer be sustained and, petitioners praying appeal to Supreme Court, it is ordered that same be granted, is not final judgment and not appealable. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5 (1949).

While a judgment which adjudicates everything material to the determination of the cause, and which, when executed according to its terms, will give all the relief which could be afforded, is final, a necessary qualification of this rule is that, if a motion for the setting aside of a judgment is filed before the end of the term of the court at which it was rendered, the finality of the judgment is thereby suspended and the limitation on the time for an appeal begins when, but not until, the motion is disposed of. *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642 (1940).

Judgment lacks finality putting statute of limitations respecting appeals into operation until final disposition of seasonable motion for new trial or other proper motion challenging it. *Moore v. Montgomery Ward & Co.*, 171 Miss. 420, 156 So. 875 (1934).

While motion for new trial is unnecessary to obtain review of judgment in Supreme Court, unless made on grounds which would set aside or modify judgment and could not otherwise be considered by trial judge, complaining party has right to make motion and judgment is not final as respects appeal until trial court disposes of motion, if seasonably made. *Moore v. Montgomery Ward & Co.*, 171 Miss. 420, 156 So. 875 (1934).

Judgment to be final must adjudicate merits of the controversy. *Bank of Courtland v. Long Creek Drainage Dist.*, 133 Miss. 531, 97 So. 881 (1923); *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5 (1949).

Decree adjudicating everything material, and which when executed, will give all the relief that could be afforded, is final. *Humphreys v. Stafford*, 71 Miss. 135, 13 So. 865 (1893); *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642 (1940).

### 14. —Final judgments and decrees.

Although Mississippi appellate courts are generally without jurisdiction to hear

direct appeals from temporary orders, the denial of a Miss. Code Ann. § 11-51-3 (Supp. 1993), the denial of a Miss. R. Civ. P. 60(b) motion is a final judgment that is reviewable. *Clark v. Clark*, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Where the trial court's order simply compelled arbitration, but did not dismiss claims or end litigation on the merits, it had to be treated as interlocutory and not as final; thus, the Mississippi Supreme Court did not have jurisdiction to review it. *Banks v. City Fin. Co.*, 825 So. 2d 642 (Miss. 2002), overruled, *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026 (Miss. 2010).

There was no final judgment where the appellant sought review of an order of the county board of supervisors calling for a special election as an election had yet to be held and the board had declined to act unilaterally on the appellant's petition. *Mississippi Waste of Hancock County, Inc. v. Board of Supvrs.*, 818 So. 2d 326 (Miss. 2001).

This section [Code 1942, § 1147] does not authorize an appeal from an order or a judgment vacating a writ of garnishment and dismissing the suit as to a garnishee where the garnishment is issued as a part of an attachment writ in a suit which is still pending in the trial court at the time the appeal is allowed. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270 (1940). But see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The Supreme Court was authorized to treat a circuit court's denial of a criminal defendant's motion to dismiss the indictment against him on double jeopardy grounds as a "final judgment" in a civil action under § 11-51-3, which authorizes an appeal from a final judgment, and § 9-3-9, which gives the Supreme Court jurisdiction of an appeal from any final judgment in the circuit court, since the double jeopardy claim went beyond the defendant's right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore denial of the claim was final and

justified immediate determination. *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

A Chancery Court ruling entitled "Court Opinion," which stated that it was the "final order," acted to finally terminate litigation in the trial court for purposes of appeal such that no further act by the court was necessary even though no separate "final judgment" was entered. *Karenina ex rel. Vronsky v. Presley*, 526 So. 2d 518 (Miss. 1988).

Order overruling motion to reconsider is final judgment for purposes of appeal. *Belhaven Imp. Ass'n v. City of Jackson*, 507 So. 2d 41 (Miss. 1987).

Rule, that order dismissing cause of action as to all defendants served with process is final even though no order has been entered as to defendant who has not been served, has not been changed by adoption of Mississippi Rules of Civil Procedure. *Stanley v. Allstate Ins. Co.*, 465 So. 2d 1023 (Miss. 1985).

In a tort action based on an alleged defect in a bridge that was brought against a county board of supervisors and other named defendants, the trial court's order sustaining demurrers filed by each of the defendants, except one who was not served with process and who filed no pleadings, was a final appealable judgment as to all the parties legally before the lower court; the mere naming of a person in a declaration and the issuance of process without service thereof did not make the remaining named defendant a party to the action for purposes of the statute governing appeals from final judgments or decrees. *State ex rel. Moak v. Moore*, 373 So. 2d 1011 (Miss. 1979).

In an action on an open account in which the defendant's plea in bar was sustained by the county court and the case dismissed, the order of the circuit court reversing the county court, holding that the plea in bar was without merit and setting the case on its docket for trial was not a final judgment from which an appeal to the Supreme Court would lie. *Southern Saw & Mower Distribs., Inc. v. Dolmar N. Am. Corp.*, 317 So. 2d 400 (Miss. 1975).

Order of the circuit court requiring the presence of the court reporter to tran-



scribe the proceedings of the grand jury was a final order appealable by the state, as all issues raised by the appellee's motion upon which the order was based were concluded and no further proceedings were to be had that could affect them. *State v. Burrill*, 312 So. 2d 1 (Miss. 1975).

An order sustaining a demurrer is not final for purposes of appeal where leave to amend is granted, unless there is a formal judgment of dismissal by the trial judge on or after the expiration of the period to amend. *Farned v. Aetna Cas. & Sur. Co.*, 263 So. 2d 790 (Miss. 1972).

Where the circuit court sustained an insurer's demurrer to the declaration of the insured seeking recovery under uninsured motorist coverage, and no leave to amend was granted, the judgment became final at the end of the court term and an appeal could lie therefrom. *Farned v. Aetna Cas. & Sur. Co.*, 263 So. 2d 790 (Miss. 1972).

Order granting new trial in the circuit court is not a final order as required by this section [Code 1942, § 1147], and hence is not appealable. *Street v. Lokey*, 209 Miss. 412, 47 So. 2d 816 (1950).

Order granting plaintiff's motion for nonsuit requested after defendant had moved for directed verdict and court had indicated an intention to grant defendant's motion but before the peremptory instruction was given, is not appealable. *Johns-Manville Prods. Corp. v. McClure*, 209 Miss. 240, 46 So. 2d 538 (1950).

After motion for new trial is filed, judgment finally disposing of case, prior to which no appeal to Supreme Court will lie, is judgment overruling motion for new trial. *Shaw v. Bula Cannon Shops*, 205 Miss. 458, 38 So. 2d 916 (1949).

Motion for new trial suspends final judgment as final judgment until motion is overruled, but it does not operate to revoke notice to court reporter to transcribe notes of evidence which was given according to law and at proper time, and motion to strike stenographer's transcript on ground notice was revoked should be overruled. *Shaw v. Bula Cannon Shops*, 205 Miss. 458, 38 So. 2d 916 (1949).

Action by judge in vacation in denying writ of prohibition was not such a final order as may be appealable. *Holmes v.*

*Board of Supvrs.*, 199 Miss. 363, 24 So. 2d 867 (1946).

When a decree dismisses a bill as to one party and it is not contemplated that any further proceedings are to be taken against him, it is final as to that party, although other parties remain against whom further proceedings are to be taken, but, generally, there must be a final decree as to all the parties before an appeal will lie, and the statute limiting the time for appeal does not begin to run until final judgment as to all parties. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Where permission granted to corporate receiver to file bill of complaint was revoked and bill of complaint was dismissed, dismissal of defendant's cross bill, though without prejudice, was a final decree within the meaning of this section [Code 1942, § 1147], and appealable. *Federal Credit Co. v. Newman*, 196 Miss. 463, 16 So. 2d 153 (1944).

No final judgment valid in law was entered in the circuit court where the presiding judge failed to sign the minutes on or before the last day of the term and, accordingly, under this section [Code 1942, § 1147] the supreme court had no jurisdiction over an appeal therefrom except to determine upon the record before it that there was no final judgment, and to enter an order vacating the supposed judgment upon the record of the case. *Jackson v. Gordon*, 194 Miss. 268, 11 So. 2d 901 (1943), but see, *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992).

Under statutes governing appeals, order sustaining demurrer to replication in part and overruling it in part was not "final," and hence not appealable. *Covington v. Ross*, 180 Miss. 789, 178 So. 474 (1938).

Dismissal of a case without prejudice held "final judgment" within this section [Code 1942, § 1147]. *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376 (1936).

In quo warranto proceeding, order ruling on demurrer, and which went no further than simply to rule on demurrer, was not appealable "final judgment." *State ex*



rel. *Rice v. Large*, 171 Miss. 330, 157 So. 694 (1934).

Refusal to grant either writ of error coram nobis or supersedeas by judge in vacation held not "judgment" from which appeal lies. *Carraway v. State*, 163 Miss. 639, 141 So. 342 (1932).

Decree ordering sale of land to pay debts was final decree as regards appeal, and precluded the necessity of compliance with the requirements of the statute relating to interlocutory decrees. *Blum v. Planters' Bank & Trust Co.*, 154 Miss. 800, 122 So. 784 (1929).

Interlocutory decree in chancery court, sustaining demurrer to bill and transferring cause to circuit court was not appealable. *Warner v. Hogin*, 148 Miss. 562, 114 So. 347 (1927).

Judgment of circuit court setting aside judgment by default rendered at a former term and reinstating cause on the docket of court for trial, was not a "final judgment," and was not appealable. *American Cotton Oil Co. v. La Valle House*, 148 Miss. 259, 114 So. 321 (1927).

Order substituting another for complainant held appealable. *Miller v. Hay*, 143 Miss. 467, 106 So. 818 (1926).

Decree of court of equity is final, which dismisses bill as to certain persons and claims, when no further hearing or proceeding is contemplated as to such claims or persons, though the decree is not final as to other claims in the bill, and further proceedings are to be taken as to some of the defendants. *Carter v. Kimbrough*, 122 Miss. 543, 84 So. 251 (1920).

Nonsuit without prejudice is not a final judgment. *State ex rel. Brown v. Poplarville Sawmill Co.*, 119 Miss. 432, 81 So. 124 (1919), overruled in part, *Solomon v. Continental Baking Co.*, 174 Miss. 890, 165 So. 607 (1936), superseded by statute as stated in *De La Beckwith v. State*, 615 So.2d 1134 (Miss. 1992).

Decree sustaining demurrer to bill and ordering transfer of cause to circuit court is appealable. *Robertson v. F. Goodman Dry Goods Co.*, 115 Miss. 210, 76 So. 149 (1917).

However, where court sustained demurrer to a bill, and granted time to amend, an appeal from the order should be dismissed. *Armstrong v. Moore*, 112 Miss. 511, 73 So. 566 (1917).

Voluntary dismissal or nonsuit by a plaintiff after defendant had moved for a peremptory instruction and the court had indicated its intention of giving such instruction was not a final judgment and not appealable. *Gulf & S.I.R.R. v. Williams*, 109 Miss. 549, 68 So. 776 (1915), suggestion of error overruled, 109 Miss. 429, 69 So. 215 (1915), overruled on other grounds, *Solomon v. Continental Baking Co.*, 174 Miss. 890, 165 So. 607 (1936), overruled on other grounds, *Hattiesburg Butane Gas Co. v. Griffin*, 206 So. 2d 845, 36 A.L.R. 3d 1108 (Miss. 1968).

Judgment, on defendants' plea in abatement in suit instituted by attachment, adjudging that attachment was wrongfully sued out and assessing defendants' damages, was a final judgment. *Chas. Brooks & Co. v. Gentry*, 108 Miss. 447, 66 So. 812 (1914).

Decree vacating temporary injunction and dismissing bill was final and appealable. *Anderson v. Henderson*, 103 Miss. 211, 60 So. 137 (1912).

Order allowing complainant 30 days to file amended bill after demurrer to complaint sustained is not appealable. *Moore v. Evans*, 98 Miss. 855, 54 So. 438 (1911).

Appeal from an order granting a new trial is not from final judgment and will be dismissed. *Yazoo & Miss. V. Ry. v. Reid*, 90 Miss. 616, 43 So. 952 (1907).

Ruling on demurrer in action at law, not reviewed where no final judgment rendered by the trial court. *Pine Lumber Co. v. Covington County*, 87 Miss. 706, 40 So. 260 (1906); *Tate County v. Bourland*, 42 So. 379 (Miss. 1906); *Davis v. Woods*, 95 Miss. 432, 48 So. 961 (1909).

The Supreme Court is without jurisdiction of an appeal in a criminal case which is prosecuted before judgment from a verdict convicting the appellant, and will of its own motion dismiss the same. *Hayden v. State*, 81 Miss. 55, 32 So. 922 (1902).

A decree sustaining or dismissing a bill of review is a final decree from which an appeal will lie. *Gillelyen v. Martin*, 73 Miss. 695, 19 So. 482 (1896).

A decree directing a partition of land if it can be equitably done, and if not that the commissioners appointed to make the sale shall report accordingly to the next term, is an interlocutory and not a final

decree. *Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482 (1896).

If plaintiff does not during the term obtain leave to amend, judgment sustaining demurrer to declaration, though not expressing that the action is dismissed, is final and may be appealed from. *Jacobs v. New York Life Ins. Co.*, 71 Miss. 656, 15 So. 639 (1894); *Dickerson v. Western Union Tel. Co.*, 111 Miss. 264, 71 So. 385 (1916).

Decree on final account of administrator, which allows some items and disallows others, and awards payment of certain sums in partial distribution, is final, and may be appealed from without leave, although it continues the final account. *McDonald v. McDonald*, 68 Miss. 689, 9 So. 896 (1891).

Order of circuit court sustaining motion for removal of cause to Federal court, not a final judgment from which an appeal can be prosecuted. *Jackson v. Alabama G.S.R.R.*, 58 Miss. 648 (1881).

### 15. Matters presented for review.

There are practical and institutional limitations upon the Supreme Court's ability to find facts; consequently, much deference is placed upon the trial judge's full discharge of his or her responsibility to make findings of fact as to the question of whether Miranda rights have been intelligently, knowing and voluntarily waived. However, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, the Supreme Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made. *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong; this is so whether the finding relates to evidentiary or ultimate fact questions. *Smith v. Smith*, 545 So. 2d 725 (Miss. 1989).

With respect to issues of fact where the chancellor made no specific finding, the Supreme Court proceeds on the assumption that the chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the

decree. *Smith v. Smith*, 545 So. 2d 725 (Miss. 1989).

Where appeal with supersedeas was still pending in the court and issue remained open, Supreme Court could correct judgment awarding appellee impleaded fund which erroneously included interest on the fund, on motion, although judgment of circuit court was rendered against appellee rather than against the fund. *Gayden v. Kirk*, 208 Miss. 283, 44 So. 2d 410, 15 A.L.R.2d 471 (1950).

Purchaser of real property who refuses to carry out contract to purchase on other grounds cannot, on appeal from judgment in favor of vendor, raise the objection to form of deed tendered that it required vendee to pay taxes, since grantor did not have opportunity to meet this objection, which he might have corrected had any request been made that he do so. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578 (1949).

Rule that question not raised in trial court cannot be raised for first time on appeal is subject to exception where alleged error affects fundamental rights of the parties or public policy, if such will work no injustice to any party to the appeal. *Carter v. State*, 198 Miss. 523, 21 So. 2d 404 (1945).

If the records show that the court adjudicated that a fact existed, the existence of which was essential to the court's acquiring jurisdiction over the party, the record is conclusive as against attack on appeal. *Gulf & S.I.R.R. v. F.L. Riley Mercantile Co.*, 139 Miss. 158, 104 So. 81 (1925), error dismissed, 269 U.S. 597, 46 S. Ct. 120, 70 L. Ed. 432 (1925).

On issue raised by plea in abatement, finding was against defendant, and on appeal from judgment on the merits exonerating defendant, the cause was reversed and remanded to fix plaintiff's damages. An appeal was taken from the judgment fixing damages, and the bond recited that appeal was taken also from the judgment on the plea. Whether appellant was entitled to have reviewed the judgment on the plea could be determined on appeal from the final judgment. *Yazoo & Miss. V. Ry. v. McNeely*, 121 Miss. 803, 83 So. 815 (1920).

Correction of errors made by a court having full jurisdiction of the cause is

committed solely to the Supreme Court on direct appeal. *Hinton v. Shedd*, 115 Miss. 208, 76 So. 144 (1917).

Appeal from the final decree in an equity suit brings in review all interlocutory decrees adverse to the appellant to which due exception was taken and made of record. *Jackson v. Lemler*, 83 Miss. 37, 35 So. 306 (1903).

### 16. Dismissal of appeal.

In an appeal from what was effectively, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal and was dismissed. *Evans v. Moore*, 853 So. 2d 850 (Miss. Ct. App. 2003).

Supreme Court is without jurisdiction of case by appeal from order of circuit court sustaining demurrer to petition and granting appeal, and case so appealed must be dismissed. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5 (1949).

Appeal from court's refusal to modify divorce decree directing that parties' minor children be placed in certain boarding school for scholastic year and then be returned to mother's father for six weeks, then transferred to custody of father for six weeks was dismissed as moot on mother's motion where the scholastic term and the two successive six weeks' periods had expired. *Savell v. Savell*, 206 Miss. 55, 39 So. 2d 532 (1949).

Appellant cannot dismiss appeal unless granted right to do so by the court. *Wolf v. Mississippi Valley Trust Co.*, 130 Miss. 144, 93 So. 581 (1922).

Where it appears that all of the principles of the case cannot be settled on the appeal, the appellant will be allowed to dismiss it. *Wolf v. Mississippi Valley Trust Co.*, 130 Miss. 144, 93 So. 581 (1922).

Assignment of error not considered when decision of the question it presents will have no effect upon the rights of appellant. *Ramsay v. Ramsay*, 125 Miss. 185, 87 So. 491, 14 A.L.R. 712 (1921), opinion set aside 125 Miss. 715, 88 So. 280.

Appeal dismissed where real purpose is not to obtain a reversal of the decree but to have it affirmed. *Smith v. Citizens' Bank & Trust Co.*, 125 Miss. 139, 87 So. 488 (1921).

The Supreme Court is without jurisdiction of an appeal in a criminal case which is prosecuted before judgment from a verdict convicting the appellant, and will of its own motion dismiss the appeal. *Hayden v. State*, 81 Miss. 55, 32 So. 922 (1902).

### 17. Statutory damages.

Statute (Code 1942, § 1971), providing for damages in case of unsuccessful appeals, is applicable only to final decrees and not to appeals from interlocutory decrees. *Canal Bank & Trust Co. v. Brewer*, 147 Miss. 885, 113 So. 552 (1927), motion overruled, 147 Miss. 920, 114 So. 127 (1927); *Sample v. Romine*, 193 Miss. 736, 10 So. 2d 346 (1942).

### 18. Limitations.

Constitution of 1890, § 104 and Code 1906, § 3096, providing that the statutes of limitation in civil cases shall not run against municipal corporations have no bearing on appeals. Section 3112 fixing the time for taking appeals must be construed with § 33 authorizing appeals. *Town of Tutwiler v. Gibson*, 117 Miss. 879, 78 So. 926 (1918).

## RESEARCH REFERENCES

**ALR.** Appealability of order entered on motion to strike pleading. 1 A.L.R.2d 422.

Finality of judgment or decree for purposes of review as affected by provision for future accounting. 3 A.L.R.2d 342.

Right of trustee of express trust to appeal from order or decree not affecting his own personal interest. 6 A.L.R.2d 147.



Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor. 9 A.L.R.2d 984.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted. 10 A.L.R.2d 1075.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below. 11 A.L.R.2d 317.

Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant. 11 A.L.R.2d 607.

Appealability of order denying directed verdict or for judgment n. o. v. where movant has been granted new trial. 57 A.L.R.2d 1198.

Appealability of order setting aside, or refusing to set aside, default judgment. 8 A.L.R.3d 1272.

Reviewability of order denying motion for summary judgment. 15 A.L.R.3d 899.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal had passed. 32 A.L.R.3d 1290.

Appealability of state court's order granting or denying motion to disqualify attorney. 5 A.L.R.4th 1251.

Appealability, under 28 USCS § 1291, of order awarding or denying attorneys' fees. 73 A.L.R. Fed. 271.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue. 76 A.L.R. Fed. 522.

**Am Jur.** 15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 463.2 (Notice of motion — To vacate judgment — Insufficiency of evidence and error of law).

18 Am. Jur. Pl & Pr Forms (Rev), Motions, Rules, and Orders, Form 5.1 (Notice of motion — To vacate or modify judgment — By stipulation of parties).

**CJS.** 4 C.J.S., Appeal and Error §§ 140-159, 213, 233, 419-421.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

## § 11-51-5. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 17; 1871, § 2161; 1880, § 2682; 1892, § 2752; 1906, § 3112; Hemingway's 1917, § 2476; 1930, § 2323; 1942, § 753; Laws, 1916, ch. 222; Laws, 1926, ch. 153; Laws, 1954, ch. 214, §§ 1, 2 (§§ 1, 2), effective sixty days after passage (approved March 2, 1954); Am Laws, 1972, ch. 459, § 1]

**Editor's Note** — Former § 11-51-5 related to time for appeals to the supreme court.

## § 11-51-7. Repealed.

Repealed by Laws of 1993, ch. 448, § 1, eff from and after passage (approved March 22, 1993).

[Codes, Hutchinson's 1848, ch. 54, art. 37; 1857, ch. 60, art. 102; 1871, § 1257; 1880, § 2311; 1892, § 34; 1906, § 35; Hemingway's 1917, § 10; 1930, § 14; 1942, § 1148; Laws, 1924, ch. 151; Am. Laws, 1978, ch. 335, § 10]

**Editor's Note** — Former § 11-51-7 provided how and when interlocutory orders or decrees of the chancery court may be appealed.

## § 11-51-9. Decrees in matters testamentary.

The final decrees of chancery courts, and interlocutory orders or decrees named in this chapter, include such final or interlocutory decrees as may be made in matters testamentary and of administration, and in minors' business, and in cases of persons of unsound mind, unless it be otherwise expressly provided by a statute applicable to such cases.

**SOURCES:** Codes, 1880, § 2315; 1892, § 37; 1906, § 38; Hemingway's 1917, § 14; 1930, § 17; 1942, § 1151.

**Cross References** — All orders that meet requirements of Miss. Rules of Appellate Procedure Rule 5 may be considered on interlocutory appeal, see Miss. R. App. P. 1 and 5.

## JUDICIAL DECISIONS

### 1. In general.

An appeal may not be taken from the appointment of a guardian for an incompetent for the purpose of bringing a suit to

set aside his conveyance, by the persons against whom such suit is to be brought. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844 (1959).

## RESEARCH REFERENCES

**ALR.** Right of appeal from order on application for removal of personal representative, guardian, or trustee. 37 A.L.R.2d 751.

Right of executor or administrator to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 183-185.

**CJS.** 4 C.J.S., Appeal and Error § 221.

## § 11-51-11. Appeal from judgment of criminal contempt.

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. Where the punishment is either a fine only, or jail confinement only, the appeal shall be allowed upon the posting of a bond, payable to the state, with sufficient sureties, not exceeding One Thousand Dollars (\$1,000.00), conditioned to abide the results of the appeal. Where the punishment is both a fine and jail confinement, the appeal shall be allowed upon the posting of a bond, not exceeding Two Thousand Dollars (\$2,000.00), conditioned to appear in the court to which the appeal is prosecuted and to abide the results of such appeal.

(2) The amount of the bonds provided for in subsection (1) of this section shall be fixed by the tribunal appealed from, shall be approved by the sheriff or other officer in whose custody the appellant may be and shall not be construed as a limitation on the amount of any fine which may be imposed.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.

(4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds Five Hundred Dollars (\$500.00), or the imprisonment exceeds six (6) months.

**SOURCES:** Codes, 1880, § 2316; 1892, § 38; 1906, § 39; Hemingway's 1917, § 15; 1930, § 18; 1942, § 1152; Laws, 1978, ch. 335, § 11; Laws, 1981, ch. 369, § 1, eff from and after July 1, 1981.

**Cross References** — Bills of exception generally, see § 11-7-211.

### JUDICIAL DECISIONS

1. In general.
2. Criminal contempt.
3. Punishment.
4. Bonds.

#### 1. In general.

The factual findings of a chancery court in a civil contempt case are affirmed unless manifest error is present and apparent. However, the Supreme Court is not bound by the manifest error rule when reviewing an appeal of a conviction of criminal contempt; reviewing proceeds ab initio to determine whether on the record the contemnor is guilty of contempt beyond a reasonable doubt. *Premeaux v. Smith*, 569 So. 2d 681 (Miss. 1990).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause v. Smith*, 548 So. 2d 412 (Miss. 1989).

Under this statute, the Supreme Court must decide from the record whether the appellant was actually guilty of contempt, and in so doing the Court is not held to the rule that they will not reverse unless the chancellor is manifestly wrong. *Prestwood v. Hambrick*, 308 So. 2d 82 (Miss. 1975).

Under this section [Code 1942, § 1152] a husband had a right to appeal with supersedeas from his conviction of con-

tempt for failure to pay child support. *Mullen v. Mullen*, 248 So. 2d 786 (Miss. 1971).

An appeal from a judgment of civil contempt was properly based on this section [Code 1942, § 1152]. *Bryant v. Associates Distct. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

The application of this section [Code 1942, § 1152] is not limited to criminal contempts. *Bryant v. Associates Distct. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

This statute is designed to protect a person convicted of any kind of contempt, by fixing specific amounts for his appeal and appearance bonds, and by giving the Supreme Court a broader than usual review of the decision of the trial court. *Bryant v. Associates Distct. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

On appeals from a judgment for contempt of court, the Supreme Court will decide for itself the question of contempt. *Evers v. State*, 241 Miss. 560, 131 So. 2d 653 (1961).

In an appeal from a conviction for contempt, the Supreme Court is not held to the rule that it will not reverse unless the chancellor is manifestly wrong, but is empowered to review the case and decide for itself whether there had been an actual contempt of court. *Ballew v. Case*, 232 Miss. 183, 98 So. 2d 451 (1957).

Appellant, who claimed that certain household goods and an automobile which had been in possession of the decedent belonged to his wife and his principal, respectively, was not guilty of contempt of court by filing replevin action against the administratrix, in her individual capacity, to recover possession of the property while



the estate was in process of administration. *Ballew v. Case*, 232 Miss. 183, 98 So. 2d 451 (1957).

Court's knowledge in contempt case should be reflected in judgment for purposes of review. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930).

Judgment for contempt should be clear and explicit to constitute *res judicata*, and warrant appellate court in affirming, reversing, annulling, or modifying it. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930).

Judgment, in effect reciting court found respondent guilty of contempt, but leaving time and manner to conjecture, could not be maintained. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930).

In proceeding for direct contempt, contemnor should be permitted to make statement and apology, and courteously state views to have them incorporated in bill of exceptions. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930).

An appeal can be taken only from a final judgment or decree. *Eure v. Taylor*, 126 Miss. 155, 88 So. 514 (1921).

The court being the trier of facts in criminal contempt proceedings, it is presumed that he followed the evidence in finding facts showing guilt. *Durham v. State*, 97 Miss. 549, 52 So. 627 (1910).

A decree adjudging a party guilty of contempt and providing that unless he purges himself thereof within a designated time the court will adjudge punishment, is interlocutory and non-appealable. *Nutt v. State*, 95 Miss. 422, 49 So. 145 (1909); *Eure v. Taylor*, 126 Miss. 155, 88 So. 514 (1921).

## 2. Criminal contempt.

In a child custody case, there was sufficient evidence to support a conviction for constructive criminal contempt based on a failure to comply with visitation and a failure to provide an accounting of college funds. Even though some of the facts were disputed, it was admitted that there was a violation of a visitation order, and several explanations were given for this conduct. *Davis v. Davis*, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

A contemnor was denied due process of law where the show cause hearing for the contempt charges was conducted by the same judge who presided over the divorce proceedings and the related motion for recusal from which the alleged contempt originated, the contemnor was charged with a course of conduct that was committed, for the most part, outside the presence of the court, his conduct associated with the divorce proceedings involved the judge personally, and the judge chose to set a show cause hearing at a date subsequent to the alleged contemptuous conduct. *Purvis v. Purvis*, 657 So. 2d 794 (Miss. 1994), on rehearing (Miss. Apr. 27, 1995).

The evidence was sufficient to support a conviction of an attorney for criminal contempt based on the violation of a court order prohibiting communication with jurors after the return of the verdict, where the attorney admitted to being present in the courtroom when the judge read the order twice, the attorney contacted two jurors and attempted to have them discuss items relevant to the case with him by pretending to have authority from the judge to contact the jurors, and the conversations between the attorney and the jurors indicated the attorney's knowledge of the order, even though the attorney claimed that he did not comprehend the order because of a hearing problem and fatigue as a result of the trial. *Lawson v. State*, 573 So. 2d 684 (Miss. 1990).

Criminal contempt was not proven beyond a reasonable doubt, in spite of the antagonistic behavior of an adjoining landowner who had been unsuccessful in a boundary dispute action, where there was no proof that the landowner aided the lessee in continuing farming operations on the land, the landowner testified that he moved the court-ordered property line stakes so that the farming machinery would not run over them, and the landowner did not pose any real threat to other adjoining landowners, even though he made reference to a "smoking stick" during a verbal altercation, since he did not have a gun and there was no testimony that the other landowners felt so threatened as to abandon the survey of the land. *Mabry v. Howington*, 569 So. 2d 1165 (Miss. 1990).

A citation for criminal contempt is to vindicate the dignity and authority of the court. A citation is proper only when the contemnor has willfully, deliberately and contumaciously ignored the court. A decree which defines with reasonable specificity what the alleged contemnor must do or refrain from doing is prerequisite to a citation. The burden of proving the criminal contempt is on the party asserting it. The guilt of the contemnor must be established beyond a reasonable doubt for a conviction of criminal contempt. *Premeaux v. Smith*, 569 So. 2d 681 (Miss. 1990).

Attorney who aids client in denying visitation rights to client's former spouse when client petitions court for modification of custody and visitation, only to confront congested court calendar and legitimate trial preparation needs and scheduling conflicts of opposing counsel, as result of which immediate hearing cannot be had, is not guilty of criminal contempt; furthermore, where judge whose court or order has allegedly been offended by conduct of attorney has substantial personal involvement in bringing and prosecution of criminal contempt proceedings, he may not adjudge attorney's guilt. *Cook v. State*, 483 So. 2d 371 (Miss. 1986).

This section [Code 1942, § 1152] is the only statute authorizing an appeal from conviction of criminal contempt. *Masonite Corp. v. International Woodworkers of Am.*, 206 So. 2d 171, 24 A.L.R.3d 632 (Miss. 1967).

In the absence of proof in the record sufficient to convict beyond a reasonable doubt, conviction for constructive criminal contempt was not sustained. *Brannon v. State*, 202 Miss. 571, 29 So. 2d 916 (1947).

### 3. Punishment.

A divorced wife appealing from a judgment of contempt of court for her failure to

return a house to her divorced husband in good condition in violation with the provisions of the divorce decree, could enter a plea for mitigation of punishment by reason of insanity, for the first time on appeal. *Adair v. Holden*, 222 So. 2d 834 (Miss. 1969).

Appeal from a decree of conviction of contempt does not lie where the decree imposes no fine or punishment of any kind. *Bond v. Anderson*, 203 Miss. 283, 33 So. 2d 833 (1948).

### 4. Bonds.

On an appeal from a judgment of civil contempt, the question as to the sufficiency of the appeal bond is not governed by Code 1942, § 1162, but by this section [Code 1942, § 1152]. *Bryant v. Associates Dist. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

Where a sheriff, who had been judged guilty of contempt of court, made no effort to file an appeal bond, and, after the time for an appeal had expired, the county judge directed the issuance of a *capias* pro fine to the coroner, who took the sheriff into custody, whereupon the sheriff petitioned the circuit court for a writ of habeas corpus, which was made returnable before the county judge, the trial judge in the habeas corpus proceedings did not have the power then to permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924 (1956).

Since the sheriff, in his contemptuous acts was not representing the county, and it had no beneficial interest in his conviction or acquittal, the sheriff was not exempt by Code 1942, § 1210, from executing a bond upon appealing from contempt judgments. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924 (1956).

## ATTORNEY GENERAL OPINIONS

Conviction of contempt for failing to pay previously assessed fines is appealable under the provisions of this section or § 11-51-12. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A separate appeal bond is required for

each case in which a contempt finding is made. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A defendant has the right to appeal a contempt conviction, but not the sentence. His appeal would be limited to whether or

not he was guilty of contempt. Markopoulos, Nov. 19, 2004, A.G. Op. 04-0566.

## RESEARCH REFERENCES

**ALR.** Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 589.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt. 30 A.L.R.4th 155.

Right to appointment of counsel in contempt proceedings. 32 A.L.R.5th 31.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 197-200.

17 Am. Jur. 2d, Contempt § 98.

**CJS.** 4 C.J.S., Appeal and Error §§ 268, 269.

17 C.J.S., Contempt §§ 207-242.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-12. Appeal from judgment of civil contempt.

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a civil contempt, may appeal to the court to which other cases are appealable from said tribunal. If jail confinement is ordered to compel the payment of any monetary sum, the contemnor shall be allowed to appeal upon the execution of an appearance bond, payable to the appellee, with sufficient sureties, in the penalty of one hundred twenty-five percent (125%) of such sum as he has been adjudicated in contempt for failure to pay, unless the court shall determine that a lesser bond should be required. The bond shall be conditioned to abide the results of the appeal.

(2) Where the punishment for civil contempt is other than jail confinement, the contemnor shall be allowed to appeal upon the posting of a bond, payable to the appellee, with sufficient sureties, to be approved by the tribunal appealed from, in an amount to be fixed by such tribunal, conditioned to abide the results of the appeal.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.

(4) The burden of proof in civil contempt shall be proof by a preponderance of the evidence.

**SOURCES:** Laws, 1981, ch. 369, § 2; Laws, 1991, ch. 573, § 80, eff from and after July 1, 1991.

**Cross References** — Stay or injunction pending appeal, see Miss. R. App. P. 8.

Procedural requirements for appeals to circuit courts in civil cases, see Miss. Uniform Circuit and County Court Rules 12.02, 12.03.



## JUDICIAL DECISIONS

**1. In general.**

In a child custody proceedings, the evidence was sufficient to support a finding of civil contempt based on a mother's failure to provide an accounting of certain college funds; the mother was unable to testify with certainty that the accounting was ever filed with the chancery clerk as ordered by the court. *Davis v. Davis*, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

In a divorce matter, a chancellor's decision to disbelieve a contemnor when the contemnor asserted that the contemnor did not have an ability to pay was supported by the record because the contemnor failed to show, by a preponderance of the evidence, an inability to pay; moreover, the chancellor chose to disbelieve the contemnor's assertions because, among other things, the contemnor had previously manufactured figures and understated the contemnor's income. *Stribling v. Stribling*, 960 So. 2d 556 (Miss. Ct. App. 2007).

There are several available defenses to a civil contempt charge. One defense is that whatever violation there may have been of a decree or order was not wilful or deliberate such that the behavior in question may not be labeled as contumacious. Included in this defense may be an honest inability to perform according to the dictates of the order or decree. Another avail-

able defense is the traditional notion of "clean hands." A third defense is that of an inability to obey an order which is vague or not sufficiently specific. *Smith v. Smith*, 545 So. 2d 725 (Miss. 1989).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause v. Smith*, 548 So. 2d 412 (Miss. 1989).

Father who was imprisoned for civil contempt because of failure to pay past due child support was entitled to release pending appeal in accordance with the terms and conditions of Mississippi Code § 11-51-12. *Jones v. Hargrove*, 493 So. 2d 346 (Miss. 1986).

Mother's proposal that the appearance bond, required of father to secure his release from custody pending appeal, should be conditioned so that, in the event Supreme Court affirmed the lower court's contempt order, payment of child support average would be forthcoming was beyond the requirement of Mississippi Code § 11-51-12. *Jones v. Hargrove*, 493 So. 2d 346 (Miss. 1986).

## ATTORNEY GENERAL OPINIONS

Conviction of contempt for failing to pay previously assessed fines is appealable under the provisions of § 11-51-12 or this section. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A defendant has the right to appeal a contempt conviction, but not the sentence. His appeal would be limited to whether or

not he was guilty of contempt. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A separate appeal bond is required for each case in which a contempt finding is made. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

# RESEARCH REFERENCES

**ALR.** Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 589.

Oral communications insulting to particular state judge, made to third party out of judgment's physical presence, as criminal contempt. 30 A.L.R.4th 155.

Right to appointment of counsel in contempt proceedings. 32 A.L.R.5th 31.

**Am Jur.** 17 Am. Jur. 2d (Rev), Contempt § 3.

**CJS.** 4 C.J.S., Appeal and Error §§ 268, 269.

## §§ 11-51-13 through 11-51-15. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-13. [Codes, 1871, §§ 410, 1250; 1880, § 2317; 1892, § 40; 1906, § 41; Hemingway's 1917, § 17; 1930, § 20; 1942, § 1154]

§ 11-51-15. [Codes, 1871, § 2841; 1880, § 2318; 1892, § 41; 1906, § 42; Hemingway's 1917, § 18; 1930, § 21; 1942, § 1155; Am. Laws, 1978, ch. 335, § 12]

**Editor's Note** — Former § 11-51-13 related to how appeal obtained; by petition to clerk except in certain cases.

Former § 11-51-15 related to the petition for appeal.

## § 11-51-17. One of several parties may appeal; failure to join appeal.

Any one or more of the parties to a judgment or decree may appeal therefrom. If all the parties to a judgment after receiving notice thereof in the time required by the Supreme Court do not join the appeal, they shall not afterward have the right of appeal, and the judgment of the court below shall remain in full force against them.

**SOURCES:** Codes, 1857, ch. 62, art. 107; 1871, § 1258; 1880, § 2319; 1892, § 42; 1906, § 43; Hemingway's 1917, § 19; 1930, § 22; 1942, § 1156; Laws, 1991, ch. 573, § 81, eff from and after July 1, 1991.

**Cross References** — Return-days for appeals, see § 11-3-3.

Appeal as of right, how taken, see Miss. R. App. P. 3.

Filing and service, see Miss. R. App. P. 25.

# JUDICIAL DECISIONS

1. In general.
2. Issuance of summons.
3. Failure to issue summons, effect of.
4. —Time for objection.
5. Necessary parties.

## 1. In general.

The purpose of the statute is to prevent the splitting of appeals. *Duckworth v. Allis-Chalmers Mfg. Co.*, 247 Miss. 198, 150 So. 2d 163 (1963).

Where plaintiffs brought an action against a city and landowner, among others, for injury sustained by the fall of a tree upon their automobile, and the landowner entered his appearance but filed no defensive pleadings, order of the trial court sustaining demurrer to an amended petition had the effect of finally dismissing plaintiff's entire suit upon the failure to plead further within the time allowed and finally disposed of the case as to the landowner, and neither this section nor chapter 259, Laws of 1952 ( [Code 1942, § 1156] § 335.5), precluded plaintiff's appeal from the trial court's action. *Barron v. City of Natchez*, 229 Miss. 276, 90 So. 2d 673 (1956).

Final decree against certain named defendants where not all of the defendants were even in court by any known valid form of process, which decree was wholly ineffectual and validly accomplished no purpose sought by the complainant, would be reversed and remanded pursuant to appeal by some of the defendants. *Dorsey v. Sullivan*, 199 Miss. 602, 24 So. 2d 852 (1946).

Summons and severance requirement of statute respecting appeal is procedural only, and not jurisdictional, purpose being to prevent splitting of appeals. *Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co.*, 167 Miss. 63, 146 So. 889 (1933).

Statutory provision for summons and severance when all parties to decree do not join in appeal held inapplicable to appeals from county to circuit courts. *Barber v. Loveland*, 166 Miss. 625, 146 So. 854 (1933).

Complainants, seeking separate and distinct judgment, cannot file cross-assignment of errors to defendants' appeal, transferring controversy with other complainant. *Walter Fisher Co. v. I. Lowenberg & Co.*, 149 Miss. 761, 116 So. 91 (1928).

Within statutory period, one or more parties to judgment may appeal without consent of others. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707 (1928).

## 2. Issuance of summons.

Where a landlord brought an action against a tenant and others who were claiming to have an interest in lease for rent owing and possession of premises,

and a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829 (1955).

Those summoned to join in appeal must give bond, and they cannot join after cause has proceeded to judgment. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707 (1928).

After expiration of 6 months from rendition of judgment, parties summoned cannot join in appeal. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707 (1928).

Where one defendant appeals by giving supersedeas bond a summons should issue to the other judgment defendants before proceeding to final hearing, and if appellant does not issue such summons the appellee should have it issued or move to dismiss the appeal, and if no summons is issued no execution can be issued on the judgment superseded. *United States Fid. & Guar. Co. v. Jackson*, 123 Miss. 676, 86 So. 456 (1920).

Where all parties against whom judgment was rendered did not join in appeal and no summons was issued to those not joined, the appellee may have such summons issued. *Tardy v. Rosenstock*, 118 Miss. 720, 80 So. 1 (1918).

## 3. Failure to issue summons, effect of.

Where parties permitted cause to proceed to judgment, validity cannot be questioned on ground summons to other parties not joining in appeal was not issued, and cause will not be remanded to docket for that purpose. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707 (1928).

Where one defendant appeals by giving a supersedeas bond and no summons is issued, no execution can be issued on the judgment superseded, since if the appellant does not issue summons for the other judgment defendants the appellee should have it issued or move to dismiss the appeal. *United States Fid. & Guar. Co. v. Jackson*, 123 Miss. 676, 86 So. 456 (1920).

Where judgment was rendered against several defendants and an appeal taken in which one of the defendants did not join and for whom no summons was issued requiring him to join, the Supreme Court



will either dismiss appeal or require statute to be complied with before consideration by court. *Tardy v. Rosenstock*, 118 Miss. 720, 80 So. 1 (1918).

Where judgment was rendered against a firm, and it does not appear that there was any summons and severance so as to conclude one of the partners, the other cannot alone appeal. *Gibson v. Carr*, 91 Miss. 773, 45 So. 864 (1908).

#### 4. —Time for objection.

Contention based on fact that appellant's co-complainants in trial court did not appeal, and that there was no summons and severance, could not be made

for first time on suggestion of error. *Hamel v. Marlow*, 171 Miss. 559, 157 So. 255, 96 A.L.R. 924 (1934), modified on suggestion of error, 171 Miss. 565, 157 So. 905, 96 A.L.R. 924 (1934).

Objection that all parties to decree were not joined in appeal from county to circuit court could not be raised for first time in Supreme Court. *Barber v. Loveland*, 166 Miss. 625, 146 So. 854 (1933).

#### 5. Necessary parties.

Sureties on bond on appeal to circuit court were not necessary parties to appeal. *Wilson v. City of Lexington*, 153 Miss. 209, 119 So. 795 (1928).

### RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 293.

**CJS.** 4A C.J.S., Appeal and Error §§ 29, 264, 273-276, 290, 294-297, 348, 353-387.

#### § 11-51-19. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 43; 1906, § 44; Hemingway's 1917, § 20; 1930, § 23; 1942, § 1157]

**Editor's Note** — Former § 11-51-19 related to when appeal returnable if issued by the clerk of the supreme court.

#### § 11-51-21. Bond to be given by parties who join in the appeal.

If the parties summoned to join in the appeal desire to do so, they must comply with the requirements to perfect an appeal as if they had appealed in the first instance, or they shall not be allowed to join in said appeal. Such compliance shall be made within the time required by the Supreme Court, and if a supersedeas bond be filed, may be approved by the Clerk of the Supreme Court, or the clerk of the court from whose judgment the appeal was taken, and certified and filed in the office of the Clerk of the Supreme Court.

**SOURCES:** Codes, 1880, § 2320; 1892, § 44; 1906, § 45; Hemingway's 1917, § 21; 1930, § 24; 1942, § 1158; Laws, 1978, ch. 335, § 13; Laws, 1991, ch. 573, § 82, eff from and after July 1, 1991.

**Cross References** — Circuit court restrictions on who may sign bonds, see Uniform Rules of Circuit and County Court Practice Rule 1.07.

Appeal as of right, when taken, see Miss. R. App. P. 4.

## JUDICIAL DECISIONS

**1. In general.**

The purpose of the statute is to prevent the splitting of appeals. *Duckworth v. Alis-Chalmers Mfg. Co.*, 247 Miss. 198, 150 So. 2d 163 (1963).

Those summoned to join in appeal must give bond, and they cannot join after cause has proceeded to judgment. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707 (1928).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 325, 327.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 461.1 (notice — motion for order dispensing with or limiting security); Form 491.1 (notice — motion for order that security is insufficient).

**CJS.** 4A C.J.S., Appeal and Error §§ 325.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

**§ 11-51-23. Execution when suspended as to some parties.**

If only part of those against whom a judgment or decree is rendered appeal and supersede its execution, an execution may be issued against all, and the clerk issuing it shall note on it the fact of the supersedeas as to those who appeal, and it shall be executed only as to the others.

**SOURCES:** Codes, 1880, § 2321; 1892, § 45; 1906, § 46; Hemingway's 1917, § 22; 1930, § 25; 1942, § 1159.

**Cross References** — Executions generally, see §§ 13-3-111 et seq.

**§ 11-51-25. Repealed.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2322; 1892, § 46; 1906, § 47; Hemingway's 1917, § 23; 1930, § 26; 1942, § 1160; Am Laws, 1978, ch. 335, § 14]

**Editor's Note** — Former § 11-51-25 related to petition not necessary to the validity of appeal.

**§ 11-51-27. Terms for granting appeal.**

An appeal may be granted by the court in all cases, upon terms prescribed, which shall include payment of all costs in the lower court.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, art. 2, § 150; 1857, ch. 62, art. 108; 1871, § 1250; 1880, § 2323; 1892, § 47; 1906, § 48; Hemingway's 1917, § 24; 1930, § 27; 1942, § 1161; Laws, 1978, ch. 335, § 15; Laws, 1991, ch. 573, § 83, eff from and after July 1, 1991.

**Cross References** — Computation and extension of time, see Miss. R. App. P. 26.

## RESEARCH REFERENCES

**CJS.** 4 C.J.S., Appeal and Error § 402.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

### § 11-51-29. Prepayment of costs in civil cases on appeal.

On appeals from decrees overruling demurrers or other interlocutory orders or decrees, or where the appeal is granted to settle the principles of the case, or on appeals from final judgments of a circuit court in civil cases, or from final decrees of a chancery court including cases where the circuit court or chancery court has acted as an appellate court, the appellant shall prepay all of the costs in the lower court including the cost of the preparation of the record of the proceedings in the trial court, and fee prescribed in Section 25-7-3, to the clerk of the court from which the appeal is taken.

**SOURCES:** Codes, Hutchinson's 1848, ch. 54, art. 2, § 37; 1857, ch. 62, art. 104; 1871, § 1252; 1880, § 2334; 1892, § 48; 1906, § 49; Hemingway's 1917, § 25; 1930, § 28; 1942, § 1162; Laws, 1896, ch. 90; Laws, 1978, ch. 335, § 16, eff from and after July 1, 1978.

**Cross References** — Power of supreme and circuit judges and chancellors to grant writ of supersedeas, see § 9-1-19.

Power of county judge to issue writ of supersedeas, see § 9-9-23.

Motion to discharge supersedeas, see § 11-3-21.

Judgment on bond for supersedeas, see § 11-3-27.

Exception to sufficiency of bond for supersedeas, see § 11-3-33.

Deposit for costs, see §§ 11-51-69, 99-35-107.

Appeals from county court operating as supersedeas, see § 11-51-79.

## JUDICIAL DECISIONS

1. In general.
2. Sufficiency.
3. Operation.
4. Sureties.
5. Statutory damages.

### 1. In general.

Although § 11-51-29 may be interpreted to require all court costs to be prepaid upon the taking of an appeal, the statutory language is subject to Supreme Court Rule 11(b)(1) which clearly limits prepaid costs to those essential to the processing of the appeal. In re Newsom, 536 So. 2d 1 (Miss. 1988).

An appeal taken to the Supreme Court either by means of prepaying the costs in the lower court and the fee required by § 25-7-3 or by means of filing in the office

of the Clerk of the Supreme Court a transcript of the record of the case (§ 11-51-25 [Repealed]) is taken when the costs are prepaid as provided in §§ 11-51-29 and 11-51-61 [Repealed]; since an appeal must be taken within 45 days after the rendition of the judgment or decree (§ 11-51-5 [Repealed]), the prepayment of costs must be accomplished within that period of time. Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 384 So. 2d 1031 (Miss. 1980).

Although an appeal was not perfected where appellant failed to prepay court costs and the filing fee within the forty-five-day time limit, the appeal would not be dismissed where a new statute requiring the prepayment of costs and fees for the perfection of an appeal had gone into



effect shortly before the final judgment was rendered, where the appellant had made a good faith effort to timely perfect the appeal under the old method, and where appellant was not timely presented with a bill of costs, as required by the new statute, but prepaid the cost bill as soon as presented. In future cases, if the clerk of the trial court fails to satisfy the statutory requirements as to the bill of costs, the attorney of record desiring an appeal must make a motion in writing to the trial judge, within the allotted forty-five days, compelling production of the costs bill from the trial court clerk and, absent such a written motion within the time for appeal, the appeal will be dismissed for lack of jurisdiction. *Allgood v. Allgood*, 367 So. 2d 450 (Miss. 1979).

Legislative intent of amendments to §§ 11-51-25 [Repealed] and 11-51-29 is to require prepayment of costs as means to perfect appeal; failure to timely perfect appeal, which requires prepayment of costs and fees, is jurisdictional and requires dismissal. *Allgood v. Allgood*, 367 So. 2d 450 (Miss. 1979).

Appellant's Motion for Stay of Execution and Motion for Leave to Appeal Without Supersedeas Bond did not toll the time allowed for appeal by Code 1972, § 11-51-5 [Repealed]. When it became apparent that no ruling would be had on the appellant's motions within the 45 day period, the appellant was required to post a cost bond as provided by Code 1972, § 11-51-29 within the 45 day period, and he could then have filed a motion to the Supreme Court for supersedeas as provided for in Code 1972, § 11-51-43. *Summer v. Henn*, 323 So. 2d 751 (Miss. 1975).

This section [Code 1942, § 1162] and Code 1942, § 1163, which deal with appeal bonds generally in civil cases, were inapplicable to an appeal bond given on an appeal from a judgment of civil contempt. *Bryant v. Associates Dist. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

The furnishing of a bond by appellant and its approval, or a deposit in lieu thereof, must be within the time allowed for appeal. *Hutchinson v. Ferrell*, 248 Miss. 700, 160 So. 2d 903 (1964).

County board of education, and its president, as agents of the state, may appeal

without giving bond. *County Bd. of Educ. v. Smith*, 239 Miss. 53, 121 So. 2d 139 (1960).

This section [Code 1942, § 1162] did not apply in an appeal from the determination of the chancellor in an annexation proceeding. *Dodd v. City of Jackson*, 238 Miss. 372, 118 So. 2d 319 (1960).

Where the circuit court, upon appeal, reviewed the case upon a record made in the county court, the contention of appellant, who undertook an appeal to the Supreme Court and deposited \$100.00 in cash with the circuit clerk in lieu of a bond, that "the cost of the transcript" meant solely the cost in the circuit court and did not include the cost previously accrued in the county court was rejected, since the quoted term meant the transcript upon which the appellant relied for his appeal, including the stenographer's notes of the testimony in county court, as well as other costs accrued in the appeal to the circuit court. *Walters v. Fine*, 232 Miss. 494, 95 So. 2d 229 (1957).

Appellee could not file bond under this section [Code 1942, § 1162] and thereby prosecute appeal for appellant and move to advance cause on Supreme Court docket. *Gaudet v. Mayor & Bd. of Aldermen*, 42 So. 2d 808 (Miss. 1949).

Defect in appeal bond given in appeal from municipal ordinance to Circuit Court, in that it was signed only by the protestants as principals, and without the two sureties required by law, was waived by failure to object thereto in the circuit court; and, bond being amendable, defect did not deprive either the circuit court or supreme court of jurisdiction. *Neely v. City of Charleston*, 35 So. 2d 316 (Miss. 1948).

All defendants in the trial court must be specifically named as obligees in the appeal bond. *Williams v. J.E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131 (1947).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the supreme court. *Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219 (1941).

Where an effort had been made in good faith by a drainage district to perfect an

appeal within six months, and there had been no intentional delay in having the record filed with the clerk of the Supreme Court, and only a short delay in filing it, with no damage or prejudice to the other party, the Supreme Court in its discretion overruled a motion to dismiss the appeal on the ground of inexcusable delay in filing the transcript in the Supreme Court, and granted the drainage district permission to file the proper appeal bond within ten days. *Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219 (1941).

That circuit court permitted alleged defective bond given on appeal from county court to be amended held not error. *Bassett v. Building & Loan Ass'n*, 164 Miss. 674, 145 So. 109 (1933).

Failure to file \$100 appeal bond after prepaying cost of transcript requires dismissal of appeal. *Howell v. Miller*, 151 Miss. 372, 118 So. 178 (1928).

An appeal bond is valid though executed and approved before the entry of the decree to be appealed from, and when the decree is entered will transfer the cause to the Supreme Court. *Hughes v. Kaw Inv. Co.*, 129 Miss. 434, 91 So. 702 (1922).

## 2. Sufficiency.

On an appeal from a judgment of civil contempt, the question as to the sufficiency of the appeal bond is not governed by this section, but by Code 1942, § 1152. *Bryant v. Associates Dist. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

A deposit of money equal to the penalty of the bond does not satisfy the requirements of the statute for an appeal without supersedeas in a civil case except where the cost of the transcript is prepaid, in which event a deposit of \$100 may be made in view of the bond. *Snipes v. Commercial & Indus. Bank*, 225 Miss. 345, 82 So. 2d 895 (1955).

Under a statute providing that where appellant prepay cost of transcript, a bond for \$100 shall be sufficient or appellant may deposit that sum in cash with the clerk in lieu of the bond, and the appellants had not prepaid the cost of transcript within six months' period, an appeal would be dismissed. *Wooten v. City of Laurel*, 221 Miss. 652, 74 So. 2d 752 (1954).

Deposit of \$100 with chancery clerk from which he deducted cost of making transcript of records was insufficient to comply with provision in this section [Code 1942, § 1162] permitting prepayment of costs of transcript and a \$100 deposit in lieu of bond; consequently, the appeal was not perfected under Code 1942, § 1174, so that a motion to advance cause on docket of Supreme Court was properly denied as prematurely made. *Gaudet v. Mayor & Bd. of Aldermen*, 42 So. 2d 808 (Miss. 1949).

The appeal bond of an appellant, not desiring a supersedeas, in the amount of \$100 is insufficient where appellant has not prepaid the cost of the transcript. *Williams v. J.E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131 (1947).

## 3. Operation.

There is nothing in this section which requires the clerk or any party to apply for an additional bond; The statute merely provides that such persons may apply for a greater bond if the cost of the appeal will exceed \$500. *Summer v. Henn*, 323 So. 2d 751 (Miss. 1975).

To operate as supersedeas, one of conditions of bond must be that appellant will satisfy judgment or decree complained of. *Spiro v. Shapleigh Hdwe. Co.*, 153 Miss. 195, 119 So. 206 (1928).

Where condition of bond was to pay Supreme Court's judgment and all costs, it would not operate as supersedeas. *Spiro v. Shapleigh Hdwe. Co.*, 153 Miss. 195, 119 So. 206 (1928).

An appeal with or without supersedeas has the same effect except that the former operates to stay execution. *Yazoo & Miss. V. Ry. v. Adams*, 78 Miss. 977, 30 So. 44 (1901).

## 4. Sureties.

Where trial court fixed the bond at \$1000 for an appeal without supersedeas and the appellant filed a petition for appeal and deposited cash without prepaying the transcript, this cash deposit did not satisfy the statutory requirement but the appellant should be given seven days to file a good and sufficient bond with proper sureties. *Snipes v. Commercial & Indus. Bank*, 225 Miss. 345, 82 So. 2d 895 (1955).

A surety against whom judgment was rendered in the lower court, along with its principal there, is not a sufficient surety on an appeal bond, whether the surety be personal or corporate. *Williams v. J.E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131 (1947).

Appeal bond must have more than one surety unless surety is guaranty company. *Champernois & Blanks v. Donald Co.*, 153 Miss. 719, 121 So. 485 (1929).

A bond with but one surety is insufficient. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505 (1882).

### 5. Statutory damages.

Surety on appellant's cost bond held not liable for statutory penalty of 5 per cent on money judgment affirmed, such penalty not being a part of "costs." *Humphreys v. Thompson*, 130 So. 152 (Miss. 1930).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 325, 327.

Deposit in lieu of bond, 2 Am. Jur. Pl & Pr Forms (Rev ed), Appeal and Error, Forms 381-388.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 295, 296.

**CJS.** 4A C.J.S., Appeal and Error §§ 322-324, 337-340, 349-352.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-31. Bond for supersedeas.

A supersedeas shall not be granted in any case pending before the Supreme Court, unless the party applying for it shall give bond as required by the Rules of the Supreme Court.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 54, art. 2, §§ 34, 37; 1857, ch. 62, art. 105; 1871, § 1251; 1880, § 2325; 1892, § 49; 1906, § 50; *Hemingway's* 1917, § 26; 1930, § 29; 1942, § 1163; *Laws*, 1954, ch. 238; *Laws*, 1978, ch. 335, § 17; *Laws*, 1985, ch. 386; *Laws*, 1991, ch. 573, § 84, eff from and after July 1, 1991.

**Cross References** — Appeal with supersedeas to chancery court from suspension, cancellation or revocation of grain warehouseman's license, see § 75-44-25.

Application of this section to appeal with supersedeas from suspension, cancellation or revocation of license of pulpwood receiving facility, see § 75-79-21.

Circuit court restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

Interlocutory appeal by permission, see Miss. R. App. P. 5.

Stay or injunction pending appeal, see Miss. R. App. P. 8.

## JUDICIAL DECISIONS

1. In general.
2. Bond on supersedeas.
3. Rights and liabilities on supersedeas.
4. Statutory damages.

### 1. In general.

The filing of a \$500 cost bond by a party appealing to the Supreme Court of Missis-

sippi from a decree confirming a municipal ordinance extending the city limits does not operate as a supersedeas where, following an unsuccessful appeal to that court, the appellant filed a petition for certiorari in the Supreme Court of the United States. *Bridges v. City of Biloxi*, 253 Miss. 812, 178 So. 2d 683 (1965),



motion overruled, 253 Miss. 812, 180 So. 2d 154 (1965), motion overruled, 253 Miss. 812, 180 So. 2d 641 (1965), appeal dismissed, 383 U.S. 574, 86 S. Ct. 1077, 16 L. Ed. 2d 106 (1966).

Code 1942, § 1162 and this section [Code 1942, § 1163], which deal with appeal bonds generally in civil cases, were inapplicable to an appeal bond given on an appeal from a judgment of civil contempt. *Bryant v. Associates Disct. Corp.*, 251 Miss. 1, 167 So. 2d 657 (1964).

Supersedeas in civil cases under this section [Code 1942, § 1163] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. City of Tupelo*, 241 Miss. 894, 133 So. 2d 531 (1961).

This section [Code 1942, § 1163] did not have any application in an appeal in an annexation proceeding. *Dodd v. City of Jackson*, 238 Miss. 372, 118 So. 2d 319 (1960).

Since the denial to an electric power distributing company of a decree, enjoining a municipality and rural cooperative from proceeding further in establishing a competitive electrical power distribution system in the municipality, was not a money decree, was not for the recovery or against a retention of specific property, nor directed the sale of property, the electric power distributing company was not entitled to a supersedeas as a matter of right. *Mississippi Power & Light Co. v. Town of Coldwater*, 234 Miss. 640, 99 So. 2d 443 (1958).

The dismissal of an appeal for failure to file the appeal bond within the required time is a breach of the conditions of the appeal bond so as to render the sureties liable. *Davidson v. Hunsicker*, 224 Miss. 206, 80 So. 2d 834 (1955).

Code 1942, § 1970, permitting motion to discharge supersedeas in appeal to Supreme Court before appeal is returnable, is not applicable in case arising under this section [Code 1942, § 1163], which unquestionably grants right to appeal with supersedeas. *Coulter v. Banks*, 38 So. 2d 696 (Miss. 1949).

This section [Code 1942, § 1163] is not applicable to an appeal from an order

issuing a writ of mandamus to compel a circuit clerk to permit a candidate to examine the ballot boxes after a primary election as provided by the Corrupt Practices Act, so as to allow an appeal with supersedeas as of right. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

Appeals to the Supreme Court with supersedeas in civil cases are matters of right only under this section and §§ 31 and 33, Code of 1930 (Code 1942, §§ 1165, 1167), and then only in three classes of cases: (1) Where there is a money decree or judgment, or (2) where there is a decree or judgment for the recovery or against the retention of specific property, or (3) where the decree directs the sale or delivery of possession of real estate, in which cases a supersedeas is allowed as a matter of right when an approved supersedeas bond in double the amount or value is given, provided, of course, the decree or judgment is final in its nature or effect. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

Where the chancery court, having found that the plaintiff had an interest in certain oil and gas leases, appointed a master, who was directed to state an account of the income and profits from the operation theretofore conducted under the leases, and of expenditures appropriately made to develop the property, and to report to the court his findings as to the rights of the parties under the accounting and for proper hearing and further decree thereon, and, to settle controlling principles and to avoid delay and expense, directed that an appeal should be granted to the Supreme Court, the chancery court, in undertaking to fix the value of the interest of the plaintiff, did so only for the purpose of determining the amount of the appeal bond to be furnished, and not as a final decree which would preclude further consideration of such value. *Sample v. Romine*, 193 Miss. 706, 8 So. 2d 257 (1942), error overruled, 193 Miss. 733, 9 So. 2d 643 (1942), corrected, 193 Miss. 736, 10 So. 2d 346 (1942).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving

bond for appeal to the supreme court. *Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219 (1941).

To operate as supersedeas, one of conditions of bond must be that appellant will satisfy judgment or decree complained of. *Spiro v. Shapleigh Hdwe. Co.*, 153 Miss. 195, 119 So. 206 (1928).

Where condition of bond was to pay Supreme Court's judgment and all costs, it could not operate as supersedeas. *Spiro v. Shapleigh Hdwe. Co.*, 153 Miss. 195, 119 So. 206 (1928).

If supersedeas does not on compliance with Code 1906 § 50, as matter of right, follow an appeal from a final decree, a judge of the Supreme Court may grant it under § 56 [Code 1942, § 1169]. *Yazoo & Miss. V. Ry. v. James*, 108 Miss. 656, 67 So. 152 (1915).

Appeals with and without supersedeas have the same effect except that the former operate to stay execution. *Yazoo & Miss. V. Ry. v. Adams*, 78 Miss. 977, 30 So. 44 (1901).

## 2. Bond on supersedeas.

The amount of a supersedeas bond should be sufficient to protect the appellee in his or her judgment and, therefore, it should ensure the payment of the judgment and interest, and any waste that could occur pending the appeal. If the appeal is affirmed, the appellee should be able to satisfy the payment of the judgment in full, together with costs, interests, and the damages for delay. The bond is the typical means of giving the appellees security. However, the court may approve security in the form of cash or property. The judgment may be secured in other ways such as the court's taking possession of personal property or otherwise providing for a method to ensure payment of the appellee's judgment. The controlling guideline in determination of form, amount, and procedure for supersedeas bonds is Mississippi Supreme Court Rule 8, effective January 1, 1988 which governs all proceedings in appeals and other proceedings subsequently brought. *Perkins v. Thompson*, 539 So. 2d 1029 (Miss. 1989).

Since appellant's filing of two appeal bonds totaling 125 per cent of the judgment appealed from, under which differ-

ent sureties bound themselves for a stated portion of the required supersedeas bond, was not a sufficient compliance with Code 1942, §§ 1163 and 1973, appellee's exceptions to the sufficiency of the bonds would be sustained, unless within 30 days appellant filed a good and sufficient supersedeas bond. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

A supersedeas bond signed by only one individual surety is defective. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

The requirement as to the amount of a supersedeas bond is not met by giving bonds with different sureties for varying amounts aggregating the required amount. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

The NAACP, against whom a judgment was entered in a protracted state anti-trust action arising from civil rights activities, was denied due process of law and was entitled to a preliminary injunction against the enforcement of § 11-51-31 where state remedies with respect to the bond provisions had been exhausted, where the prevailing parties at trial were not required to give security for any loss or damage which might be sustained should the trial court's judgment be set aside on appeal, where the parties prevailing at trial would not be substantially harmed by granting the injunctive relief and where, if injunctive relief were not granted, the NAACP's rights of free speech and association would be severely impaired and the NAACP would suffer immediate and irreparable harm to its projects and programs. *Henry v. First Nat'l Bank*, 424 F. Supp. 633 (N.D. Miss. 1976), *aff'd*, 595 F.2d 291 (5th Cir. 1979), *reh'g denied*, 601 F.2d 586 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020, 62 L. Ed. 2d 756 (1980).

Where the value of appellee's net interest, including the money decree and the value of the property in controversy, less the amount awarded to appellants on their cross-bill, was \$13,225, an appeal



bond in the penal sum of \$593.75 was for an insufficient amount, and the supersedeas would be ordered discharged unless, within 10 days, an adequate bond should be given and approved. *Horton v. Boatright*, 234 Miss. 446, 105 So. 2d 567 (1958).

In an arbitration proceeding where an award has been entered almost two years earlier and which was subsequently affirmed, the chancery court had authority to correct the decree and where supersedeas bond had been overlooked in declaring a decree, the chancery court could include finding of liability to cost claimants against the supersedeas bond given by surety in connection with prior interlocutory appeal which had been dismissed. *Fidelity & Cas. Co. v. State Bldg. Comm'n*, 228 Miss. 37, 87 So. 2d 449 (1956).

On appeal by the defendants from an adverse decree in a suit by the owners of one-fourth of the stock of a corporation to have the corporation dissolved and the proceeds distributed, a supersedeas bond in double the par value of the stock of the complainants, rather than a bond in double the amount of the entire capital stock of the corporation, would be required. *Hyman Mercantile Co. v. Kiersky*, 192 Miss. 195, 4 So. 2d 881 (1941).

On appeal from order granting injunction, if the bond required by the supersedeas decree is deemed insufficient and a motion filed to increase the bond, the facts showing the insufficiency of the bond must be set forth in the motion. *McNeeley v. City of Natchez*, 139 Miss. 628, 102 So. 564 (1925).

Bond in double the amount of decree is required for supersedeas except where impounded funds are separately decreed to be turned over. Surety companies are qualified bondsmen. *Aetna Ins. Co. v. Robertson*, 127 Miss. 440, 90 So. 120 (1921).

Where appellant executed appeal bond which is insufficient as a supersedeas under § 50, Code 1906, a motion to require a larger penalty will be overruled. *McCrory v. Donald*, 118 Miss. 596, 79 So. 801 (1918).

If in a suit to restrain proceedings under an act of the Legislature, the chancery court dissolve the injunction, award dam-

ages against complainants and dismiss the bill, and the complainants obtain a supersedeas appeal under Code 1892, § 49, the Supreme Court on motion of appellees will discharge the supersedeas as to the dissolution of the injunction, but will continue it until the final hearing as to the decrees dismissing the suit and adjudging the act constitutional. *Ross v. Quick*, 89 Miss. 29, 42 So. 281 (1906).

Bond with but one personal surety is insufficient. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505 (1882).

### 3. Rights and liabilities on supersedeas.

Sureties on husband's supersedeas bond, staying enforcement pending appeal of decree granting wife divorce and establishing her title to the home, whereby husband was enabled to occupy part of the property and collect rent upon the remainder, were liable in a suit for an accounting for such rent due by the husband for his occupancy and for the amounts collected by him from the other tenants during the pendency of appeal. *Hemphill v. Hemphill*, 199 Miss. 428, 24 So. 2d 855 (1946).

Where a surety appealed from a judgment against it and its principal executed an appeal bond providing that the surety should satisfy the judgment or decree complained of and also such final judgment or decree as might be made in the cause and all costs if the same should be affirmed, the surety was not liable for the judgment rendered in the court below by reason of such appeal bond where the judgment as to it was reversed on appeal. *United States Fid. & Guar. Co. v. Rice*, 184 Miss. 443, 185 So. 563 (1939), error overruled, 184 Miss. 449, 186 So. 620 (1939).

Authority of a court to make orders for the preservation of property in the hands of a receiver is not impaired by an appeal with supersedeas from the final decree. *Lamb v. Rowan*, 81 Miss. 369, 33 So. 4 (1902).

Actions on supersedeas and injunction bonds are not maintainable until the final disposition of the case in which they were given. *Yazoo & Miss. V. Ry. v. Adams*, 78 Miss. 977, 30 So. 44 (1901).

Where pending an appeal with supersedeas, the bond not having been executed until nearly four months after date of



judgment, and the sheriff not having been served with the writ of supersedeas or received other official notification of it, he is not liable on his bond for permitting a successful claimant to take property that had been adjudged to him. *Memphis Grocery Co. v. Anderson*, 76 Miss. 322, 24 So. 387 (1898).

By executing bond to supersede a decree in chancery the sureties subject themselves to the jurisdiction of the court to enforce the decree and it may render a decree against them on the bond. *Kiernan v. Cameron*, 66 Miss. 442, 6 So. 206 (1889).

#### 4. Statutory damages.

The amount of the supersedeas bond is not conclusive of the basis upon which the

5% damages of a successful appellee is to be computed. *Sunflower Farms, Inc. v. McLean*, 238 Miss. 168, 117 So. 2d 808 (1960).

Where an appeal was dismissed because of the appellant's failure to file an appeal bond within the required time, under Code 1942, § 1973 statutory damages will be allowed. *Davidson v. Hunsicker*, 224 Miss. 206, 80 So. 2d 834 (1955).

Notwithstanding granting of appeal with supersedeas to settle principles of the case on dissolution of an injunction to restrain a sale under a trust deed, statutory damages should be allowed. *Burns v. Dreyfus*, 69 Miss. 211, 11 So. 107 (1891).

### RESEARCH REFERENCES

**ALR.** Validity and construction of state statutory provision forbidding court to stay, pending review, judgment or order revoking or suspending professional, trade, or occupational license. 42 A.L.R.4th 516.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 325, 327.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 461.1 (notice — motion

for order dispensing with or limiting security); Form 491.1 (notice — motion for order that security is insufficient).

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 295, 296.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-33. Parties and sureties on bonds examined on oath.

To enable the clerk to determine the value or amount of the matter in controversy, or the value of rents, where the same shall not appear by the proceedings in the cause, he may examine the parties and other persons, on oath. He may also examine, on oath, all persons who may be offered as sureties on any supersedeas bond, touching their sufficiency as such sureties, and require the examination to be put in writing and signed by such persons.

**SOURCES:** Codes, 1857, ch. 62, art. 106; 1871, § 1253; 1880, § 2343; 1892, § 50; 1906, § 51; Hemingway's 1917, § 27; 1930, § 30; 1942, § 1164; Laws, 1978, ch. 335, § 18, eff from and after July 1, 1978.

**Cross References** — Power of clerk to administer oaths, see § 11-1-1.

### RESEARCH REFERENCES

**ALR.** Counterclaim, etc. as affecting appellate jurisdictional amount. 58 A.L.R.2d 84.

Jurisdictional amount for appellate review as affected by payment, tender, or settlement. 58 A.L.R.2d 166.

Jurisdictional amount for appellate review as affected by abandonment of claim, wholly or in part. 58 A.L.R.2d 177.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

**Am Jur.** 5 Am. Jur. 2d Appellate Review §§ 422, 433.

**CJS.** 4A C.J.S., Appeal and Error §§ 339, 342.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-35. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 61, art. 1 (88); 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2326; 1892, § 51; 1906, § 52; Hemingway's 1917, § 28; 1930, § 31; 1942, § 1165; Am Laws, 1978, ch. 335, § 19]

**Editor's Note** — Former § 11-51-35 related to bond to supersede writ of possession.

## § 11-51-37. Judgment on bond to supersede writ of possession.

If the judgment or decree as to the land embraced in the stay of execution obtained under Section 11-51-35 shall be affirmed, the court below, on the receipt of the certificate of the affirmance, shall, after the obligors in the supersedeas bond have been summoned, proceed to inquire, as well of the value of the use and occupation of said land as of the damages by any waste or injury contemplated by the bond. Judgment for the sums assessed shall be rendered against the obligors in the bond, or such as are alive; and if any be dead, like proceedings in all respects may be had as are provided for in other cases of deceased obligors in bonds given in legal proceedings.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1(88); 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2327; 1892, § 52; 1906, § 53; Hemingway's 1917, § 29; 1930, § 32; 1942, § 1166; Laws, 1978, ch. 335, § 20, eff from and after July 1, 1978.

**Editor's Note** — Section 11-51-35 referred to in this section was repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

This section is modified or supplanted by Rule 8, Miss. R. App. P. as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

**Cross References** — Proceedings on death of surety on bonds, see §§ 11-1-29 to 11-1-35.

Judgment on appeal bonds generally, see §§ 11-3-27 to 11-3-33.

Proceedings upon affirmance of judgment in ejectment when crop is growing on land, see §§ 11-19-91, 11-19-93.

## JUDICIAL DECISIONS

### 1. In general.

Neither Code 1942, § 1165 nor this section [Code 1942, § 1166] has any application to an appeal by tenant from judgment

rendered in proceeding against him as a holdover tenant, awarding appellee recovery of land as against contention that tenant was in possession under contract

for purchase, since this is not an appeal from judgment in an action of ejectment with a stay of execution. *Hodges v. Jones*, 197 Miss. 107, 19 So. 2d 917 (1944).

Plaintiff's cause of action on defendant's appeal bond stipulating that if the judgment, awarding plaintiff possession of land under statute (Code 1942, § 948) providing for proceedings against tenant holding over, as against defendant's contention that he was in possession under contract of purchase, should be affirmed,

defendant would pay all costs and the value of the use and occupation of the land after the time of taking the appeal, as well as damages for waste or injury, is enforceable, upon affirmance of the judgment, only by an original action on the bond and not merely by remanding the cause to the court below for the ascertainment of the amount of damages covered by the bond. *Hodges v. Jones*, 197 Miss. 107, 19 So. 2d 917 (1944).

### RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 422, 433.

**CJS.** 5 C.J.S., Appeal and Error §§ 1182, 1223-1233.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

### § 11-51-39. Requirements of supersedeas bond where judgment appealed from directs sale or delivery of possession of real estate.

If the judgment appealed from directs the sale or the delivery of possession of real estate, the supersedeas bond shall be conditioned to pay all damages, and not to commit or suffer to be committed any waste thereon, and to pay the value of the use and occupation thereof until the delivery of possession, in case the possession is to be surrendered, if the judgment appealed from shall be affirmed. In such case, the chancery court, when the cause shall be remanded, shall ascertain the value of the use and occupation and of any waste committed and the damages, and shall render such judgment therefor against the obligors in the supersedeas bond, or the representatives of any who have died, as may be necessary to secure the rights of the party entitled to such judgment. A judgment for the sums assessed shall be rendered against the obligors in the bond or such as are alive; and if any be dead, like proceedings may be had in all respects as provided for in other cases of deceased obligors in bonds given in legal proceedings.

**SOURCES:** Codes, 1880, § 2328; 1892, § 53; 1906, § 54; *Hemingway's* 1917, § 30; 1930, § 33; 1942, § 1167; *Laws*, 1978, ch. 335, § 21; *Laws*, 1991, ch. 573, § 85, eff from and after July 1, 1991.

**Editor's Note** — This section is modified or supplanted by Miss. R. App. P. 8, as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

**Cross References** — Proceedings on death of surety on bond, see §§ 11-1-29 to 11-1-35.

Sale of land under decree, see §§ 11-5-93 et seq.



## JUDICIAL DECISIONS

1. In general.
2. Bond on real property judgment.

**1. In general.**

Supersedeas in civil cases under this section [Code 1942, § 1167] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. City of Tupelo*, 241 Miss. 894, 133 So. 2d 531 (1961).

Since denial to an electric power distributing company of a decree enjoining a municipality and rural cooperative from proceeding further in establishing a competitive electrical power distribution system in the municipality, was not a money decree, was not for the recovery or against a retention of specific property, nor directed the sale of property, the electric power distributing company was not entitled to a supersedeas as a matter of right. *Mississippi Power & Light Co. v. Town of Coldwater*, 234 Miss. 640, 99 So. 2d 443 (1958).

Since Code 1942, § 1165, was inapplicable, to an appeal from the chancellor's action in refusing to quash an alias writ of possession instituted at the instance of a party who had previously been adjudicated to have the title to and possession of the land in question, a bond conditioned thereon was improper. The bond should have been conditioned upon this section [Code 1942, § 1167]. *Melvin v. Parker*, 231 Miss. 844, 95 So. 2d 790 (1957).

This section [Code 1942, § 1167] is not applicable to an appeal from an order issuing a writ of mandamus to compel a circuit clerk to permit a candidate to examine the ballot boxes after a primary election as provided by the Corrupt Practices Act, so as to allow an appeal with supersedeas as of right. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

Appeals to the Supreme Court with supersedeas in civil cases are matters of

right only under this section [Code 1942, § 1167] and §§ 29 and 31, Code of 1930 (Code 1942, §§ 1163, 1165) and then only in three classes of cases: (1) Where there is a money decree or judgment, or (2) where there is a decree or judgment for the recovery or against the retention of specific property, or (3) where the decree directs the sale or delivery of possession of real estate, in which cases a supersedeas is allowed as a matter of right when an approved supersedeas bond in double the amount or value is given, provided, of course, the decree or judgment is final in its nature or effect. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

Where court decrees sale of real estate to satisfy lien established by the court, to obtain an appeal with supersedeas, a bond is required in double the value of the property ordered sold, or in double the judgment rendered against the property, taking whichever is the smallest as a basis for the bond. *Beekman v. Bost*, 125 Miss. 77, 86 So. 713 (1920).

Where appellant executed bond which is insufficient as a supersedeas under Code 1906, § 54, a motion to increase penalty will be overruled. *McCrory v. Donald*, 118 Miss. 596, 79 So. 801 (1918).

**2. Bond on real property judgment.**

Trial court did not err in awarding each party 50 percent of marital assets where the husband maintained the farms and helped wife through medical school, which gave her a higher income, but the trial court erred in determining the amount of the supersedeas bond because the bond on the money judgment awarded to the husband should have been set in accordance with Miss. R. App. P. 8, and the bond on the farm awarded to the husband should have been set according to Miss. Code Ann. § 11-51-39. *Deal v. Wilson*, 922 So. 2d 24 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 127 (Miss. 2006).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 422, 433.

Undertaking to stay judgment directing sale or delivery of possession of real property, 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 233, 234.

**CJS.** 5B C.J.S., Appeal and Error §§ 1018, 1065-1075.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-41. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2331; 1892, § 56; 1906, § 57; Hemingway's 1917, § 33; 1930, § 36; 1942, § 1170]

**Editor's Note** — Former § 11-51-41 related to supersedeas as to decree fixing specific charge on real estate.

## § 11-51-43. Supersedeas in cases not provided for.

In any case of an appeal to the Supreme Court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas.

**SOURCES:** Codes, 1880, § 2330; 1892, § 55; 1906, § 56; Hemingway's 1917, § 32; 1930, § 35; 1942, § 1169.

**Editor's Note** — This section is modified or supplanted by Rule 8, Miss. R. App. P. as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

**Cross References** — Exception to sufficiency of bond for supersedeas, see § 11-3-33.

## JUDICIAL DECISIONS

1. Allowance of writ.
2. Matters covered.
3. Bond required.

## 1. Allowance of writ.

Appellant's Motion for Stay of Execution and Motion for Leave to Appeal Without Supersedeas Bond did not toll the time allowed for appeal by Code 1972, § 11-51-5 [Repealed]; When it became apparent that no ruling would be had on the appellant's motions within the 45 day period, the appellant was required to post a cost bond as provided by Code 1972, § 11-51-29 within the 45 day period, and he could then have filed a motion to the Supreme Court for supersedeas as pro-

vided for in Code 1972, § 11-51-43. *Summer v. Henn*, 323 So. 2d 751 (Miss. 1975).

Supersedeas is in the discretion of the court on appeal from a decree granting an injunction. *Walton v. City of Tupelo*, 241 Miss. 894, 133 So. 2d 531 (1961).

In a proceeding by an electric power distributing company to enjoin a municipality and rural cooperative from proceeding further in establishing a competitive electric power distributing system, a decree that the complainant "take nothing" was a self-executing decree for which no process was required, and, since there was nothing upon which a supersedeas could operate, the writ would not issue. *Mississippi Power & Light Co. v. Town of*

Coldwater, 234 Miss. 640, 99 So. 2d 443 (1958).

Under this section [Code 1942, § 1169] whether a supersedeas shall be allowed is within the sound discretion of the court. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526 (1953).

Where the chancellor heard the evidence and denied request for appeal with supersedeas, and that evidence was not before the supreme court, the court was in no position to say that this action of the chancellor constituted an abuse of sound discretion vested in him and accordingly would deny petition filed in supreme court by supersedeas. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526 (1953).

This section [Code 1942, § 1169], governs appeals to the Supreme Court with supersedeas from final decrees or judgments in all civil cases other than those mentioned in Code 1942, §§ 1163, 1165, and 1167, and allowance thereof is within the sound discretion of the court. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

Allowance of appeal with supersedeas from writ of mandamus ordering circuit clerk to permit candidate to examine ballot boxes after primary election as provided by the Corrupt Practices Act was an abuse of discretion, where such allowance had the practical effect of denying the writ so far as affording any relief before the day of the general election, and it appeared on review that the appeal was without merit and instituted for the purpose of delay. *Sartin v. Barlow ex rel. Smith*, 196 Miss. 159, 16 So. 2d 372 (1944).

If supersedeas does not, on compliance with Code 1906 § 50 (Code 1942, § 1163), as matter of right, follow an appeal from a final decree, a judge of the Supreme Court can grant it under this section (Code 1906,

§ 56). *Yazoo & Miss. V. Ry. v. James*, 108 Miss. 656, 67 So. 152 (1915).

## 2. Matters covered.

Affirmative injunctive relief, denied the appellant by the lower court, may not be granted by the Supreme Court under the guise of a writ of supersedeas. *Mississippi Power & Light Co. v. Town of Coldwater*, 234 Miss. 640, 99 So. 2d 443 (1958).

A supersedeas or stay will not be granted by either the lower or the appellate court where it would result in irreparable or disproportionate injury to the appellee, or where the damage which may result from it cannot be compensated for in money, so that the appellee will not be protected by the bond in case of affirmance. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526 (1953).

On motion for a supersedeas in cause appealed thereto, the Supreme Court will not pass on matters litigated further than is necessary to determine the motion. *Alabama & V. Ry. Co. v. Jackson & E. Ry. Co.*, 129 Miss. 437, 91 So. 902 (1922).

## 3. Bond required.

On appeal by the defendants from an adverse decree in a suit by the owners of one-fourth of the stock of a corporation to have the corporation dissolved and the proceeds distributed, a supersedeas bond in double the par value of the stock of the complainants, rather than a bond in double the amount of the entire capital stock of the corporation, would be required. *Hyman Mercantile Co. v. Kiersky*, 192 Miss. 195, 4 So. 2d 881 (1941).

Supersedeas may be granted upon giving bond for costs, interest and damages where a money decree is separable in ordering payment of impounded funds in a suit for penalty for violating anti-trust law. *Aetna Ins. Co. v. Robertson*, 127 Miss. 440, 90 So. 120 (1921).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 422 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 241.1 (application for stay of execution pending appeal).

**CJS.** 5B C.J.S., Appeal and Error §§ 1018-1094.



**§ 11-51-45. When bond made payable to state.**

In all cases not specially provided for, the supersedeas bond may be made payable to the state. Where it is provided that such bond shall be made payable to the opposite party, it shall not be an objection to the bond that it is not payable to the proper person, but such bond shall be valid and binding on the obligors, and may be proceeded on in all respects as if it were payable as directed by law.

**SOURCES:** Codes, 1880, § 2329; 1892, § 54; 1906, § 55; Hemingway's 1917, § 31; 1930, § 34; 1942, § 1168; Laws, 1978, ch. 335, § 22, eff from and after July 1, 1978.

**Cross References** — General effect of defect in bond, see § 11-3-5.

**RESEARCH REFERENCES**

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 422-433.

**CJS.** 5 C.J.S., Appeal and Error §§ 1182-1187, 1191-1193.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

**§ 11-51-47. Supersedeas bond signed by one appellant sufficient.**

Supersedeas bonds shall be sufficient if signed by one or more of several appellants, with sureties as required by law, and in case of the affirmance of the decree or judgment complained of, the judgment of affirmance shall be entered against all the appellants in the same manner as if all had signed such bond; but if the decree or judgment be affirmed as to some and reversed as to others of said appellants, the judgment of affirmance shall be entered only against those as to whom it is affirmed, and the sureties on the bond.

**SOURCES:** Codes, 1857, ch. 62, art. 111; 1871, § 1261; 1880, § 2332; 1892, § 57; 1906, § 58; Hemingway's 1917, § 34; 1930, § 37; 1942, § 1171; Laws, 1978, ch. 335, § 23, eff from and after July 1, 1978.

**Cross References** — Circuit court restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

**JUDICIAL DECISIONS**

1. In general.
2. Defects in bond.
3. Liability on bond.

**1. In general.**

Defendant who did not sign appeal bond held estopped, after decision, from setting up want of authority in his attorney to

authorize appeal where petition for appeal was filed jointly and severally by defendants and was signed by attorney who represented each of them in trial court. *Great Atl. & Pac. Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (1936).

It is unnecessary for all the appellants who unite in the appeal to execute the

bond. *Hudson v. Gray*, 58 Miss. 589 (1881); *Avent v. Markette*, 109 Miss. 835, 69 So. 705 (1915).

## 2. Defects in bond.

Where appeal bond executed by surety and signed by one defendant recited that both defendants were appellants and record came before Supreme Court in regular form with appeal bond operating as a supersedeas and court's attention was not directed to any defects therein, surety held estopped to rely on any defects in proceedings or to assert that defendant who did not sign bond did not authorize appeal. *Great Atl. & Pac. Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (1936).

Sureties on appeal bonds, make themselves parties to appeal and answerable to appellee respecting all liability thereon; hence must ascertain before bonds are signed and approved who are appellants therein. *Great Atl. & Pac. Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (1936).

After appeal has been granted and cause removed by approval of the appeal bond, the chancellor has lost jurisdiction to reform the bond. *Avent v. Markette*, 109 Miss. 835, 69 So. 705 (1915).

Appeal bond will not be stricken and appeal dismissed because names of some of principals were inserted without authority. *Avent v. Markette*, 109 Miss. 835, 69 So. 705 (1915).

Where on motion to dismiss appeal appellant's counsel admits defect in the appeal bond and requests leave to file a bond, such leave will be granted. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780 (1915).

## 3. Liability on bond.

Where judgment is rendered against two or more persons from which an appeal with supersedeas is taken and the judgment is reversed as to one and affirmed as to the other or others, the appellee as to whom the case is reversed is not liable on the supersedeas bond but the sureties are liable thereon. *Wise v. Cobb*, 135 Miss. 673, 100 So. 189 (1924).

If appellants execute a joint supersedeas bond and the judgment be reversed as to some and affirmed as to others, the court will render judgment against the sureties. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229 (1889).

## RESEARCH REFERENCES

**Am Jur.** 5 *Am. Jur.* 2d (Rev), Appellate Review §§ 422-433.

**CJS.** 5 *C.J.S.*, \*Appeal and Error §§ 1191-1193.

**Law Reviews.** 1979 *Mississippi Supreme Court Review: Civil Procedure*. 50 *Miss. L. J.* 719, December 1979.

## § 11-51-49. Bonds by corporations.

Appeal bonds may be executed by a corporation by its authorized agent or attorney, in the name of the corporation, without affixing its corporate seal, and such bond, when so executed by the attorney of record of a corporation, shall be held and conclusively presumed to have been executed by the authority of such corporation.

**SOURCES:** Codes, 1892, § 58; 1906, § 59; *Hemingway's* 1917, § 35; 1930, § 38; 1942, § 1172; Laws, 1888, p. 92.

**Cross References** — Corporate instrumentalities of United States government appealing without bond, see § 11-51-101.

RESEARCH REFERENCES

**CJS.** 5B C.J.S., Appeal and Error §§ 1034-1037.

**§§ 11-51-51 through 11-51-55. Repealed.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-51. [Codes, 1892, § 59; 1906, § 60; Hemingway's 1917, § 36; 1930, § 39; 1942, § 1173; Am Laws, 1978, ch. 335, § 24]

§ 11-51-53. [Codes, 1892, § 60; 1906, § 61; Hemingway's 1917, § 37; 1930, § 40; 1942, § 1174; Am Laws, 1978, ch. 335, § 25]

§ 11-51-55. [Codes, Hutchinson's 1848, ch. 63, class IV, art. 1 (24); 1851; 1851, ch. 63, art. 29; 1871, § 431; 1880, § 2345; 1892, § 72; 1906, § 73; Hemingway's 1917, § 53; 1930, § 52; 1942, § 1186]

**Editor's Note** — Former § 11-51-51 related to appeals to be granted and bonds approved by clerk.

Former § 11-51-53 related to bond to be given to perfect an appeal.

Former § 11-51-55 related service and return of summons in appeal.

**§ 11-51-57. Appellee, nonresident or residence unknown.**

When the appellee's residence is unknown, and he has no attorney in this state, notice of the appeal may be published in the manner provided for by the Mississippi Rules of Civil Procedure for service by publication upon such persons, and the Supreme Court, being satisfied thereof, may hear and determine the appeal as if a summons had been duly served on the appellee.

**SOURCES:** Codes, Hutchinson's 1848, ch. 63, class IV, art. 3; 1857, ch. 63, art. 30; 1871, § 432; 1880, § 1420; 1892, § 73; 1906, § 74; Hemingway's 1917, § 54; 1930, § 53; 1942, § 1187; Laws, 1991, ch. 573, § 86, eff from and after July 1, 1991.

**Cross References** — Appeal as of right, how taken, see Miss. R. App. P. 3. Filing and service, see Miss. R. App. P. 25.

RESEARCH REFERENCES

**CJS.** 4 C.J.S., Appeal and Error §§ 472-476. ing equal protection clause of Federal Constitution's Fourteenth Amendment —

**Lawyers' Edition.** State regulation of appellate procedure in civil case as violat- Supreme Court cases. 100 L. Ed. 2d 947.

**§ 11-51-59. Execution stayed by bond.**

When an appeal shall be taken, and bond for stay of execution given, the clerk shall not issue execution on the judgment or decree appealed from until such stay shall end or be discharged. If execution had been issued before the bond for stay of execution was given, the clerk shall issue a command to the officer in whose hands the execution may be to desist from enforcing it, and to



surrender any property seized under it to the person from whom it was taken or who may be entitled to it.

**SOURCES:** Codes, 1880, § 2346; 1892, § 74; 1906, § 75; Hemingway's 1917, § 55; 1930, § 54; 1942, § 1188.

**Cross References** — Judgments and executions generally, see § 9-7-91.

Motion to discharge supersedeas in appeal to Supreme Court, see § 11-3-21.

Bond required to stay proceedings at law, see § 11-13-3.

Time for issuance of executions on judgments and decrees, see § 13-3-109.

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 290, 327, 373-375.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 241.1 (application for stay of execution pending appeal).

General forms for bond to stay execution, 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 211-223.

**CJS.** 4 C.J.S., Appeal and Error §§ 472-476.

## §§ 11-51-61 through 11-51-63. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-61. [Codes, Hutchinson's 1848, ch. 63, art. 2 (151); 1857, ch. 62, art. 103; 1871, § 1255; 1880, § 2344; 1892, § 68; 1906, § 69; Hemingway's 1917, § 47; 1930, § 55; 1942, § 1189; Am Laws, 1978, ch. 335, § 26]

§ 11-51-63. [Codes, Hemingway's 1917, § 48; 1930, § 56; 1942, § 1190; Laws, 1914, ch. 209]

**Editor's Note** — Former § 11-51-61 related to duty of clerk when appeal is taken.

Former § 11-51-63 related to appeals to Supreme Court — records to be made in duplicate.

## § 11-51-65. Record on second appeal.

If a case be remanded by the Supreme Court to the court below, and afterwards an appeal be taken in the same case to the Supreme Court, it shall not be necessary for the appellant to cause to be filed in the Supreme Court a transcript of so much of the record as may be already on file in said court, but the transcript previously sent up, together with a transcript of the subsequent proceedings in the case in the court below, shall constitute the record for the case in the Supreme Court. In such case, if the appellant shall, in his application for appeal, signify his desire for the clerk to make out and certify only a transcript of such subsequent proceedings, the clerk shall act accordingly.

**SOURCES:** Codes, 1880, § 2347; 1892, § 75; 1906, § 76; Hemingway's 1917, § 56; 1930, § 57; 1942, § 1191.

## JUDICIAL DECISIONS

### 1. In general.

Pleadings and replications already in Supreme Court on first appeal should be omitted from record on subsequent appeal. *Yazoo & Miss. V. Ry. v. M. Levy & Sons*, 147 Miss. 211, 113 So. 325 (1927).

Record on second appeal purporting to be full and complete is presumed so. *Gilbert v. Glenn*, 106 So. 517 (Miss. 1925).

Statute does not authorize court to consider on second appeal evidence in record

on first appeal in passing on sufficiency of that on second trial. *Gilbert v. Glenn*, 106 So. 517 (Miss. 1925).

The court on appeal from decree enjoining enforcement of a judgment cannot examine the record filed on an appeal in the action in which the judgment was obtained. *Hooks v. Alabama & V. Ry. Co.*, 73 Miss. 145, 18 So. 925 (1895).

## RESEARCH REFERENCES

**Am Jur.** 5 *Am. Jur. 2d* (Rev), Appellate Review §§ 441-448, 463-473, 577.

**CJS.** 4 *C.J.S.*, Appeal and Error §§ 554-687.

### § 11-51-67. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1942, § 1191.5; Laws, 1958, ch. 277, eff May 26, 1958]

**Editor's Note** — Former § 11-51-67 related to appeal to supreme court without transcript of evidence.

### § 11-51-69. Prepayment for costs certified on transcript.

When prepayment for costs shall be made with a clerk, he shall certify the fact on the transcript of the record, and immediately pay the costs of the court reporter. When the case shall be determined, if costs be adjudged against the appellant, the clerk shall pay the remaining costs out of the money so deposited, and shall deliver the residue of the money, or all of it if costs be not adjudged against such party, to the party entitled to it; and for any failure thereof he shall be liable to be dealt with by the Supreme Court, or the court of which he is clerk, for a contempt.

**SOURCES:** Codes, 1880, § 2348; 1892, § 76; 1906, § 77; *Hemingway's* 1917, § 57; 1930, § 58; 1942, § 1192; Laws, 1978, ch. 335, § 27; Laws, 1979, ch. 482, § 2, eff from and after passage (approved April 18, 1979).

**Cross References** — Security for costs in civil action of habeas corpus, see § 11-43-47.

Deposit for costs in lieu of bond, see § 11-51-29.

Deposits for costs in criminal cases, see § 99-35-107.

## JUDICIAL DECISIONS

**1. In general.**

Section 11-51-69 clearly contemplates that the court reporter will be paid after the transcript is completed, and not before; estimated fees should not be disbursed to court reporters, but rather, the actual cost of the transcript should be paid to the court reporter when the transcript is satisfactorily completed in compliance with the Mississippi Supreme Court Rules and filed with the trial court clerk. In re Southwest Miss. Regional Medical Ctr., 593 So. 2d 44 (Miss. 1992).

Clerk's certificate showing merely aggregate amount of fees for making transcript and for other services did not autho-

rize taxation of costs therefor. McDonald v. Spence, 179 Miss. 348, 176 So. 607 (1937).

Taxation of costs by clerk of Supreme Court based upon trial court's certificate which stated aggregate amount of fees for making transcript and for other services rather than itemizing the account to show amount of fee for transcript would be set aside except insofar as it taxed fee due clerk of Supreme Court, but with permission granted to clerk of trial court to file a proper certificate and without prejudice to appellant to move for retaxation of costs. McDonald v. Spence, 179 Miss. 348, 176 So. 607 (1937).

## RESEARCH REFERENCES

**Am Jur.** Deposit in lieu of bond, 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 381-388.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 561 et seq.

**CJS.** 4 C.J.S., Appeal and Error §§ 441, 442.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## § 11-51-71. Statement on transcript of payment of fee therefor.

The clerk shall make a statement on the transcript of the record sent to the Supreme Court that the amount of his fee for such transcript has been paid to him; and, if he shall not do this, the Clerk of the Supreme Court shall not be required to demand and receive the same prior to filing the appeal.

**SOURCES:** Codes, 1880, § 2349; 1892, § 77; 1906, § 78; Hemingway's 1917, § 58; 1930, § 59; 1942, § 1193; Laws, 1978, ch. 335, § 28, eff from and after July 1, 1978.

**Cross References** — Fees of clerks of chancery courts, see §§ 25-7-9, 25-7-13.  
Fees of clerks of circuit courts, see §§ 25-7-9, 25-7-13.

## JUDICIAL DECISIONS

**1. In general.**

An item for transcribing court reporter's notes erroneously omitted by the chancery clerk from the transcript, upon the supposition that the fact that the reporter had been paid made inclusion

improper, may be added by the Supreme Court to the costs taxable against appellees, although the time for filing a motion to retax costs has expired. Mississippi Power & Light Co. v. Town of Coldwater, 234 Miss. 640, 99 So. 2d 443 (1958).



RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 849-897.      **preme Court Review:** Civil Procedure. 50 Miss. L. J. 719, December 1979.  
**Law Reviews.** 1979 Mississippi Su-

§ 11-51-73. Provision as to sending up bond directory.

The provision that the clerk shall send up to the Supreme Court any bond taken is directory, and shall not preclude the rendition of judgment by the Supreme Court on a copy of such bond, but said court may give judgment on a copy of such bond as if the original were before it.

**SOURCES:** Codes, 1880, § 2350; 1892, § 78; 1906, § 79; Hemingway's 1917, § 59; 1930, § 60; 1942, § 1194; Laws, 1978, ch. 335, § 29, eff from and after July 1, 1978.

**Cross References** — Effect of defect in bond, see § 11-3-5.

RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 325, 327.      **Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.  
**CJS.** 4 C.J.S., Appeal and Error §§ 519, 520, 531-545.

§ 11-51-75. Appeal to circuit court from board of supervisors, municipal authorities.

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities. Costs shall be awarded as in other cases. The board of supervisors or municipal authorities may employ counsel to defend such appeals, to be paid out of the county or municipal treasury. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of either party and written notice for ten (10) days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending unless the judge in his order shall otherwise direct.

Provided, however, that no appeal to the circuit court shall be taken from any order of the board of supervisors or municipal authorities which authorizes the issuance or sale of bonds, but all objections to any matters relating to the issuance and sale of bonds shall be adjudicated and determined by the chancery court, in accordance with the provisions of Sections 31-13-5 to 31-13-11, both inclusive, of the Mississippi Code of 1972. And all rights of the parties shall be preserved and not foreclosed, for the hearing before the chancery court, or the chancellor in vacation. Provided, further, nothing in this section shall affect pending litigation.

**SOURCES:** Codes, Hutchinson's 1848, ch. 51, art. 5 (45, 46); 1857, ch. 59, art. 33; 1871, § 1383; 1880, § 2351; 1892, § 79; 1906, § 80; Hemingway's 1917, § 60; 1930, § 61; 1942, § 1195; Laws, 1940, ch. 245; Laws, 1955, Ex ch. 33; Laws, 1962, ch. 240, eff from and after passage (approved June 1, 1962).

**Cross References** — Actions to recover past due income, inheritance, and privilege taxes, see § 7-5-55.

Bills of exceptions generally, see § 11-7-211.

Appeals from special court of eminent domain, see § 11-27-29.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

Presentation of claims against county, see § 19-13-23.

Appeal from decree on municipal incorporation, see § 21-1-21.

Appeal from decree of extension or contraction of municipal corporate boundaries, see § 21-1-37.

Right of appeal from municipal equalization of tax assessments, see § 21-33-39.

Right of appeal from action of municipality in assessing or collecting property taxes, see § 21-33-83.

Claimant against municipality having right of appeal, see § 21-39-11.

Right of appeal from determinations under Homestead Exemption Law, see § 27-33-35.

Appeal from action of board of supervisors in equalizing tax assessments, see §§ 27-35-119, 27-35-121.

Effect of appeal of tax assessment, see § 27-35-121.

Appeal from order of county board of education in abolition, alteration, or creation of school districts, see §§ 37-7-103 et seq.

Appeal of an order by the school board, see § 37-7-115.

Appeal from ordinance incorporating airport property into municipal boundaries, see § 61-9-7.

Appeal from decision of Board of Bar Admissions, see § 73-3-39.

Appeal from determination by municipal governing authorities of future power requirements of municipality, see § 77-5-707.

## JUDICIAL DECISIONS

1. In general.
2. Rules of Civil Procedure.
3. Bill of exceptions in general.
4. —Signing bill of exceptions.
5. Appeal bond.
6. Persons entitled to appeal.
7. Time for appeal.
8. Particular matters as appealable.
9. Questions presented for review.

- 10 Proceedings on appeal.
11. Disposition of appeal.
12. Other remedies.
12. Standing.
14. Jurisdiction.

### 1. In general.

Circuit court had to enter an order granting the appropriate building permit

to the corporation as the city did not have discretion to deny a building permit to the corporation as a building leased by the corporation was zoned for commercial business, which included a package retail store; the city had no legally valid reason for denying a building permit. *Vineyard Invs., LLC v. City of Madison*, 999 So. 2d 438 (Miss. Ct. App. 2009).

Where a person objects to unethical conduct by that body, that person is only entitled to file a charge with the Mississippi Ethics Commission for investigation and subsequent action in the courts. The Commission should then investigate the individual's allegations, and upon finding probable cause for believing that a violation has occurred, the Commission is statutorily commanded to refer all complaints and evidence gathered during its investigation to the attorney general and the local district attorney having jurisdiction for prosecution. *City of Jackson v. Greene*, 869 So. 2d 1020 (Miss. 2004).

Although the words, "final judgment" or "decision," were not used, since a board of supervisors had in fact rendered its final decision on the matter, having ordered the zoning administrator to take legal action in an effort to seek the removal of structures from a property owner's land, it had in fact rendered a final judgment; thus, the circuit court had jurisdiction to hear the owner's appeal. *Hinds County Bd. of Supvrs. v. Leggette*, 833 So. 2d 586 (Miss. Ct. App. 2002).

A mayor's veto is an appealable action of a "municipal authority" under the statute. *City of Madison v. Shanks*, 793 So. 2d 576 (Miss. 2000).

This section is not applicable to a school board's decision granting or denying the issuance of a Sixteenth Section land hunting and fishing lease. *Prisock v. Perkins*, 735 So. 2d 440 (Miss. 1999).

This section's 10-day time limit in which to appeal the decision of a board of supervisors is both mandatory and jurisdictional, even where the decision of a board is claimed to be unlawful. *Newell v. Jones County*, 731 So. 2d 580 (Miss. 1999).

Where, within 10 days of the granting of a special exception by a county board of supervisors, a property owner filed a motion to amend his pending complaint,

which amended complaint raised the issues that would have been raised by an appeal, the defects in procedure were not on the timeliness or on the issues raised, but on the label, "complaint" instead of "appeal," and on the absence of a bill of exceptions, and, therefore, the property owner was entitled to promptly correct his deficiencies. *Bowling v. Madison County Bd. of Supvrs.*, 724 So. 2d 431 (Miss. Ct. App. 1998).

The zoning decision of a local governing body which appears to be "fairly debatable" will not be disturbed on appeal, and will be set aside only if it clearly appears that the decision is arbitrary, capricious, discriminatory, illegal, or not supported by substantial evidence; neither the Supreme Court nor the circuit court should sit as a "super-zoning commission"; thus, the circuit court erred in overturning a city council's decision that the character of a neighborhood had changed substantially and that a public need existed to justify rezoning where the decision of the city council was fairly debatable. *City of Biloxi v. Hilbert*, 597 So. 2d 1276 (Miss. 1992).

Any court in state sitting as appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon court's invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing amicus curiae at request of court or by leave of court; motion for leave to file amicus brief should demonstrate (1) amicus has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) amicus has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be ade-



quately protected by those already parties. *Cooper v. City of Picayune*, 511 So. 2d 922 (Miss. 1987).

Validation proceedings are the exclusive remedy for raising objections in connection with the issuance and sale of bonds, except those which could be or should be raised before the board of supervisors or municipal authorities, and such objections cannot be properly raised in a suit for an injunction. *Chambers v. Perry*, 183 So. 2d 645 (Miss. 1966).

The statute as amended has the effect of requiring that objections to an issue of school bonds shall be heard in validation proceedings, whether or not the order of the board of supervisors overruling such objections is appealed from. In *re* \$250,000 Sch. Bonds, 246 Miss. 470, 150 So. 2d 412 (1963).

This section [Code 1942, § 1195] provides an adequate remedy at law precluding an injunction against an order denying a request to rezone property. *Highland Village Land Co. v. City of Jackson*, 243 Miss. 34, 137 So. 2d 549 (1962).

From the nature of the judgments and decisions of the various boards mentioned in this section [Code 1942, § 1195], persons who are not parties may have a direct pecuniary or other interest in such judgment or decision. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844 (1959).

Where following a published notice of a hearing at which no one appeared and protested, the board of supervisors adopted a resolution finding a need for housing authority to function, and no appeal was taken from the board's adopted resolution, which was legal on its face, a collateral attack upon the resolution in the form of a proceeding to enjoin the board of supervisors from acting under the Housing Authority Act was not maintainable. *Biloxi-Pascagoula Real Estate Bd., Inc. v. Mississippi Regional Hous. Auth. No. VIII*, 231 Miss. 89, 94 So. 2d 793 (1957).

Where, following the time when it became publicly known that the board of supervisors and the housing authority were attempting to apply for loans, the complainant without avail appeared before the board and asked it to rescind its prior action declaring the need for the

authority, and the approval of the application for preliminary loans, but took no appeal to the circuit court, the board's action was not subject to a collateral attack by a suit to enjoin it from proceeding under the Housing Authority Act. *Biloxi-Pascagoula Real Estate Bd., Inc. v. Mississippi Regional Hous. Auth. No. VIII*, 231 Miss. 89, 94 So. 2d 793 (1957).

Where objectors to a school bond issue charged that a large majority of the petitioners would not have signed the petition had they known that the proposed issue would raise their taxes, it was their duty to appeal to the circuit court from a decision of the board of supervisors and in absence of such an appeal the objection constitutes a collateral attack and is too late. In *re* Magee Consol. Sch. Bonds, 212 Miss. 454, 54 So. 2d 664 (1951).

Right to appeal from refusal of board of supervisors to levy tax for school district is not a "speedy remedy" within meaning of Code 1942, § 1109, so as to bar issuance of writ of mandamus. *State ex rel. Chatham v. Board of Supvrs.*, 209 Miss. 79, 46 So. 2d 73 (1950).

Statute (Code 1942, § 2932) relating to allowance of claims against county is not the only statutory provision authorizing an appeal to the circuit court from disallowance of a claim by county board of supervisors, since this section [Code 1942, § 1195] is the general statute providing for such an appeal. *Board of Supvrs. v. Jones*, 199 Miss. 373, 24 So. 2d 844 (1946).

Sheriff's claim presented to county board of supervisors for entering, returning and serving the road overseer's commission, for services required of the sheriff by the board of supervisors for which no fees were fixed, and for executing decrees, judgments, orders of process of the Supreme Court, chancery court or board of supervisors, was not required to be accompanied by any evidence of performance or delivery of services to an amount equal to the compensation claimed, irrespective of whether Code 1942, § 2932 or this section [Code 1942, § 1195] was applicable to the presentation of such claim. *Board of Supvrs. v. Jones*, 199 Miss. 373, 24 So. 2d 844 (1946).

Adjudication of county board of supervisors as to sufficiency of signatures to peti-

tion for an election to determine whether traffic in light wines and beer should be excluded from county, was interlocutory, and entire cause, including that issue, must on pertinent and competent protest be adjudicated by the board upon trial after the election before the final judgment could be entered in the case. *Costas v. Board of Supvrs.*, 198 Miss. 440, 22 So. 2d 229 (1945).

This section [Code 1942, § 1195] (Code 1906, § 80) gives right of appeal to any person aggrieved by a judgment or decision of a board of supervisors and requires that bill of exceptions embodying the facts as duly presented shall be signed by the person acting as president of the board. *Wilkinson County v. Tillery*, 122 Miss. 515, 84 So. 465 (1920).

Code 1906, § 81 (Code 1942, § 1196), applies specifically to all appeals relating to taxes, while this section [Code 1942, § 1195] (Code 1906, § 80) applies to all other cases. *Kuhn Bros. v. Warren County*, 98 Miss. 879, 54 So. 442 (1911).

This section [Code 1942, § 1195] (Code 1892, § 79) allows appeal from board of supervisors to the circuit court for final judgment there. Section 85 (Code 1942, § 1201), limits appeals from circuit court to cases where amount in controversy exceeds \$50 if originating in courts of justices of the peace. There is no such limitation as to boards of supervisors, and § 93 (Code 1942, § 1210) allows board to appeal from a judgment without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007 (1906).

This section [Code 1942, § 1195] applies to appeals generally from judgments of boards of supervisors, while Code 1906 § 81 (Code 1942, § 1196) regulates appeals relating to assessments of property for taxation. *Jennings v. Board of Supvrs.*, 79 Miss. 523, 31 So. 107 (1902).

## 2. Rules of Civil Procedure.

The Rules of Civil Procedure do not replace the statute. *Bowling v. Madison County Bd. of Supvrs.*, 724 So. 2d 431 (Miss. Ct. App. 1998).

## 3. Bill of exceptions in general.

Plaintiff property owner was not seeking to overturn a decision to condemn his property or destroy his property, he was

asserting his right to constitutional protections, so his failure to file his notice of appeal and bill of exceptions was not dispositive in this case. *Pearson v. City of Louisville*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Where the circuit court dismissed a company's challenge to the City's decision to award a sewer improvement project to the second lowest bidder, the circuit court did not err by not including a news release as part of the record showing that the second lowest bidder had been fined extensively for safety violations which resulted in the death of one of its employees because the press release was not included in the bill of exceptions. *Nelson v. City of Horn Lake*, 968 So. 2d 938 (Miss. 2007).

District court found a part of an ordinance intended to regulate businesses providing nude exotic dancing but that restricted other sexual conduct, was both overbroad and in conflict with other parts of the ordinance; time periods in the statute were also in need of amendment, and the statutory procedure for filing a bill of exceptions on judicial appeal required to be followed. *Freelance Entm't, LLC v. Sanders*, 280 F. Supp. 2d 533 (N.D. Miss. 2003).

Dismissal of property owner's attempted appeal of the county board of supervisors' denial of the property owner's request for a conditional use permit was error as the property owner was not obligated to file a bill of exceptions within the statutory time period for filing an appeal in order to confer subject matter jurisdiction on the trial court as the statute only required that a pleading be filed indicating an intent to appeal, which the property owner filed, and that the bill of exceptions be filed within a reasonable time as it was necessary to decide the appeal. *Bowen v. DeSoto County Bd. of Supvrs.*, 850 So. 2d 1156 (Miss. Ct. App. 2002), *aff'd*, 852 So. 2d 21 (Miss. 2003).

Even if a school board held a secret meeting for the purpose of rendering impossible a timely appeal, the plaintiff's failure to file a bill of exceptions was fatal to the appeal; further, even if the plaintiff did all he could to obtain execution of a



tendered bill of exceptions, but his efforts were refused by the school board, he should have proceeded by mandamus to compel signature. *Prisock v. Perkins*, 1998 Miss. LEXIS 633 (Miss. Dec. 13, 1998), subst. op., 735 So. 2d 440 (Miss. 1999).

The bill of exceptions required by § 11-51-75 is necessary to vest the circuit court with subject matter jurisdiction in all appeals from boards of supervisors, regardless of the issues presented. (Overruling *Evans v. Sharkey County*, 89 Miss 302, 42 So 173 (1906)). Thus, the failure to obtain and file a bill of exceptions as prescribed by § 11-51-75 was fatal to an appeal prosecuted under § 65-7-67. *McIntosh v. Amacker*, 592 So. 2d 525 (Miss. 1991).

Neither the circuit court nor the Supreme Court had the authority to consider a county supervisor's attempted appeal from an order of the board of supervisors finding that he had removed himself from his district and declaring his office vacant under the authority of § 25-1-59, where the supervisor filed a notice of appeal to the circuit court but failed to file a bill of exceptions as required by § 11-51-75. *Moore v. Sanders*, 569 So. 2d 1148 (Miss. 1990).

In the absence of a bill of exceptions a circuit court had no jurisdiction to reverse the action of the board of supervisors pertaining to a lease of certain 16th section lands. *Cox v. Board of Supvrs.*, 290 So. 2d 629 (Miss. 1974).

A bill of exceptions which embodies the facts and the decision of the city council on a petition to rezone property, and is signed by the mayor, is sufficient to confer jurisdiction on the circuit court despite the fact that a copy of the actual ordinance formally setting forth the council's decision was omitted from the bill. *Weathersby v. City of Jackson*, 226 So. 2d 739 (Miss. 1969).

On appeal to the circuit court from an order of the board of supervisors of Neshoba county directing issuance of bonds in the amount of \$40,000 for the benefit of a high school, the circuit court had authority to hear and determine the matter only on the case as presented by the bill of exceptions as an appellate court, and hence the court was correct in refusing to permit the introduction of evidence

on the hearing of the cause. *East Neshoba Vocational High Sch. Bonds v. Board of Supvrs.*, 213 Miss. 146, 56 So. 2d 394 (1952).

Where a bill of exceptions in an appeal from an order of the Board of Supervisors, adjudicating all the necessary jurisdictional facts to entitle the Board to issue bonds on behalf of a Consolidated School District, undertook to recite the matters and things which had transpired at the meeting at which the order had been made, by setting forth the objections made at the meeting and averring facts in conflict with the express adjudications contained in the order, but failed to state the grounds on which the judgment appealed from had been entered, as required by statute in case of appeal, the order appealed from, which was attached to the bill of exceptions as an exhibit and made a part thereof by statute, was affirmed. *Adcock v. Board of Supvrs.*, 191 Miss. 379, 2 So. 2d 556 (1941).

That order disallowing city's claim for road taxes collected by county was not entered on minutes of board of supervisors and embodied in bill of exceptions held not to deprive circuit court of jurisdiction of appeal therefrom on bill of exceptions, where record contained agreement by parties reciting that claim was rejected. *Grenada County v. City of Grenada*, 168 Miss. 68, 150 So. 655 (1933).

Thirty days within which to procure signing of bill of exceptions after adjournment of term of board of supervisors held not unreasonable time. *Board of Supvrs. v. Stephenson*, 160 Miss. 372, 134 So. 142 (1930).

"Next term" of circuit court, to which appeal from decision of board of supervisors must go, is term next after appeal has been perfected. *Board of Supvrs. v. Stephenson*, 160 Miss. 372, 134 So. 142 (1930).

Bill of exceptions to order annexing territory to school district, with uncontroverted caption reciting that objectors were taxpayers of such territory, a statement of fact, sufficiently showed their interest to allow them to appeal. *Brannan v. Board of Supvrs.*, 141 Miss. 444, 106 So. 768 (1926).

Without a bill of exceptions a circuit court has no jurisdiction of an appeal from



a judgment of a board of supervisors disallowing a claim against a county and can only dismiss the appeal. *Yandell v. Madison County*, 79 Miss. 212, 30 So. 606 (1901).

A bill of exceptions to the action of a board of supervisors must be taken and signed during the term, unless by consent or under an order of court, the time for preparing and perfecting it be extended into vacation. *McGee v. Jones*, 63 Miss. 453 (1886); *Board of Supvrs. v. Stephenson*, 160 Miss. 372, 134 So. 142 (1930).

#### 4. —Signing bill of exceptions.

When the appellant signed the bill of exceptions, he essentially waived an issue that was not included in the bill and agreed that it would not be considered on appeal. *Van Meter v. City of Greenwood*, 724 So. 2d 925 (Ct. App. 1998).

Signature of the bill of exceptions by the attorney for an appellant city does not meet this requirement. *City of Jackson v. Varia, Inc.*, 241 Miss. 705, 133 So. 2d 16 (1961).

On appeal from the adoption by a city of a re-zoning ordinance, the mayor may not arbitrarily refuse to sign a bill of exceptions on the ground that it is incorrect, but should sign it with corrections. *Reed v. Adams*, 236 Miss. 333, 111 So. 2d 222 (1959).

The officer by whom bill of exceptions is to be signed is without discretion in the matter. *Koestler v. Dallas Tank Co.*, 234 Miss. 112, 107 So. 2d 361 (1958).

A bill of exceptions to a decision of municipal authorities is properly signed by successor in office of the mayor at the time of decision, the latter having refused to sign. *Koestler v. Dallas Tank Co.*, 234 Miss. 112, 107 So. 2d 361 (1958).

The act of the president of a Board of Supervisors, in signing a bill of exceptions to the Board's order for the issuance of school bonds, was an acknowledgment that the objections set out in the bill were in fact made by the persons who had appeared as objectors, but did not constitute an agreement that the facts therein recited were true. *Adcock v. Board of Supvrs.*, 191 Miss. 379, 2 So. 2d 556 (1941).

When bill of exceptions is duly presented, it is the duty of the presiding

officer to sign same. He has no discretion in the matter. *Polk v. Hattiesburg*, 109 Miss. 872, 69 So. 675 (1915); *Polk v. Hattiesburg*, 110 Miss. 80, 69 So. 1005 (1915).

Where bill of exceptions was not taken and signed during term of municipal board at which the order complained of was passed, and time was not extended, the mayor was correct in refusing to sign the bill. *Hathorn v. Morgan*, 107 Miss. 589, 65 So. 643 (1914).

Only the president of the board of supervisors can sign a bill of exceptions upon appeals under this section [Code 1942, § 1195] and if he refuses he may be compelled by mandamus. *Roach v. Tallahatchie County*, 78 Miss. 303, 29 So. 93 (1901).

Section 798, Code 1906, providing for all bills of exceptions to be signed by attorneys where the judge refuses to sign, does not apply to appeals under this section [Code 1942, § 1195]. *Roach v. Tallahatchie County*, 78 Miss. 303, 29 So. 93 (1901).

When the bill is duly prepared and tendered to the president during the term, the exceptor will not be prejudiced because of the failure of that officer to sign it during the term. *McGee v. Beall*, 63 Miss. 455 (1886).

#### 5. Appeal bond.

Decision of Board of Supervisors that petition for tax levy was signed by majority of electors held final and appealable without bond. *Moore v. Board of Supvrs.*, 151 Miss. 671, 118 So. 349 (1928).

The appeal provided for by this section [Code 1942, § 1195] can be prosecuted without bond. *Monroe County v. Strong*, 78 Miss. 565, 29 So. 530 (1900).

#### 6. Persons entitled to appeal.

Mississippi Supreme Court adopted the federal test for associational standing; under that test, the Supreme Court found that the trial court erred in dismissing the manufactured housing association's bill of exceptions regarding the adoption of a zoning ordinance and map restricting manufactured housing developments in the city for lack of standing by the association because (1) one of the association's members owned property and managed a retail manufacturing housing center in

the city; (2) the zoning decision would have a direct negative economic impact on any member of the association that sold manufactured homes in the city because their buyer's market would be diminished; and (3) the association's challenge to the city's zoning restrictions was of importance to the association's members. *Miss. Manufactured Hous. Assn v. Bd. of Aldermen*, 870 So. 2d 1189 (Miss. 2004).

Statute outlined the proper procedure to appeal when someone was aggrieved by a decision of a municipality; it did not in any way confer standing. *Burgess v. City of Gulfport*, 814 So. 2d 149 (Miss. 2002).

The appellant was not a person aggrieved by a judgment or decision of the board where it sought review of the board's order calling for a special election as an election had yet to be held and the board had declined to act unilaterally on the appellant's petition. *Mississippi Waste of Hancock County, Inc. v. Board of Supvrs.*, 818 So. 2d 326 (Miss. 2001).

Any court in state sitting as appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon court's invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing amicus curiae at request of court or by leave of court; motion for leave to file amicus brief should demonstrate (1) amicus has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) amicus has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be adequately protected by those already parties. *Cooper v. City of Picayune*, 511 So. 2d 922 (Miss. 1987).

Community improvement association may have standing to appeal from deci-

sion of board of supervisors or municipal authorities, by falling within category of "persons aggrieved," on showing extent of interest, adverse effect, participation of membership, and authority of association to act pursuant to its charter, by laws, and minutes. *Belhaven Imp. Ass'n v. City of Jackson*, 507 So. 2d 41 (Miss. 1987).

One not an abutting owner, who will be compelled by the closing of an alley to take a less direct route to his place of business, is not a "person aggrieved" by a determination of the city to close the alley, so as to be entitled to appeal therefrom. *City of Hattiesburg v. Colson*, 236 Miss. 237, 109 So. 2d 868 (1959).

Mortgagees of abutting lots are not "persons aggrieved" so as to have a right to appeal from the city's determination to close an alley, unless the adequacy of their security will be impaired by such closing. *City of Hattiesburg v. Colson*, 236 Miss. 237, 109 So. 2d 868 (1959).

A foreign power and light company qualified to do business within the state which had a considerable investment in electric distribution lines in a county and the election district sought to be incorporated as an electric power district, was a person adversely affected by the order of the board of supervisors purporting to create a power district, and could appeal therefrom. *Mississippi Power & Light Co. v. Mississippi Power Dist.*, 230 Miss. 594, 93 So. 2d 446 (1957).

This section [Code 1942, § 1195] authorizes an appeal by any qualified elector and taxpayer from a decision of the board of supervisors ordering an election to determine as to the sale of intoxicating liquors in the county. *Ferguson v. Board of Supvrs.*, 71 Miss. 524, 14 So. 81 (1893).

Any taxpayer may appeal from a decision allowing a claim against the county. *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128 (1886).

It is unnecessary that the appellant be a party to the record; he may show by evidence apart from the proceedings in the supervisors' court that his right has thus been injured by said judgment. *Deberry v. President of Holly Springs*, 35 Miss. 385 (1858).

## 7. Time for appeal.

Judgment for municipal authorities in a case filed by citizens over increases in



trash collection fees was vacated. The case should have been dismissed for lack of jurisdiction because the citizens failed to perfect its appeal from the municipal authorities within the time limitations of Miss. Code Ann. § 11-51-75 (2002) for such an appeal, in that the group had ten days from the end of the sessions during which the rate increases were made to appeal those increases, but they did not do so until two or more years later. *Foster v. Edwards*, 61 So. 3d 960 (Miss. Ct. App. 2011).

Buyer's appeal of the city's decision not to sign his bill of exceptions was filed outside the ten-day period allowed by Miss. Code Ann. § 11-51-75; pursuant to Miss. Code Ann. § 21-15-33, the ten-day time period for appeal began when the city adjourned the meeting on September 11, 2007, after making a decision about the property. *Rankin Group, Inc. v. City of Richland*, 8 So. 3d 259 (Miss. Ct. App. 2009).

Trial court properly dismissed property owners' appeal of the denial of their rezoning petition because the petition to rezone was time-barred; the city council denied the owners' petition to rezone on April 17, 2007, but the owners did not appeal to the trial court until May 3, 2007, clearly more than 10 days after the city council's decision. *Pruitt v. Zoning Bd. of the City of Laurel*, 5 So. 3d 464 (Miss. Ct. App. 2008).

Since the landowners' appeal was not filed within 10 days from the day of adjournment of the board meeting, under Miss. Code Ann. § 11-51-75 neither the circuit court, nor the appellate court had jurisdiction to consider the appeal; although the failure to file the appeal within 10 days determined the outcome of the landowners' appeal, the landowners had not presented a proper bill of exceptions because the bill was not signed by the person acting as president of the board of supervisors or of the municipal authorities. *Tilghman v. City of Louisville*, 874 So. 2d 1025 (Miss. Ct. App. 2004).

Although the owner failed to file a bill of exceptions with his notice of appeal, it was not necessary to file the bill of exceptions within 10 days where the owner had timely and properly filed a notice of appeal, which was sufficient to vest jurisdic-

tion; the owner could have a reasonable amount of time in which to file the bill of exceptions. *Bowen v. DeSoto County Bd. of Supervisors*, 852 So. 2d 21 (Miss. 2003).

Neighbor did not file his bill of exception until well beyond the time frame dictated by statute; as such, the filing was not timely and the circuit court was correct in dismissing the appeal with prejudice for failure to have subject matter jurisdiction. *Lucas v. Williamson*, 852 So. 2d 67 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Trial court reached the correct result in granting judgment to the city, but erred in not dismissing the employee's claim on jurisdictional grounds due to his failure to timely appeal the adverse decision of the city to terminate his services in accordance with Miss. Code Ann. § 11-51-75 (2002); the employee had 10 days to appeal after the city board of aldermen failed to sustain a motion to take up the mayor's veto of the employee's reinstatement. *McPhail v. City of Lumberton*, 832 So. 2d 489 (Miss. 2002).

Final actions by municipal authorities or a board of supervisors was appealable under the statute, but an appeal had to be filed within the prescribed 10 days from the day of adjournment of the board of supervisors session, or the circuit court or appellate court will not have jurisdiction to consider the appeal. *House v. Honea*, 799 So. 2d 882 (Miss. 2001).

A mayor's veto became final for purposes of perfecting an appeal on the date it was accepted by the board of aldermen and, consequently, an appeal filed within 10 days of that date was timely. *City of Madison v. Shanks*, 793 So. 2d 576 (Miss. 2000).

An appeal under the statute was filed in a timely manner where (1) the mayor issued a veto which was filed with the city clerk on June 27, (2) the board of aldermen accepted the veto and refused to override it on August 2, and (3) the appeal was filed on August 12. The veto became effective on August 2, rather than on June 27, and the appeal was filed within 10 days thereafter. *City of Madison v. Shanks*, 793 So. 2d 576 (Miss. 2000).

A bill of exceptions was properly before the Circuit Court in an action concerning



an appeal of the decision of a county commission and board to sell real property owned by the county; although the transaction did in fact substitute one parcel of property for another parcel, it was nevertheless a conveyance evidenced by a special warranty deed which was directly challenged by the bill of exceptions, and the fact that the plaintiff did not properly appeal the previous sale of land was irrelevant since it challenged the latter decision within 10 days as required by the statute. *Coast Materials Co. v. Harrison County Dev. Comm'n*, 730 So. 2d 1128 (Miss. 1998).

The ten-day period for an appeal of a decision by the defendant board of aldermen did not begin when the board awarded a contract to a competitor of the plaintiff, but on the later date when the board received requisite approvals from the Mississippi Department of Transportation and the Federal Highway Commission. *J.H. Parker Constr. Co. v. Board of Aldermen*, 721 So. 2d 671 (Miss. Ct. App. 1998).

Heavy equipment vendor's action against a county board of supervisors which was timely filed in the chancery court, but later transferred to the circuit court, would be deemed to have been timely filed in the circuit court. *Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098 (Miss. 1987).

Since a city utilities commission was not a municipal authority, the vacation pay cause of one of its employees should not have been dismissed on the ground that the employee had failed to appeal within 10 days of the adjournment date of the commission's regular meeting. *Robinson v. Utilities Comm'n*, 487 So. 2d 827 (Miss. 1986).

A bill of exceptions filed on June 13, 1980, to challenge a rezoning of certain property was not untimely where, although the Mayor and Board of Aldermen voted on May 6, 1980, to reclassify the property, the rezoning ordinance did not become effective until written, signed and formally adopted on June 3, 1980, at which time the ten-day appeal period commenced to run. *City of Oxford v. Inman*, 405 So. 2d 111 (Miss. 1981).

Order of board of supervisors, adjudicating sufficiency of petitions for election

and providing for election to exclude traffic in light wines and beer in the county, was an interlocutory order and not a final order, requiring appeal therefrom within ten days in order to question sufficiency of petitions. *Costas v. Board of Supvrs.*, 196 Miss. 104, 15 So. 2d 365, 154 A.L.R. 863 (1943), suggestion of error sustained in part, 196 Miss. 104, 16 So. 2d 378 (1943).

Although board of supervisors was acting judicially in adjudicating sufficiency of petitions for election and providing for election to exclude traffic in light wines and beer in county, it did not complete its judicial functions in regard to such matter, as regards appeal therefrom, until the election was held and it adjudicated that notice of the election stated the proposition to be voted on, that it was published as required by law and that the election had been conducted according to law in all other respects. *Costas v. Board of Supvrs.*, 196 Miss. 104, 15 So. 2d 365, 154 A.L.R. 863 (1943), suggestion of error sustained in part, 196 Miss. 104, 16 So. 2d 378 (1943).

Final order of board of supervisors from which appeal will lie in the exclusion of light wines and beer in the county is the order showing affirmatively an adjudication as to the sufficiency of the notice of the election and publication according to law, that the notice contained a statement of the proposition to be voted on at the election, and that the report of the election commissioners disclosed that a majority of those voting in the election had voted in favor of the exclusion. *Costas v. Board of Supvrs.*, 196 Miss. 104, 15 So. 2d 365, 154 A.L.R. 863 (1943), suggestion of error sustained in part, 196 Miss. 104, 16 So. 2d 378 (1943).

The board is the only tribunal empowered to take the initiative action necessary to the lawful establishment of a stock law. Until such action is taken no appeal properly lies. *Bailey v. Delta Elec. Light, Power & Mfg. Co.*, 86 Miss. 634, 38 So. 354 (1905).

A creditor of a county has no access to the circuit court until after his claim has been rejected by the supervisors; if the board disallow his claim he can appeal or he may sue directly in any court of competent jurisdiction. *Board of Supvrs. v.*

Brookhaven, 51 Miss. 68 (1875); Taylor v. Marion County, 51 Miss. 731 (1875).

### 8. Particular matters as appealable.

Appeals from the initial extension of an option agreement and the conveyance of city property were timely under Miss. Code Ann. § 11-51-75 because both actions extended beyond an earlier resolution and option agreement. Ball v. Mayor & Bd. of Aldermen, 983 So. 2d 295 (Miss. 2008).

A mayor's veto is an appealable action of a municipal authority as contemplated by the statute. City of Madison v. Shanks, 793 So. 2d 576 (Miss. 2000).

In action by registered voters against county board of supervisors alleging that board violated due process right by refusing to hold election on bond issues, refusal did not rise to level of constitutional deprivation, and even if board members, as alleged, improperly eliminated signatures on plaintiffs' protest petition or viewed required number of signatures too restrictively, proper avenue for such claims was through state election procedures, not action in federal court. Thrasher v. Board of Supvrs., 765 F. Supp. 896 (N.D. Miss. 1991).

Statute, directing that appeals from judgments or decisions of municipal authorities are to be taken to Circuit Court, provided exclusive remedy for plaintiff, seeking declaratory and injunctive relief and alleging election regarding use, possession and sale of alcoholic beverages within city was without legal authority, and thus, Chancery Court lacked subject matter jurisdiction over plaintiff's action, even though election was not complete before plaintiff filed complaint, where remedy from city's action of holding election was provided for in Circuit Court. Benedict v. City of Hattiesburg, 693 So. 2d 377 (Miss. 1997).

Any act of county or municipality leaving party aggrieved is appealable to circuit court when all issues of controversy are finally disposed of by order of city council. Garrard v. City of Ocean Springs, 672 So. 2d 736 (Miss. 1996).

City council's decision to transfer property to park commission was appealable; order was final resolution of controversy as to disposition of property. Garrard v.

City of Ocean Springs, 672 So. 2d 736 (Miss. 1996).

Any act of a county or municipality which leaves a party aggrieved is appealable under § 11-51-75, which provides for appeal from a "judgment or decision" of the board of supervisors or municipal authorities of a city, town or village, where all issues of the controversy are finally disposed of by order of the city council. Thus, a city council's award of a lease contract for golf carts was an appealable action under § 11-51-75. South Cent. Turf, Inc. v. City of Jackson, 526 So. 2d 558 (Miss. 1988).

The circuit court acted within its jurisdiction in reversing a rezoning ordinance of the city of Oxford which rezoned 8.33 acres from agricultural to multi-family residential and such decision of the circuit court would be affirmed where the building of low-rent housing and a recreational facility as well as a road expansion had been changes in accordance with the original zoning plan and where there had been no concrete evidence of public need for housing on the 8.33 acres sought to be rezoned, but only testimony that there was generally a public need for multi-family dwellings in the city. City of Oxford v. Inman, 405 So. 2d 111 (Miss. 1981).

Order prescribing hours of opening and closing of places for sale of beer or wine outside the municipality in the county, under Code 1942, § 10224, is appealable under this section [Code 1942, § 1195]. Board of Supvrs. v. McCormick, 207 Miss. 216, 42 So. 2d 177 (1949).

Order of board of supervisors excluding traffic in light wines and beer pursuant to election had is a final order from which an appeal lies. Costas v. Board of Supvrs., 196 Miss. 104, 15 So. 2d 365, 154 A.L.R. 863 (1943), suggestion of error sustained in part, 196 Miss. 104, 16 So. 2d 378 (1943).

Order of county board of supervisors providing for election to determine whether sales of beer and light wines should be abolished held appealable by certiorari. Mohundro v. Board of Supvrs., 174 Miss. 512, 165 So. 124 (1936).

Issues arising under law relating to objections to improvements by majority of property owners are appealable. Faison v.



City of Indianola, 156 Miss. 872, 127 So. 558 (1930).

Decision of board of supervisors denying petitioners for increase in school tax right to withdraw, can be questioned only on an appeal to the circuit court. *Havens v. Brown*, 132 Miss. 747, 96 So. 405 (1923).

This section [Code 1942, § 1195] has no application to an appeal to the circuit court from the judgment of municipal authorities changing the boundaries of a municipality. *Yerger v. Town of Greenwood*, 77 Miss. 378, 27 So. 620 (1900).

### 9. Questions presented for review.

Decision to reverse the denial of a petition for rezoning from residential to commercial under Miss. Code Ann. § 11-51-75 was reversed on appeal because the issue of whether a change in the community had occurred was fairly debatable, and there was no evidence that the decision was arbitrary, capricious, or unsupported by substantial evidence; as such, the trial court overreached the applicable standard of appellate review of a decision from a mayor and board of aldermen. *Mayor & Bd. of Alderman v. Estate of Lewis*, — So. 2d —, 2006 Miss. App. LEXIS 887 (Miss. Ct. App. Nov. 28, 2006), opinion withdrawn by, substituted opinion at 963 So. 2d 1210, 2007 Miss. App. LEXIS 288 (Miss. Ct. App. 2007).

An appeal from a board of supervisors or city by a bill of exceptions is an appeal to an appellate court, and the circuit court is bound by the record made before the board. *Thornton v. Wayne County Election Com.*, 272 So. 2d 298 (Miss. 1973); *Tally v. Board of Supvrs.*, 323 So. 2d 547 (Miss. 1975).

Where a determinative vote on a resolution, directing the dismissal of the city's suit to recover losses resulting from budget excesses, illegal expenditures and failure to keep proper records by officials of the city, was cast by one of the officials sued, the resolution was void, not only as to the voting city official but as to the other defendant as well. *Friedhof v. City of Biloxi*, 232 Miss. 20, 97 So. 2d 742 (1957).

Appeal from decision of Board of Supervisors on legislative or administrative matters is within the contemplation of this section [Code 1942, § 1195] but such appeal is limited to whether or not the

order is reasonable and proper or is arbitrary or capricious, or beyond the power of the board to make, or whether it violates any constitutional right of the complaining party. *Board of Supvrs. v. McCormick*, 207 Miss. 216, 42 So. 2d 177 (1949).

In proceeding to close road, where question whether road was private rather than public road was not raised or passed upon by county board of supervisors or circuit court, issue could not be considered in Supreme Court. *Byrd v. Board of Supvrs.*, 179 Miss. 889, 176 So. 910 (1937).

### 10 Proceedings on appeal.

Circuit court sitting as an appellate court under Miss. Code § 11-51-75 has no power to grant an injunction; if it is necessary to delay implementation of a municipality's order pending the circuit court's ruling on a bill of exceptions, the proper remedy is issuance of a stay under Miss. R. Civ. P. 62. *Falco Lime, Inc. v. Mayor of Vicksburg*, 836 So. 2d 711 (Miss. 2002).

A city was not entitled to a jury trial in the Circuit Court where the court was sitting as an appellate court pursuant to § 11-51-75 and where the cause of action at issue derived from statutory, rather than common, law. *City of Durant v. Laws Constr. Co.*, 721 So. 2d 598 (Miss. 1998).

The Circuit Court, sitting as an appellate court pursuant to the statute, without a jury, may award and determine compensatory damages and attorney's fees. *City of Durant v. Laws Constr. Co.*, 721 So. 2d 598 (Miss. 1998).

A circuit court order remanding a rezoning case to the city council for a determination of the number and percentage of eligible property owners who protested the zoning change and ordering that a report of its findings and conclusions be filed with the court clerk to become part of the record was not intended to constitute a final judgment contemplated by § 11-51-75, but, rather, the circuit court, sitting as an appellate court, retained jurisdiction pending record expansion and supplementation. *City of Biloxi v. Hilbert*, 597 So. 2d 1276 (Miss. 1992).

Any court in state sitting as appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon court's



invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing amicus curiae at request of court or by leave of court; motion for leave to file amicus brief should demonstrate (1) amicus has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) amicus has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be adequately protected by those already parties. *Cooper v. City of Picayune*, 511 So. 2d 922 (Miss. 1987).

An appeal cannot be heard on oral testimony by agreement of the parties, whether or not confined to witnesses examined before the municipal authorities. *City of Greenwood v. Henderson*, 84 Miss. 802, 37 So. 745 (1905).

### 11. Disposition of appeal.

Circuit court properly ruled that a contractor's appeal of the decision of a county board of supervisors to award a contract to another was moot because the circuit court gave the board an opportunity to decide that it would reject all previous bids and reopen the request-for-proposals process, and the board decided to reject all bids and reopen the request-for-proposals process; any error that resulted from the circuit court's decision to remand for reconsideration of the matter by the board was harmless because the circuit court could have ordered the board to reject all bids and reopen the request-for-proposals process. *Precision Communs., Inc. v. Hinds County*, 74 So. 3d 366 (Miss. Ct. App. 2011), writ of certiorari denied by 73 So. 3d 1168, 2011 Miss. LEXIS 548 (Miss. 2011).

County board of supervisors' consideration of a local company's promise to em-

ploy local residents and provide special services to the elderly in awarding a contract for solid waste disposal, when it had failed to include them in the request for proposals, was a violation of Miss. Code Ann. § 31-7-13(r), requiring the bid process to be reinitiated. Because the remedy of reinitiating the bid process was authorized under § 31-7-13, it was properly ordered under Miss. Code Ann. '11-51-75. *Preferred Transp. Co., LLC v. Claiborne County Bd. of Supervisors*, 32 So. 3d 549 (Miss. Ct. App. 2010).

The party relying on the  $\frac{2}{3}$  majority voting requirement of § 17-1-17 has the burden of proving that 20 percent or more of the protesting landowners fit within the class of landowners outlined in the statute, and this showing must be made before the local governing body and not for the first time on appeal; thus, the circuit court's remand of a rezoning case to the city council for the purpose of applying the enhanced voting requirements of § 17-1-17 was unwarranted where the applicability of § 17-1-17 was not raised until the appeal was taken to the circuit court, and the circuit court erroneously placed upon the city council the burden of satisfying the requirements of § 17-1-17, as it was up to the protesting landowners to affirmatively show that they were within the statutory class who could validly object. *City of Biloxi v. Hilbert*, 597 So. 2d 1276 (Miss. 1992).

The manifest error doctrine did not apply to an appeal from a decision by the board of supervisors as the appellants had no access to a jury trial and, therefore, should not be held to the manifest error standard. *Leigh v. Board of Supvrs.*, 525 So. 2d 1326 (Miss. 1988).

In a proceeding to review the discharge for cause of a fire fighter, the circuit court improperly modified the Civil Service Commission's decision by entry of an additur or remand to the commission, where, absent certain inadmissible judicially noticed statistical data erroneously considered by the Commission, the fire fighter's evidence as to his earnings and what he reasonably should have earned was not substantially contradicted and therefore the circuit court should have reversed the Commission's order and ren-

dered the fire fighter a judgment for his back pay due him less the total of what, accordingly to relevant and properly adduced evidence, he earned and reasonably should have earned after he was terminated. *Eidt v. City of Natchez*, 421 So. 2d 1225 (Miss. 1982).

The Circuit Court can only consider the case as made by the bill of exceptions, and if the bill is not complete and is fatally defective in that pertinent and important facts and documents are omitted therefrom, the court does not have a record upon which it can intelligently act and the appeal must be dismissed. *Stewart v. City of Pascagoula*, 206 So. 2d 325 (Miss. 1968).

Where, upon appeal, the circuit judge correctly reversed the action of the mayor and board of supervisors in dismissing a petition asking that an election be held to determine whether or not beer could be lawfully sold in the city, it was error to fail to enter a judgment directing the mayor and the board of aldermen to call an election in accordance with Code 1942, § 10208.5. *Lee County Drys v. Anderson*, 231 Miss. 222, 95 So. 2d 224 (1957).

An appeal from an order of the board of supervisors authorizing a loan prayed for and affirmed by a school board for the construction of a building and the repair of others should not have been dismissed, but should have been either affirmed or reversed. *White v. Board of Supvrs.*, 192 Miss. 327, 5 So. 2d 233 (1941).

Where one convicted in a mayor's court appeals to the circuit court, but fails to appear, the court should dismiss the appeal and direct a procedendo to the mayor. *Henning v. City of Greenville*, 69 Miss. 214, 12 So. 559 (1891).

If he appeals from such dismissal to the Supreme Court, he cannot assign for error defects in the affidavit, or complain that the circuit court refused in his absence to inquire into his guilt on the merits. *Henning v. City of Greenville*, 69 Miss. 214, 12 So. 559 (1891).

## 12. Other remedies.

Trial court did not err in reversing a board's decision denying a county's request for a special exception and granting the request, as the board's decision was not supported by substantial evidence and

the court had the authority to implement the decision the board should have made. *Mayor & Bd. of Aldermen v. Jefferson Davis County*, 874 So. 2d 962 (Miss. 2004).

Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised; an injunction will not issue when the complainants have a complete and adequate remedy by appeal. Thus, a county supervisor's request for injunctive relief from the board of supervisor's ruling that the county supervisor was no longer a resident of the electing district and declaring the office vacant, was properly denied since the statutory method of appeal to the circuit court under § 11-51-75 afforded the county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right. *Moore v. Sanders*, 558 So. 2d 1383 (Miss. 1990).

Although persons aggrieved by the action or decision of municipal authorities may appeal pursuant to this section, it provided no authority for aggrieved persons to petition municipal authorities for rehearing a zoning ordinance adopted by the municipal authorities; thus, a city council had no authority to remand a petition to rezone property to its planning board for a rehearing after the city council had adopted an ordinance rezoning the property and after an appeal contesting the rezoning had been perfected in the circuit court. *Gatlin v. Cook*, 380 So. 2d 236 (Miss. 1980), but see *Griffin v. Armana*, 679 So. 2d 1049 (Miss. 1996).

Where, following the entry of an order refusing a building permit for the construction of a building which would in all respects conform to the applicable laws, ordinances, and regulations, the city authorities failed for some 60 days to sign or file a bill of exceptions, the result was an unreasonable and unwarranted delay in the issuance of the permit, effectively depriving the applicants of a plain, speedy, adequate remedy in the ordinary course of law; and a writ of mandamus was properly granted directing the issuance of the permit. *Thompson v. Mayfield*, 204 So. 2d 878 (Miss. 1967).

The remedy by a writ of prohibition does not lie where there is a plain, adequate and speedy remedy in the ordinary course of the law and a writ of prohibition will



not be issued to an inferior court unless its attention has been called to the claimed lack or excess of jurisdiction. *Wilby v. Board of Supvrs.*, 226 Miss. 744, 85 So. 2d 195 (1956).

When board of supervisors, acting under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district board may issue bonds for such district for purposes therein set out, rejects such petition for reasons it deems sufficient, or for no reason at all, without adjudicating necessary jurisdictional facts to exist, remedy of petitioners is appeal to circuit court under this section [Code 1942, § 1195] and not writ of mandamus under Code 1942, § 1109, on which appeal petitioners can obtain in circuit court adjudication of all jurisdictional facts which are alleged to have existed by having embodied such facts in bill of exceptions. *Board of Supvrs. v. State ex rel. Crisler*, 205 Miss. 43, 38 So. 2d 314 (1949).

Where election commissioners certified to a Board of Supervisors the essential matters necessary for the issuance of bonds of a school district, and had determined all the jurisdictional facts essential to the validity of the election, and the Board of Supervisors had found all the jurisdictional facts essential to the issuance of the bond and had directed their issuance and validation, the pendency of a mandamus suit in the circuit court was no bar to a validation proceeding in chancery court, where no appeal was taken from the order of the Board of Supervisors to the circuit court, a mandamus suit being no substitute for the appeal provided by statute. *In re Bonds of McNeill Special Consol. Sch. Dist.*, 185 Miss. 864, 188 So. 318 (1939).

Taxpayer instituting direct suit against municipality to recover privilege taxes abandoned statutory proceeding. *Chassaniol v. City of Greenwood*, 166 Miss. 770, 144 So. 548 (1932).

It is the duty of persons claiming to have been illegally assessed to avail themselves of the statutory remedy before applying to a Federal court for relief. *First Nat'l Bank v. Gildart*, 64 F.2d 873 (5th Cir. Miss. 1933), cert. denied, 290 U.S. 631, 54 S. Ct. 50, 78 L. Ed. 549 (1933).

Mandamus will not lie to compel board of supervisors to issue bonds for construction of roads, since this section [Code 1942, § 1195] (Code 1906, § 80) provides for an appeal to the circuit court. *Robinson v. Board of Supvrs.*, 105 Miss. 90, 62 So. 3 (1913); *Board of Supvrs. v. Lee*, 147 Miss. 99, 113 So. 194 (1927).

On rejection of claim by municipal authorities the claimant is entitled to bring an original suit, and is not bound to pursue the remedy prescribed by this section [Code 1942, § 1195]. *Pylant v. Town of Purvis*, 87 Miss. 433, 40 So. 7 (1906).

## 12. Standing.

Plaintiff citizens had no standing to seek redress for a city board's illegal decision in rehiring a patrolman under Miss. Code Ann. § 11-51-75 because they had not alleged an injury separate and apart from that suffered by other citizens. *Aldridge v. West*, 929 So. 2d 298 (Miss. 2006).

In the context of standing, while any person may file a complaint with the Mississippi Ethics Commission under Mississippi law, only local district attorneys, the Mississippi Attorney General, or the Commission itself may file direct actions in court challenging the ethical conduct of public officials. As a result, where the parents sought reversal of the confirmations of two school board members by the city council, alleging that certain council members were required to have recused themselves due to conflicts of interest, the parents were not "persons aggrieved" for purposes of Miss. Code Ann. § 11-51-75, and they did not meet the statutory requirements to file a bill of exceptions under the facts presented; their sole remedy was to file a complaint with the Commission. *City of Jackson v. Greene*, 869 So. 2d 1020 (Miss. 2004).

## 14. Jurisdiction.

Appellate court affirmed the grant of summary judgment in favor of the city as the trial court did not have subject matter jurisdiction due to the firefighter's failure to exhaust his administrative remedies as required by Miss. Code Ann. § 11-51-75. *Pratt v. City of Greenville*, 918 So. 2d 81 (Miss. Ct. App. 2006).



# ATTORNEY GENERAL OPINIONS

The deadline for filing an appeal from the decision of the Mayor and Board of Aldermen under Section 17-1-17 is 10 days because any party aggrieved by the decision of the governing authorities may appeal the decision to circuit court within 10 days under Section 11-51-75. Peeples, June 14, 1995, A.G. Op. #95-0359.

## RESEARCH REFERENCES

**ALR.** Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 A.L.R.4th 1130.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 75, 76.

**CJS.** 4 C.J.S., Appeal and Error §§ 1, 41, 43-50, 54, 56-85.

## § 11-51-77. Appeal from assessment of taxes — Attorney General, district attorney, county attorney may appeal.

Any person aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town or village, as to the assessment of taxes, may, within ten days after the adjournment of the meeting at which such decision is made, appeal to the circuit court of the county, upon giving bond, with sufficient sureties, in double the amount of the matter in dispute, but never less than One Hundred Dollars (\$100.00), payable to the state, and conditioned to perform the judgment of the circuit court, and to be approved by the clerk of such board, who, upon the filing of such bond, shall make a true copy of any papers on file relating to such controversy, and file such copy certified by him, with said bond, in the office of the clerk of the circuit court, on or before its next term. The controversy shall be tried anew in the circuit court at the first term, and be a preference case, and, if the matter be decided against the person who appealed, judgment shall be rendered on the appeal bond for damages at the rate of ten percent (10%) on the amount in controversy and all costs. If the matter be decided in favor of the person who appealed, judgment in his favor shall be certified to the board of supervisors, or the municipal authorities, as the case may be, which shall conform thereto, and shall pay the costs. The county attorney, the district attorney, or the Attorney General, if the state, county or municipality be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty days after the adjournment of the meeting at which such decision is made, or within twenty days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the state tax commission, or within twenty days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the state tax commission is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as hereinbefore provided, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section.

**SOURCES:** Codes, 1880, § 504; 1892, § 80; 1906, § 81; Hemingway's 1917, § 61; 1930, § 62; 1942, § 1196; Laws, 1918, ch. 120.

**Editor's Note** — Section 27-3-4 provides that the terms "Mississippi State Tax Commission," "State Tax Commission," "Tax Commission" and "commission" appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

**Cross References** — Appeals of equalizations as final assessments of real and personal property, see § 21-33-39.

Appeals by state tax commission, see § 27-3-33.

Appeal from order of board of supervisors approving assessment for former years, see § 27-35-157.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application generally.
3. Failure to appeal, effect of.
4. Persons entitled to appeal.
5. Payment of taxes, effect of.
6. Appeal bond.
7. Time for appeal.
8. Finality of assessment.
9. Effect of appeal.
10. Questions presented for review.
11. Proceedings on appeal.
12. —Evidence.
13. —Judgment.
14. —Damages.
15. Other remedies.

### 1. Validity.

This section [Code 1942, § 1196] does not violate the due process and equal protection clauses of the Constitution by giving the state and county a longer time in which to appeal than that given the taxpayer. *Robinson Land & Lumber Co. v. Roberson*, 126 Miss. 535, 89 So. 160 (1921).

### 2. Construction and application generally.

Section 11-51-77 governs appeals to the circuit court from decisions of a county board of supervisors regarding tax matters, and the statute does not require that a bill of exceptions be filed as a prerequisite to the circuit court obtaining subject matter jurisdiction over such matters. *Lenoir v. Madison County*, 641 So. 2d 1124 (Miss. 1994).

The penalty under this section [Code 1942, § 1196] should be confined to its

specific terms and should be strictly construed. *City of Pascagoula v. Advertiser Pub. Co.*, 226 Miss. 247, 84 So. 2d 157 (1955).

In a taxpayer's suit attacking the validity of a contract between the city and company for professional services by the company in making a detailed appraisal and valuation study of all properties in the city including its replacement, physical and other values, if the taxpayers were aggrieved by tax assessments affecting their property which was based upon valuations made by the city assessor under the contract, they should have sought relief by filing objections with the mayor and the board of aldermen and by appealing from such assessments in the manner provided by the statute. *Alexander v. Mayor of City of Natchez*, 219 Miss. 78, 68 So. 2d 434 (1953), motion overruled on other grounds, 220 Miss. 207, 70 So. 2d 529 (1954).

The validity of city tax assessment, where city court denied the petition but it was not requested to apply this section [Code 1942, § 1196] allowing damages for unsuccessful appeal in such cases, no cross appeal or cross assignment of error was filed on appeal to Supreme Court and the issue of statutory damages was not raised in brief or by suggestion of error to Supreme Court's affirmation of judgment, the Supreme Court would not consider a motion to correct judgment to include statutory damages for unsuccessful appeal. *McArdle's Estate v. City of Jackson*, 215 Miss. 571, 61 So. 2d 400 (1952).

Right to appeal from refusal of board of supervisors to levy tax for school district is

not a "speedy remedy" within meaning of Code 1942, § 1109, so as to bar issuance of writ of mandamus. *State ex rel. Chatham v. Board of Supvrs.*, 209 Miss. 79, 46 So. 2d 73 (1950).

Remedy of one who is party to proceedings before board of supervisors and is aggrieved by its decision is by appeal on bill of exceptions to circuit court under this section [Code 1942, § 1196], and if this remedy is not pursued as provided by law, objections to board's decision constitute collateral attack which cannot be maintained. *In re Savannah Special Consol. Sch. Dist.*, 208 Miss. 460, 44 So. 2d 545 (1950).

Since a taxpayer would have been entitled to an appeal to the circuit court and trial de novo therein from an unfavorable decision of the board of supervisors on the question of reduction of ad valorem assessment on his property, and the jury therein would be governed by an instruction that no specific parcel of real estate may be assessed at more than its actual value, the right of the taxpayer in this respect could not be less with respect to a review by the state tax commission of a favorable decision of the board of supervisors, the state tax commission being subject to the same instruction. *Stuart v. Board of Supvrs.*, 195 Miss. 1, 11 So. 2d 212 (1943).

Proceedings under this statute are judicial rather than administrative in character and hence a "suit" within the statute relating to removal from state to Federal courts. *City of Hattiesburg v. First Nat'l Bank*, 8 F. Supp. 157 (S.D. Miss. 1934), *aff'd*, 9 F. Supp. 519 (D. Miss. 1935).

Circuit court, on appeal from the board of supervisors, as to taxes, has same power as the board. *Knox v. L.N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873 (1927).

Tax Laws are to be construed together in determining when taxpayer has right of appeal to the circuit court. *Moller-Vandenboom Lumber Co. v. Board of Supvrs.*, 135 Miss. 249, 99 So. 823 (1924).

Laws 1916 ch. 98, creating the state board of tax commissioners, does not take property without due process, since an appeal may be taken by the taxpayer. *State ex rel. Forman v. Wheatley*, 113 Miss. 555, 74 So. 427 (1917).

This section (Code 1906, § 81) applies specifically to appeals relating to taxes, while § 80 (Code 1942, § 1195) applies to all other cases. *Kuhn Bros. v. Warren County*, 98 Miss. 879, 54 So. 442 (1911).

This section [Code 1942, § 1196] only regulates appeals from judgments relating to assessments of property for taxation. *Jennings v. Board of Supvrs.*, 79 Miss. 523, 31 So. 107 (1902).

The right to apply for a reduction in the valuation of property for taxation as fixed by the board of supervisors is not affected by this section [Code 1942, § 1196]. *Simmons v. Board of Supvrs.*, 68 Miss. 37, 8 So. 259 (1890).

### 3. Failure to appeal, effect of.

Where a corporate taxpayer erroneously paid a municipal ad valorem tax assessment on personal property of the taxpayer consigned to a lessee operating as an exempt free port warehouse under Code 1972 §§ 27-31-51 et seq., the taxpayer's failure to protest the assessment by appeal to the circuit court as provided by Code § 11-51-77 did not constitute a waiver and the corporation was entitled to petition the municipality for refund under Code § 21-33-79 and thereafter appeal the municipal denial of the refund to the circuit court under Code 1972 § 21-33-83. *City of Jackson v. DeSoto, Inc.*, 350 So. 2d 684 (Miss. 1977).

Parties are bound by order awarding contract for municipal improvements without appeal therefrom; injunction is not available as to order awarding contract for improvements, where proceedings were not void on their face. *Moore v. Board of Town of Duck Hill*, 151 Miss. 840, 119 So. 324 (1928).

Taxpayers failing to appeal from an order of the board of supervisors approving an assessment are concluded thereby. *Yazoo Delta Inv. Co. v. Suddoth*, 70 Miss. 416, 12 So. 246 (1893).

If a taxpayer failed to appeal he will not be relieved in equity. *Anderson v. Ingersoll*, 62 Miss. 73 (1884).

### 4. Persons entitled to appeal.

Attorney-general may appeal from assessments without first objecting; on appeal, trial is anew and taxpayer may show overvaluation of property. *Robinson Land*



& Lumber Co. v. Roberson, 126 Miss. 535, 89 So. 160 (1921).

Appeal lies from decision of board of supervisors increasing assessor's valuation of property for taxation, though person aggrieved by decision did not object thereto. *Louis Cohn & Bros. v. Lincoln County*, 119 Miss. 718, 81 So. 492 (1919).

### 5. Payment of taxes, effect of.

Questions involved on taxpayer's appeal to circuit court from municipal assessment of taxes did not become moot, notwithstanding taxpayer while appeal was pending paid taxes under protest. *Grenada Bank v. Town of Moorhead*, 160 Miss. 163, 133 So. 666 (1931).

Taxpayer's payment of assessment under protest does not preclude him from prosecuting appeal from erroneous assessment. *Grenada Bank v. Town of Moorhead*, 160 Miss. 163, 133 So. 666 (1931).

### 6. Appeal bond.

Appeal bond executed and filed with clerk during session of board of supervisors appealed case from board, although final judgment assessing lands was entered after filing. *Moller-Vandenboom Lumber Co. v. Board of Supvrs.*, 138 Miss. 289, 103 So. 81 (1925).

The remedy of the appellee from an insufficient appeal bond is an order requiring the bond to be made sufficient rather than a preemptory dismissal. *Bank of Oxford v. Board of Supvrs.*, 79 Miss. 152, 29 So. 825 (1901).

### 7. Time for appeal.

Where appellant filed his 1999 notice of appeal with the circuit court beyond the 10-day limitation of former Miss. Code Ann. § 11-51-79 but within the 30-day time limit of Miss. Unif. Cir. & County Ct. Prac. R. 5.04, the court of appeals applied the 30-day time limit because such rules supersede statutes that are in conflict with the rules. *Wolfe v. City of D'Iberville*, 799 So. 2d 142 (Miss. Ct. App. 2001).

City's appeal of decision of county board of supervisors granting bar center property tax exempt status could be brought within 20 days after adjournment of meeting at which decision was made, and did not instead have to be brought within 20 days after board gave final approval to

State Tax Commission rolls; therefore, city's appeal was not premature. *Ditto v. Hinds County*, 665 So. 2d 878 (Miss. 1995).

Three events are sufficient to trigger time within which municipality must file appeal of tax decision of county board of supervisors: adjournment of meeting at which decision is made; adjournment of meeting at which assessment rolls are corrected in accordance with instructions of State Tax Commission; or adjournment of meeting at which approval of roll by State Tax Commission is entered. *Ditto v. Hinds County*, 665 So. 2d 878 (Miss. 1995).

Attorney-general aggrieved by decision of board of supervisors equalizing assessment roll, need not appeal till after approval of assessment roll. *Edward Hines Yellow Pine Trustees v. State*, 146 Miss. 101, 112 So. 12 (1927), but see *Ditto v. Hinds County*, 665 So. 2d 878 (Miss. 1995).

Appeal can only be taken from order finally approving assessment after its approval by state tax commission. *State ex rel. Knox v. Wyoming Mfg. Co.*, 138 Miss. 249, 103 So. 11 (1925).

Appeal from board of supervisors assessing and equalizing taxes does not lie until after the state tax commission has passed on the roll and equalized it with those of other counties; appeal prior to filing of assessment roll with tax commission will be dismissed. *Wilkinson County v. Foster Creek Lumber & Mfg. Co.*, 135 Miss. 616, 100 So. 2 (1924).

Owner of property assessed for taxation may appeal from the assessment finally approved by the tax commission and is not required to appeal until that time. *Mobile & O.R. Co. v. Board of Supvrs.*, 124 Miss. 655, 87 So. 139 (1921).

Motion to dismiss appeal from municipal assessment because not filed within five days after assessment made was properly overruled where the appeal was filed within five days after the assessment roll was approved. *Gloster Compress & Trading Co. v. Town of Gloster*, 115 Miss. 578, 76 So. 550 (1917).

An appeal does not lie from an order directing an assessment until the judgment approving the assessment roll shall

have become final. *Madison County v. Frazier*, 78 Miss. 880, 29 So. 765 (1901).

### 8. Finality of assessment.

Order of mayor and board of aldermen of town, in substance adopting and approving assessment rolls, notwithstanding subsequent order, held final, and therefore appealable. *Grenada Bank v. Town of Moorhead*, 160 Miss. 163, 133 So. 666 (1931).

Entering on the minutes order of state tax commission approving rolls certified to it by the board, is final assessment from which the taxpayer can appeal. *Marathon Lumber Co. v. State*, 139 Miss. 125, 103 So. 798 (1925).

Assessment rolls ordered to be changed by the state tax commission does not become final until approved by the board of supervisors. *Marathon Lumber Co. v. State*, 139 Miss. 125, 103 So. 798 (1925).

An order directing an assessment is not final until the assessment roll is approved and the board adjourns. *Madison County v. Frazier*, 78 Miss. 880, 29 So. 765 (1901).

### 9. Effect of appeal.

Where a taxpayer appealed to the circuit court from an assessment by the city of the company's personal property taxes and before the case came on trial *de novo* in the circuit court, the company filed a motion to dismiss its appeal, the case was not decided against the taxpayer in the circuit court within the meaning of this section [Code 1942, § 1196]. *City of Pascagoula v. Advertiser Pub. Co.*, 226 Miss. 247, 84 So. 2d 157 (1955).

State Revenue Agent cannot recover commissions for delinquent taxes after suit brought to compel payment, but before trial, where an appeal from assessment of such tax was pending. *Harrison County v. Robertson*, 121 Miss. 387, 83 So. 617 (1919); *Robertson v. Harrison County*, 127 Miss. 281, 90 So. 8 (1921).

After the execution of an appeal bond, an appeal by a taxpayer to the circuit court from the judgment of the board of supervisors approving an additional assessment made by the tax collector is not subject to dismissal for failure to pay or tender taxes. *Board of Supvrs. v. Tate*, 78 Miss. 294, 29 So. 74 (1901).

### 10. Questions presented for review.

An appeal from a city assessment covers the entire assessment; one securing deduction of fire loss in equalization of his property cannot complain because deduction was made on wrong building. *Redmond v. City of Jackson*, 143 Miss. 114, 108 So. 444 (1926).

Objection to assessment on ground of exemption precludes company from raising regularity of assessment on appeal. *Adams County v. National Box Co.*, 125 Miss. 598, 88 So. 168 (1921).

One who appeals to the circuit court from a decision of the board of supervisors raising his assessment and is defeated cannot appeal to the Supreme Court from that portion only of the judgment of the circuit court adjudging against him statutory damages and costs. *Wm. Atkinson & Bacot Co. v. Pike County Supvrs.*, 73 Miss. 348, 18 So. 924 (1896).

### 11. Proceedings on appeal.

Where the owner of property protested the assessment as being too high but the city commissioners rejected the protest and adopted the assessment without change, the burden of proof was on the owner to overturn such assessment on appeal to the circuit court with the attendant right to open and close the argument. *City of Jackson v. McCardle's Estate*, 189 Miss. 781, 198 So. 736 (1940).

Appeal by the attorney-general from assessment of taxes is tried *de novo* in circuit court. *Knox v. L.N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873 (1927).

On appeal from assessment of taxes, circuit court may require production of books and papers showing value of property. *Knox v. L.N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873 (1927).

On appeal from order increasing assessment, error to grant a peremptory instruction in favor of taxpayer, where there is testimony of undervaluation. *Town of Union v. J.R. Buchwalter Lumber Co.*, 136 Miss. 414, 101 So. 561 (1924).

Trial by circuit court on an agreed statement of facts, of appeal from order of board of supervisors reducing or refusing to reduce an assessment of property for taxation, is trial on merits. *Board of Supvrs. v. Laurel Mills*, 130 Miss. 454, 94 So. 448 (1923).



**12. —Evidence.**

That Board of Supervisors placed all cut-over land in the County, except certain swamp lands, at an arbitrary assessment value of \$2.50 per acre, that the greater area of all taxable lands was in such cut-over class assessed at \$2.50 per acre, and that taxpayer's land was so assessed although it was not worth on an average as much as the average of other land in such class, did not warrant the circuit court on appeal to receive in evidence the entire assessment roll of all lands in the county in order to emphasize taxpayer's point, where taxpayer's land was not assessed at more than its true value. *Batson v. Pearl River County*, 204 Miss. 882, 35 So. 2d 712 (1948).

Burden of proof on municipality on appeal from board of equalization increasing taxpayer's assessment above that returned by assessor. *Whittle v. City of Hattiesburg*, 132 Miss. 808, 96 So. 741 (1923).

**13. —Judgment.**

In proceeding to review an order of a board of supervisors levying a special county-wide tax for the payment of indebtedness incurred in the purchase of road machinery for the separate use of public road districts, and the refusal of the board to refund tax to taxpayer paying same under protest, in which the taxpayer filed a brief supporting its claim to a refund of the tax, failure of county's attorney to file a brief is tantamount to a confession of error and warrants judgment for the taxpayer. *Gulf, M. & O.R.R. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943).

A substantial increase, by virtue of a judgment of the circuit court on appeal by the Attorney General from the assessment adjudicated by the Board of Supervisors of the county and the State Tax Commission, of the assessment of the taxpayers' land over what similar lands of other taxpayers generally and systematically were assessed at was a discrimination against the taxpayers and a violation of the constitutional principal of uniformity, irrespective of what percentage of the true value was used as the basis of valuation. *Edward Hines Yellow Pine Trustees v. Stewart*, 46 F.2d 910 (5th Cir. 1931), cert. denied, 283

U.S. 861, 51 S. Ct. 654, 75 L. Ed. 1466 (1931).

On appeal of attorney-general from the board of supervisors, judgment increasing assessment should not order payment of his commission. *Edward Hines Yellow Pine Trustees v. State*, 146 Miss. 101, 112 So. 12 (1927), but see *Ditto v. Hinds County*, 665 So. 2d 878 (Miss. 1995).

Equality of city assessment is equality over city as a whole, and property not assessed at a greater rate than general assessment over city is not assessed beyond its true value, and assessment will be affirmed. *Redmond v. City of Jackson*, 143 Miss. 114, 108 So. 444 (1926).

Judgment on certiorari reversing judgment of state tax commission is a "final judgment," and the commission is not entitled to appeal therefrom. *Illinois Cent. R.R. v. Miller*, 141 Miss. 213, 106 So. 635 (1925).

Record held to show affirmance on merits of order abating assessment. *Miller v. Beltz-Hoover's Estate*, 141 Miss. 24, 105 So. 751 (1925).

**14. —Damages.**

Where a protestant appealed the assessment of property taxes in the circuit court which awarded 10 per cent damages and in supreme court which awarded 5 per cent as provided by the statute, the awards were for damages for unsuccessful appeals and were not a penalty. *Sellers v. City of Jackson*, 221 Miss. 150, 75 So. 2d 265 (1954).

Where City of Jackson assessed property and there was an appeal to the circuit court which confirmed the assessment, an award giving the city 10 per cent statutory damages for unsuccessful appeal was subject to interest at the rate of 6 per cent from date of judgment until paid. *Sellers v. City of Jackson*, 221 Miss. 150, 75 So. 2d 265 (1954).

Attorney-general is entitled to 15% on amount recovered in tax assessment appeals. *Jefferson Davis County v. Berry*, 152 Miss. 578, 120 So. 572 (1929).

Ten per cent damages can be recovered, where judgment in circuit court for appellant was reversed on appeal, only by claim or motion in the Supreme Court within the time prescribed to amend or correct judgment, and not by subsequent motion



in the circuit court. Board of Supvrs. v. Foster Creek Lumber & Mfg. Co., 138 Miss. 543, 103 So. 482 (1925).

### 15. Other remedies.

It is the duty of persons claiming to have been illegally assessed to avail themselves of the statutory remedy before applying to a Federal court for relief. First Nat'l Bank v. Gildart, 64 F.2d 873 (5th Cir. Miss. 1933), cert. denied, 290 U.S. 631, 54 S. Ct. 50, 78 L. Ed. 549 (1933).

A taxpayer action challenging the assessment of property added to a municipal separate school district and lying outside the municipality could not be maintained as a class action where the claims of the purported class members related to individually owned parcels of real estate separate and distinct from each other; the remedy of each of these persons, as land-owners, was by exercising the statutory right of appeal. Thompson v. Anding, 370 So. 2d 1335 (Miss. 1979).

Where bank voluntarily paid taxes and did not avail itself of statutory remedies to cure alleged errors, receiver of bank held not entitled to mandamus to compel Attorney-General to approve refund. Selig v. Price, 167 Miss. 612, 142 So. 504 (1932).

Appeal to the circuit court from tax assessment is the exclusive remedy, where the assessment is valid on its face. Reed v. Norman-Breaux Lumber Co., 149 Miss. 395, 115 So. 724 (1928), appeal dismissed, 278 U.S. 556, 49 S. Ct. 14, 73 L. Ed. 503 (1928).

Bill to enjoin attorney-general from appealing from tax assessment cannot be maintained if remedy sought is defensive merely and equally available in suit at law. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907 (1926).

Contention that appeal from tax assessment was nullity because not signed by attorney-general or assistants and because not taken within prescribed time does not constitute ground for equitable relief by way of injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907 (1926).

Alleged intention of attorney-general in appeal from tax assessment, to secure 100 per cent assessment as against assessment of 60 per cent as to other property, does not present ground for injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907 (1926).

## RESEARCH REFERENCES

**ALR.** Standing of one taxpayer to complain of underassessment or nonassessment of property of another for state and local taxation. 9 A.L.R.4th 428.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 75, 76.

**CJS.** 4 C.J.S., Appeal and Error §§ 1, 43, 44.

## § 11-51-79. Appeals from the county court.

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor. Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court. Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties as is provided in affirmances in the Supreme Court. If prejudicial error be found, the court shall reverse and

shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo. Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree. Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the court to which it has been appealed. When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

**SOURCES:** Codes, 1930, § 704; 1942, § 1616; Laws, 1926, ch. 131; Laws, 1932, chs. 140, 256; Laws, 1940, ch. 229; Laws, 1966, ch. 348, § 1; Laws, 2001, ch. 423, § 1, eff from and after July 1, 2001.

**Cross References** — Appeals in eminent domain cases, see § 11-27-29.

## JUDICIAL DECISIONS

1. Validity.
2. Jurisdiction.
3. Right and requisites of appeal.
4. Appeals in felony cases transferred to county court.
5. Time for appeal.
6. Matters considered on appeal.
7. Judgments or orders on appeal.
8. —Trial de novo.
9. —Statutory damages or penalties.

### 1. Validity.

Where the judgment of the Supreme Court reversed the circuit court and in effect affirmed the judgment of the county court, the mandate will be issued direct to the county court. *Martin v. Motors Ins. Corp.*, 219 Miss. 473, 68 So. 2d 869 (1954).

This section [Code 1942, § 1616], in providing an appeal from county court to chancery court in equity cases, is valid as against contention that an appeal from an inferior court can be taken only to the circuit court by virtue of § 156 of the Constitution. *W. Horace Williams Co. v. Federal Credit Co.*, 198 Miss. 111, 21 So. 2d 582 (1945).

This section [Code 1942, § 1616] in providing for appeals directly from the county court to the supreme court in felony cases which have been transferred from the circuit court to the county court for trial and tried in the county court is not unconstitutional as a violation of § 172 of the Constitution of 1890, providing for the establishment of inferior courts.

*Drummond v. State*, 184 Miss. 738, 185 So. 207 (1938).

## 2. Jurisdiction.

Appeals in paternity suits are governed exclusively by § 93-9-41, not by § 11-51-79, and such appeals may be made to no other court than the Supreme Court. *Gri-sham v. Britfield*, 391 So. 2d 107 (Miss. 1980).

The filing of an appeal bond within ten days from the entry of judgment in county court is jurisdictional. *Williams v. Michael*, 319 So. 2d 226 (Miss. 1975).

The filing of an approved appeal bond within 10 days, unless an extension is granted, is a jurisdictional requirement. *Parkman v. Mississippi State Hwy. Comm'n*, 250 So. 2d 637 (Miss. 1971).

Where an appeal from county court in equity case was erroneously taken to the circuit court instead of the chancery court as required by Code 1942, § 1616, and it was too late to appeal anew, circuit court should have transferred case to chancery court under § 157 of the Constitution, and that court erred in overruling a motion therefor and dismissing the appeal. *W. Horace Williams Co. v. Federal Credit Co.*, 198 Miss. 111, 21 So. 2d 582 (1945).

Under statute requiring that appeals from county court to circuit court be made within ten days from entry of final judgment unless county judge extends time, circuit court held not to have jurisdiction where appeal was filed more than ten days after entry of final judgment, in absence of affidavit asking for extension of time, since statute is mandatory. *Flowers v. Trotlos*, 172 Miss. 305, 160 So. 581 (1935).

County court being without jurisdiction to try eminent domain proceeding during vacation, circuit court and Supreme Court on appeal were likewise without jurisdiction. But see Code 1942, § 1604, providing for trial in vacation of eminent domain and unlawful entry and detainer actions. *Mississippi State Hwy. Dep't v. Haines*, 162 Miss. 216, 139 So. 168 (1932).

## 3. Right and requisites of appeal.

Failure to post required bond within time prescribed by law is jurisdictional and Circuit Court has no power to hear appeal, although failure to give notice to

court reporter is not jurisdictional. *Johnson v. Evans*, 517 So. 2d 570 (Miss. 1987).

In an action on an open account in which the defendant's plea in bar was sustained by the county court and the case dismissed, the order of the circuit court reversing the county court, holding that the plea in bar was without merit and setting the case on its docket for trial was not a final judgment from which an appeal to the Supreme Court would lie. *Southern Saw & Mower Distribs., Inc. v. Dolmar N. Am. Corp.*, 317 So. 2d 400 (Miss. 1975).

A money judgment of the county court, entered in a replevin action, was an interlocutory judgment from which no appeal to circuit court would lie after an order had been entered in the trial court granting the issuance of a writ of inquiry to ascertain the value of the property in question, and before a final judgment had been entered. *A.B. Cash Register Co. v. Travelers Reservation Ass'n*, 219 So. 2d 147 (Miss. 1969).

Where a landlord recovered judgment for rent due and possession of the premises against his tenant and other persons who were claiming to have an interest in lease, the other persons in interest with the tenant and their sureties could prosecute an appeal, even though the tenant did not appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829 (1955).

The application for an appeal is merely formal, the clerk being without the right to refuse it, provided it is accompanied by a proper bond—the only substantial requirement of the statute. *Schwartz v. McKay*, 184 Miss. 422, 185 So. 200 (1938).

The tender of an appeal bond is in fact a request that it be approved for the purpose of an appeal, and where the bond was filed with and approved by the circuit court clerk, who was also the clerk of the county court, in connection with an appeal from the county court to the circuit court, it was error to dismiss the appeal on the ground that no application therefor had been made. *Schwartz v. McKay*, 184 Miss. 422, 185 So. 200 (1938).

On appeal from county court to circuit court in eminent domain proceeding, appellants must give notice to stenographer to transcribe notes, as prescribed by statutes relating to court reporters. *Missis-*



Mississippi State Hwy. Dep't v. Haines, 162 Miss. 216, 139 So. 168 (1932).

Appeals from county court held not triable in circuit court until stenographer's transcript becomes part of record or time therefor expires. Lollar v. City of Greenwood, 148 Miss. 363, 114 So. 627 (1927).

#### **4. Appeals in felony cases transferred to county court.**

A direct appeal from a conviction of forgery in the county court to the supreme court was proper in view of this statutory provision. Drummond v. State, 184 Miss. 738, 185 So. 207 (1938).

Cases transferred from circuit courts to county courts are appealable to circuit courts. *Ex parte* Tucker, 164 Miss. 20, 143 So. 700 (1932).

#### **5. Time for appeal.**

The time for appeal ran from the date of entry of an order overruling a motion to set aside summary judgment, rather than the date of the order granting summary judgment, and therefore an appeal was timely pursuant to § 11-51-79 where the appeal bond was paid 6 days after the motion to set aside summary judgment was overruled. Allen v. Mayer, 587 So. 2d 255 (Miss. 1991).

A motion for a new trial, filed during the term of entry of the judgment but 21 days subsequent to the entry, was violative of the statute authorizing appeals from a county court judgment, and should have been dismissed as not timely made, the provisions of the statute being mandatory and jurisdictional. Mid-Continent Refrigerator Co. v. Doherty, 232 So. 2d 360 (Miss. 1970).

All appeals from the county court to the circuit court, including eminent domain proceedings, must be taken within 10 days from the date of the entry of the final judgment, or such extended time as the county judge may grant. Garrett v. Mississippi State Hwy. Comm'n, 227 So. 2d 856 (Miss. 1969).

Where a sheriff, who had been judged guilty of contempt of court, made no effort to file an appeal bond, and, after the time for an appeal had expired, the county judge directed the issuance of a *capias* pro fine to the coroner, who took the sheriff into custody, whereupon the sheriff peti-

tioned the circuit court for a writ of habeas corpus, which was made returnable before the county judge, the trial judge in the habeas corpus proceedings did not have the power then to permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. Watson v. Holifield, 229 Miss. 27, 89 So. 2d 924 (1956).

Motion to set aside judgment may be made at any time during term at which judgment was entered, the finality of the judgment being thereby suspended and the limitation of the time for appeal beginning when, but not until, the motion is disposed of. Rogers v. Ziller, 48 So. 2d 476 (Miss. 1950).

Ten-day limitation on time for appeal from judgment of county court is not applicable to motion to set aside judgment which appears on its face to have been irregularly and improperly entered against garnishee before time allowed for garnishee to answer had expired. Rogers v. Ziller, 48 So. 2d 476 (Miss. 1950).

Appeal bond and notice to stenographer on appeal from judgment of county court which were filed within ten days from time order was entered overruling motion for new trial, but not within ten days after rendition of judgment held timely, since motion for new trial extended the judgment until the motion was disposed of and the judgment denying the new trial was a "final judgment." Laurel Oil & Fertilizer Co. v. McCraw, 178 Miss. 117, 172 So. 503 (1937).

Under statute requiring that appeals from county court to circuit court be made within ten days from entry of final judgment unless county judge extends time, circuit court held not to have jurisdiction where appeal was filed more than ten days after entry of final judgment, in absence of affidavit asking for extension of time, since statute is mandatory. Flowers v. Trotlos, 172 Miss. 305, 160 So. 581 (1935).

Filing motion for new trial in county court over ten days after entry of final judgment, during same term, does not suspend judgment, nor resuscitate right of appeal. Mutual Health & Benefit Ass'n v. Cranford, 173 Miss. 152, 156 So. 876 (1934).

Appeals from county to circuit court, including eminent domain proceedings, must be taken within ten days from judgment, or such extended time as county judge may grant. *Mississippi State Hwy. Dep't v. Haines*, 162 Miss. 216, 139 So. 168 (1932).

#### 6. Matters considered on appeal.

Testimony, taken in the circuit court on a motion for a new trial and a further motion to set aside the judgment, whereby the circuit court had affirmed the judgment of the county court, tending to show that the note sued upon was executed prior to its alleged date, was wholly incompetent under this section [Code 1942, § 1616], for the reason that the appeal was to be considered solely upon the record as made in the county court, and when so considered, the judgment appealed from should be affirmed if no prejudicial error be found. *Peebles v. Miles*, 189 Miss. 623, 198 So. 29 (1940).

An appellant cannot for the first time on appeal from the county court to the circuit court present a plea supported by proof that appellee was a foreign corporation and had not complied with the statutes of this state authorizing it to do business therein and giving it access to its courts, since the circuit court, sitting as a court of appeals, can consider nothing except the record coming up from the county court. *Carmichael v. J. Cahn Co.*, 183 Miss. 535, 184 So. 417 (1938).

Where evidence warranted punitive damages, question whether they should be inflicted was for county judge trying case without jury, not for circuit judge on appeal. *Ellis v. Southern Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273 (1932).

Points not raised by assignments of error in circuit court, other than as to jurisdiction, cannot be raised in Supreme Court on appeal. *State v. Carraway*, 160 Miss. 263, 134 So. 846 (1931).

#### 7. Judgments or orders on appeal.

Where defendant in prosecution in county court for unlawful possession of whisky was entitled to a directed verdict of not guilty, circuit court should have reversed judgment of conviction and discharged defendant, and consequently Supreme Court would reverse judgment of

circuit court affirming conviction and would discharge defendant. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401 (1945).

Where only error in judgment of county court upholding buyer's right to rescind sale was in providing that, upon default of the seller returning to the buyer the note and conditional sales contract the buyer was entitled to recover from the seller as damages to the face value of the note, with interest at 6 per cent per annum after maturity of each note instalment, instead of simply providing that upon such default the buyer recover the face value thereof, circuit court could make this correction, and consequently on appeal the Supreme Court would make such correction. *Nichols Bus & Trailer Co. v. Fuller*, 198 Miss. 230, 22 So. 2d 243 (1945).

If on appeal prejudicial error is found, it is the duty of the circuit court to reverse the case whereupon this section [Code 1942, § 1616] requires that it be transferred to the issue docket of the circuit court for trial therein *de novo*; and after such trial *de novo* the circuit court would be entitled to entertain a motion for a new trial and to hear evidence in support thereof, but not otherwise. *Peebles v. Miles*, 189 Miss. 623, 198 So. 29 (1940).

Under this section [Code 1942, § 1616] the circuit court considers the case on the record made in the county court, and if harmful error is found, grants a trial *de novo* in the circuit court, and if not, affirms the judgment, an eminent domain proceeding in the county court being in the same category as any other civil cause in that court. *Mississippi State Hwy. Comm'n v. Reddoch*, 184 Miss. 302, 186 So. 298 (1939).

Where description of mortgaged property was void because insufficient and record presented no other facts for jury's determination which could affect right of purchaser at bankruptcy sale to recover, Supreme Court reversed judgment for mortgagee and entered final judgment for such purchaser. *National Foods v. Friedrich*, 173 Miss. 717, 163 So. 126 (1935).

Circuit court, when affirming money judgment of county court, where appeal bond supersedes judgment, should render judgment on bond for amount of judgment



affirmed, with interest thereon from date of rendition at same rate as borne by judgment affirmed, court costs, and six per cent damages on amount of judgment. *Ellis v. Southern Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273 (1932).

Supreme Court, reversing circuit court's judgment which reversed county court's judgment, could render such judgment as circuit court should have rendered. *Ellis v. Southern Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273 (1932).

Where Supreme Court reverses circuit court's judgment, and, by rendering contrary judgment, in effect affirms county court judgment, mandate will be issued direct to county court. *Ellis v. Southern Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273 (1932).

Supreme Court judgment, affirming circuit court judgment, affirming county court judgment, need not direct circuit court to remand case for enforcement by execution. *Brandon v. Interstate Life & Accident Co.*, 149 Miss. 814, 116 So. 739 (1928).

### 8. —Trial de novo.

Since upon the circuit court's reversal of the county court, based upon the granting of certain erroneous instructions by the county judge, the case became a pending cause on the docket of the circuit court for a new trial de novo, the order of reversal was not such a final judgment as an appeal could lie therefrom. *Allen v. Sowell*, 231 Miss. 597, 97 So. 2d 227 (1957).

A judgment in county court in an unlawful entry and detainer action awarding plaintiff double rent from a fixed date until surrender of premises was properly affirmed by the circuit court on appeal, without remanding the case to its own docket for a new trial, after striking this provision and substituting the amount which had accrued prior to rendition of judgment. *Stewart v. Miller*, 200 Miss. 188, 26 So. 2d 540 (1946).

Circuit court, in action of replevin on appeal from judgment of county court which failed to hold part of claim was barred by limitations, should reverse and try case de novo. *Blount v. Miller*, 172 Miss. 492, 160 So. 598 (1935).

In replevin against sheriff who seized automobile under unconstitutional provi-

sion of taxing statute, where county court, on appeal from justice court, erroneously rendered judgment for defendant, circuit court, on appeal from county court, should have reversed county court's judgment and tried case de novo. *Holloway v. Jordan*, 170 Miss. 99, 154 So. 340 (1934).

On Supreme Court's reversal of circuit court judgment affirming county court judgment, which was in effect reversal of county court judgment, proper course was to remand case to circuit court to try de novo in accordance with statute. *McIntosh v. Munson Rd. Mach. Co.*, 167 Miss. 546, 145 So. 731 (1933).

Trial on appeal from county court to circuit court in condemnation proceedings is not de novo, but on record and assignments of error. *State v. Carraway*, 160 Miss. 263, 134 So. 846 (1931).

Appeal to circuit court in suit of eminent domain, brought in county court, is not triable de novo on appeal to circuit court, § 1497, Code of 1930 (§ 2766, Code of 1942) not being applicable. *City of Hattiesburg v. Pritchett*, 160 Miss. 342, 134 So. 140 (1931).

### 9. —Statutory damages or penalties.

A circuit court judge did not exceed his authority by assessing statutory damages of fifteen percent against a party for failure to prosecute its appeal from the county court. *Johnson Ltd. Inc. v. Signa*, 410 So. 2d 1320 (Miss. 1982).

Code 1942, § 1616 makes applicable to appeals from county courts damages imposed by Code 1942, § 1971, in the event that judgment or decree of the court below is affirmed or the appellant fails to prosecute his appeal. *Excel Saw & Tool Co. v. Micor Corp.*, 265 So. 2d 926 (Miss. 1972).

Court in construing statutes relating to imposition of penalties on unsuccessful appeals must look to substance rather than form. *Hawkins Hdwe. Co. v. Crews*, 176 Miss. 434, 169 So. 767 (1936).

Where landlord brought suit to recover rent accompanied by an attachment, penalty on affirmance of judgment on landlord's appeal should have been calculated on money judgment recovered by tenant for wrongful suing out of attachment and not on property attached. *Hawkins Hdwe. Co. v. Crews*, 176 Miss. 434, 169 So. 767 (1936).



County court's money judgment for claimant being affirmed by circuit court and Supreme Court, claimant could re-

cover statutory damages. *Brandon v. Interstate Life & Accident Co.*, 149 Miss. 814, 116 So. 739 (1928).

### RESEARCH REFERENCES

**ALR.** Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 A.L.R.5th 531.

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 77-79, 82-116, 163.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 851 et seq.

**CJS.** 4 C.J.S., Appeal and Error §§ 157 et seq., 137, 222 et seq., 213, 230-233, 281, 284, 282, 419-421.

**Law Reviews.** Mandatory assessment of damages against an unsuccessful appellant: A constitutional analysis, 53 Miss. L. J. 281, June, 1983.

Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification, 22 Miss. C. L. Rev. 57, Fall, 2002.

## § 11-51-81. Appeals to the county court.

All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore. And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken: Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto; and provided further that there shall be no appeal from the circuit court to the Supreme Court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the Supreme Court.

**SOURCES:** Codes, 1930, § 705; 1942, § 1617; Laws, 1926, ch. 131.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Municipal police courts and police justices generally, see §§ 21-23-1 et seq.

## JUDICIAL DECISIONS

1. Constitutionality.
2. Validity.
3. Construction and application generally.
4. Appeal to Supreme Court.
5. —Constitutional question.
6. Judgments or orders on appeal.
6. Appeal dismissed.

**1. Constitutionality.**

Miss. Code Ann. § 11-51-81's "three-court rule" is unconstitutional because it usurps the Mississippi Supreme Court's constitutional rule-making power and violates the doctrine of separation of powers. Thus, any litigant whose case originates in either justice court or municipal court, and whose case is ultimately decided by the circuit court, whether it be via a trial de novo or on appellate review from a final judgment of the county court conducted by the circuit court under the applicable statute, shall have the right to appeal to the Mississippi Supreme Court. *Jones v. City of Ridgeland*, 48 So. 3d 530 (Miss. 2010).

**2. Validity.**

Provision of this section [Code 1942, § 1617] limiting appeal from circuit court to Supreme Court in cases originating in justice of peace, municipal or police court, held not invalid as denying equal protection of law. *Worley v. Pappas*, 161 M. 330, 135 So. 348 (Miss. 1931).

**3. Construction and application generally.**

Appellate court had jurisdiction to hear a landlord's appeal as the appeal was from the tenant's counterclaim that was originally filed in the county court. *Johnson v. Brooks*, 915 So. 2d 536 (Miss. Ct. App. 2005).

Defendant's appeal from his convictions for indecent exposure, reckless driving, and malicious mischief was dismissed as the appeal was not accompanied by the necessary formal allowance of either the circuit judge or a Supreme Court justice as required by Miss. Code Ann. § 11-51-81. *Johnson v. State*, 879 So. 2d 1057 (Miss. Ct. App. 2004).

Where a landlord brought an action against a tenant and others who were

claiming to have an interest in lease for rent owing and possession of premises, and where a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829 (1955).

This section [Code 1942, § 1617] expressly applies to criminal as well as to civil cases. *State v. Warren*, 197 Miss. 13, 19 So. 2d 491 (1944).

A case carried from the court of a justice of the peace to a county court for the purpose of reviewing a judgment is an appeal within the meaning of this section [Code 1942, § 1617] a writ of certiorari being one of the methods by which appellate jurisdiction is exercised. *Schwartz v. McKay*, 184 Miss. 422, 185 So. 200 (1938).

Where appeal bond for less than statutory amount was approved, appeal from justice court to county court was not void but only defective, and county court could enter nonsuit on appellant's motion. *Keys v. Borden*, 178 Miss. 173, 171 So. 887 (1937).

On appeal from justice court to county court, no demand for jury is necessary. *Speir v. Moseley*, 158 Miss. 63, 130 So. 53 (1930).

On appeal from justice to county court, appellant's obtaining delay to week in which cases before court without jury came up held not waiver of jury trial. *Speir v. Moseley*, 158 Miss. 63, 130 So. 53 (1930).

Criminal case in which justice was disqualified because of interest on appeal to county court is tried de novo. *State v. Dearman*, 152 Miss. 6, 118 So. 349 (1928).

**4. Appeal to Supreme Court.**

Once an appeal is before the Supreme Court under § 11-51-81, it is there for all purposes as the Supreme Court's jurisdiction extends to "appeals," which are entire cases, and not merely isolated or discrete issues therein; however, it is within the discretion of the Supreme Court to decline to consider nonconstitutional issues and restrict review to issues of general impor-

tance in the administration of justice, or to protect a party from substantial and irreparable injury. *Goforth v. City of Ridgeland*, 603 So. 2d 323 (Miss. 1992).

An appeal to the Supreme Court would be dismissed where the case originated in justice court, was tried *de novo* in county court and was appealed on the record to the circuit court, and nothing in the record indicated the allowance of the appeal by the circuit judge or by a judge of the Supreme Court. *Davidson v. State*, 592 So. 2d 1006 (Miss. 1992).

The requirements under § 11-51-81 that a case originating in municipal court, appealed to county court and there tried *de novo*, and from county court appealed to circuit court and by that court affirmed, may not be appealed to the Supreme Court of Mississippi unless (1) a constitutional question is necessarily involved and (2) then only upon the allowance of an appeal by the circuit judge or by a judge of the Supreme Court—are jurisdictional requirements. Thus, an appeal would be dismissed where the record failed to reflect that the appeal was allowed by a circuit judge or by a judge of the Supreme Court and no constitutional violation or constitutional question had been alleged or presented to the Supreme Court for appellate review; the appeal would be dismissed even though the jurisdictional issue was not raised in the appellate briefs, since the Supreme Court has a duty to raise on its own motion a question of jurisdiction of an appeal even though such question is not raised by either party. *Sumrall v. City of Jackson*, 576 So. 2d 1259 (Miss. 1991).

Where a defendant entered a plea of *nolo contendere* in municipal court and was found guilty, appealed to the county court and, following a trial *de novo*, was again convicted and sentenced to pay a fine, and thereafter appealed to the circuit court in which the case was heard and the conviction and sentence affirmed, the defendant's appeal to the Supreme Court would be dismissed on the ground that the defendant had failed to present his "constitutional claims" before the circuit court and had therefore precluded appeal to the Supreme Court. *Alt v. City of Biloxi*, 397 So. 2d 897 (Miss. 1981).

Upon an appeal to the supreme court from the circuit court under this section, only the constitutional question is considered. *Gaughf v. City of Jackson*, 243 Miss. 50, 137 So. 2d 190 (1962).

The presence of a constitutional question and the granting of an appeal by the circuit judge must concur in order to justify such an appeal to the supreme court. *Wells v. State*, 201 Miss. 249, 29 So. 2d 119 (1947).

An appeal to the Supreme Court will not lie from a misdemeanor conviction in a justice of the peace court which has been appealed to the county court and thence to the circuit court, where no constitutional question is involved. *Kitchens v. State*, 198 Miss. 346, 22 So. 2d 493 (1945).

There can be no appeal to Supreme Court in a case originating in justice court and thence appealed to county court and from that court to circuit court, unless a constitutional question is involved. *State v. Warren*, 197 Miss. 13, 19 So. 2d 491 (1944).

Supreme Court has no jurisdiction to entertain an appeal from circuit court affirming conviction in county court in a proceeding on charge of operating house of ill fame, which originated in justice court, where no constitutional question is involved and there has been no order by the circuit judge or any judge of Supreme Court allowing the appeal. *Keeton v. State*, 197 Miss. 11, 19 So. 2d 477 (1944).

Where a suit on a note commenced in justice of the peace court was by agreement of the parties transferred for trial to the county court, this section [Code 1942, § 1617] did not prevent an appeal to the supreme court from a judgment of the circuit court affirming judgment in the county court, where by reason of such agreement the cause occupied the same status as if it had been first instituted in the county court, and no appeal had been perfected from the justice of the peace court since there had been no judgment to appeal from. *Peebles v. Miles*, 189 Miss. 623, 198 So. 29 (1940).

If a circuit court wrongfully dismisses an appeal to it from a county court, the appellant has not had his day in the former court which this section [Code 1942, § 1617] contemplates, and conse-



quently it does not bar him from appealing to the supreme court for the correction of that error. *Schwartz v. McKay*, 184 Miss. 422, 185 So. 200 (1938).

When a case has been properly appealed from a county court to a circuit court, that court should take jurisdiction thereof and try it in the manner provided by Code 1942, § 704, and it is from judgments then rendered that this section [Code 1942, § 1617] forbids appeals to the supreme court. *Schwartz v. McKay*, 184 Miss. 422, 185 So. 200 (1938).

Appeal should be allowed to Supreme Court where defendant's constitutional rights are invaded by admitting evidence obtained by illegal search or where constitutional question is doubtful. *Johnson v. City of Hattiesburg*, 170 Miss. 527, 155 So. 418 (1934).

Appeal in case originating in justice court and appealed to county and circuit courts will be dismissed unless appeal involves constitutional question. *Williams v. State*, 160 Miss. 489, 135 So. 199 (1931).

### 5. —Constitutional question.

Appellate court was procedurally barred from reaching the merits of defendant's non-constitutional issues because the appellate court was limited to issues that involved constitutional questions. *Sasser v. City of Richland*, 850 So. 2d 206 (Miss. Ct. App. 2003).

A constitutional question is required for an appeal from a municipal court to the Mississippi Supreme Court. *Barrett v. State*, 491 So. 2d 833 (Miss. 1986).

No constitutional question was presented within Supreme Court's appellate jurisdiction in liquor prosecution claimed to involve illegal search, where defendant, before search of closet, told policeman he was pouring whisky into commode and that closet was public. *Johnson v. City of Hattiesburg*, 170 Miss. 527, 155 So. 418 (1934).

### 6. Judgments or orders on appeal.

A county court's enhancement of a defendant's sentence for breach of the peace from \$50 to \$250 on appeal from the municipal court, was proper since the fine fell within the breach of the peace statute's sentencing guideline and there was no evidence that the enhancement was

reflective of judicial vindictiveness. *Jones v. City of Meridian*, 552 So. 2d 820 (Miss. 1989).

In replevin against sheriff who seized automobile under unconstitutional provision of taxing statute, where county court, on appeal from justice court, erroneously rendered judgment for defendant, circuit court, on appeal from county court, should have reversed county court's judgment and tried case de novo. *Holloway v. Jordan*, 170 Miss. 99, 154 So. 340 (1934).

Where defendant was tried in county court for removing and concealing personal property on which there was lien, but was convicted of larceny, and court, after hearing evidence in accordance with circuit court's order on appeal, failed to enter correct judgment, judgment would be reversed, and cause remanded to circuit court for trial de novo. *Wardlaw v. State*, 158 Miss. 400, 130 So. 513 (1930).

### 6. Appeal dismissed.

Where defendant was convicted of driving under the influence offense, careless driving, and speeding in the Municipal Court of the City of Florence, and the conviction was affirmed by the Rankin County Court and then the Rankin County Circuit Court, no further appeal was permitted pursuant to Miss. Code Ann. § 11-51-81 (Rev. 2002); although a constitutional issue was presented (defendant alleged a denial of equal protection), an appeal was not specifically allowed by either the circuit judge or by a judge of the supreme court. *Estate of Beckley v. Beckley*, — So. 2d —, 2007 Miss. App. LEXIS 82 (Miss. Ct. App. Dec. 11, 2007).

Appeal was dismissed because it was procedurally barred due to the absence of the second jurisdictional requirement of Miss. Code Ann. § 11-51-81 (2002); the circuit court denied defendant's motion for reconsideration of judgment, or in the alternative, to certify a constitutional question, and there was nothing in the appellate court's file to indicate that defendant presented a request to the Mississippi Supreme Court to allow the appeal, nor that any such request was granted by a justice of the Mississippi Supreme Court. *Withers v. City of Pearl*, 919 So. 2d 1050 (Miss. Ct. App. 2005).

# RESEARCH REFERENCES

**Am Jur.** 47 *Am. Jur. 2d (Rev), Justices of the Peace* §§ 48 et seq., 52 et seq.      **CJS.** 51 *C.J.S., Justices of the Peace* §§ 129 et seq.

## § 11-51-83. Appeals from unlawful entry and detainer court.

Either party aggrieved by the judgment of the justices rendered in a case of unlawful entry and detainer, may, after final judgment, appeal to the circuit court of the county, within five days after the rendition of the judgment, by entering into bond with sufficient sureties, to be approved by the justice before whom the complaint was made, or in his absence before another justice, who tried the case, in a penalty double the amount of the rent recovered, but never less than Two Hundred Dollars (\$200.00), payable to the opposite party, conditioned for the payment of such judgment as the circuit court may render against him. Such appeal shall operate as a supersedeas. The justice shall send to the circuit court all the papers and proceedings, and a transcript of all orders and judgments in said cause, and shall deliver the same to the clerk of the circuit court, to be there docketed for trial. The circuit court shall, at the first term, hear and determine the cause anew on its merits, in a summary way. On the trial in the circuit court, the plaintiff may claim for all arrears of rent due at the time of such trial, or for the use and occupation of the premises up to that time. The court shall cause judgment to be entered against the defendant and his sureties on the appeal bond, for the amount found to be due, and award a fieri facias thereon, with legal interest and all costs; but the judgment against the surety shall not exceed the penalty of the appeal bond.

**SOURCES:** *Codes, Hutchinson's* 1848, ch. 56, art. 7 (17); 1857, ch. 42, art. 18; 1871, § 1594; 1880, § 2657; 1892, § 81; 1906, § 82; *Hemingway's* 1917, § 62; 1930, § 63; 1942, § 1197.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Actions for unlawful entry and detainer generally, see §§ 11-25-1 et seq.

Appeals from county court, see § 11-51-79.

Written demand for appeal in lieu of bond in unlawful entry and detainer, see § 11-51-103.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

# JUDICIAL DECISIONS

1. In general.
2. Appeal bond.
3. Time for appeal.
4. Matters determinable on appeal.
5. Jurisdiction.

## 1. In general.

Where a circuit court affirmed the decision of justice of peace for landlord in a

suit to remove tenant for nonpayment of rent, the circuit court properly allowed the landlord rent up to the time of the judgment. *Williams v. Shivers*, 222 Miss. 626, 76 So. 2d 838 (1955).

In an unlawful entry and detainer action where throughout the trial the appellant did not ask for rent, and the case was submitted to jury without any mention of

rent, and no claim for rent was made until after the trial and verdict, and thereby the appellant obtained a distinctive advantage in the presentation of his case to the jury, such an advantage was sufficient to constitute a waiver of claim for rent. *Producers Gin Ass'n v. Beck*, 215 Miss. 263, 60 So. 2d 642 (1952).

A judgment is "rendered" when pronounced in open court at conclusion of trial, and not at time it is entered on docket. *Simpson v. Boykin*, 118 Miss. 701, 79 So. 852 (1918).

An unlawful entry and detainer case upon appeal is tried anew on its merits. *Harvey v. Clark*, 81 Miss. 166, 32 So. 906 (1902).

## 2. Appeal bond.

Circuit court held authorized to permit amendment of \$100 appeal bond from unlawful entry and detainer court to meet statutory requirement for appeal bond of not less than \$200, or to permit execution of new bond. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936).

Defendant's bond on appeal from unlawful entry and detainer court to circuit court did not obligate sureties to pay costs of plaintiff's appeal to Supreme Court from circuit court's judgment for defendant, resulting in reversal and remand. *Cahn v. Wright*, 119 Miss. 107, 80 So. 494 (1919).

If the bond state the date of the judgment as subsequent to its own date, the defect can be cured by amendment or by giving a new bond. *Leavenworth v. Crittenden*, 62 Miss. 573 (1885).

The bond must conform substantially to the statute. *Warren v. Trustees of African Baptist Church*, 50 Miss. 223 (1874).

Objection to an appeal bond from the justice's court must be made in the circuit court, they cannot be raised for the first time in the Supreme Court. *Poston v. Mhoon*, 49 Miss. 620 (1873).

The appeal taken after judgment is not a matter which can appear in the record of the special tribunal; it is sufficient if the appeal bond appear to have been executed and approved within five days after the rendition of the judgment. *Busby v. Grayham*, 26 Miss. 210 (1853).

## 3. Time for appeal.

Appeal to circuit court taken within 10 days from county court judgment in unlawful entry and detainer action held timely, five-day statute being inapplicable. *McCandless v. Day*, 162 Miss. 859, 140 So. 337 (1932).

Appeal from a judgment dispossessing a tenant, rendered by justice of peace, must be taken within five days after pronouncement of judgment. *Simpson v. Boykin*, 118 Miss. 701, 79 So. 852 (1918).

The limitation of time on appeals from justice's court to the circuit court prescribed herein does not apply to criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

## 4. Matters determinable on appeal.

In a suit to remove tenant for nonpayment of rent, where the Supreme Court affirmed judgment for the landlord, money judgment would be assessed against tenant's supersedeas bond for rent in default for the period in which an appeal was pending. *Williams v. Shivers*, 222 Miss. 626, 76 So. 2d 838 (1955).

The Legislature has adopted this section as part of the proceeding under Code 1906, § 2885, by a landlord to get possession of the rented premises and in such proceeding a recovery of rent is also permissible though not claimed in the affidavit. *Stollenwerck v. Eure*, 120 Miss. 233, 82 So. 68 (1919).

Where, in proceedings to dispossess a tenant for holding over under Code 1892, § 2552, he appealed, it was error not to allow him to file in the circuit court for the first time the affidavit denying the facts averred by the landlord provided for in such section so as to entitle him to a trial on the merits of the issue so made. *Harvey v. Clark*, 81 Miss. 166, 32 So. 906 (1902).

A defendant who has appealed to the circuit court cannot there complain of defects in the warrant or of the record to show the formal organization of the court of the justices. *Brown v. Ashford*, 56 Miss. 677 (1879).

## 5. Jurisdiction.

Matter was brought in a county that did not have a county court; therefore, the matter was filed in justice court. Upon the ruling in justice court, the aggrieved



party, which was a creditor, could appeal the ruling to the circuit court for a new hearing on the merits, albeit in a sum-

mary manner. *Gandy v. Citicorp*, 985 So. 2d 371 (Miss. Ct. App. 2008).

### ATTORNEY GENERAL OPINIONS

Based on Section 11-51-83, a tenant may obtain a supersedeas bond to stay a removal order while his appeal is pending. A supersedeas bond is a separate bond from the appeal bond. *Grubbs*, August 9, 1996, A.G. Op. #96-0523.

The court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for

a preliminary injunction. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties. This opinion supersedes MS AG Op., *Grubbs* (August 9, 1996) and MS AG Op., *Smith* (June 27, 1997). *Parker*, Aug. 27, 2004, A.G. Op. 04-0407.

### RESEARCH REFERENCES

**Am Jur.** 4 Am. Jur. 2d (Rev), Appellate Review §§ 77, 78, 101.

**CJS.** 4 C.J.S., Appeal and Error §§ 86-89.

## § 11-51-85. Appeals from judgment of justice court judge in civil cases.

Either party may appeal to the circuit court of the county from the judgment of any justice court judge if appeal be demanded and bond given within (10) days after the rendition of the judgment. The party taking the appeal shall give bond with a sufficient surety, to be approved by the clerk of the justice court payable to the opposite party, in the penalty of double the amount of the judgment, or double the value of the property involved, and all costs accrued and likely to accrue in the case, and in no case to be less than One Hundred Dollars (\$100.00), conditioned for the payment of such judgment as the circuit court may render against him; and the appeal, when demanded and bond given, shall operate as a supersedeas of execution on such judgment. Any defendant against whom a civil judgment may have been entered by a justice court judge who, by reason of his poverty, is not able to give bond may nevertheless appeal from such judgment on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment. The clerk of the justice court shall at once make up a transcript of the record and properly transmit the same to the clerk of the circuit court, within fifteen (15) days after the bond has been filed. In counties where there is a county court, appeals from justice courts shall be to the county court.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 50, art. 17; 1857, ch. 58, art. 23; 1871, § 1332; 1880, § 2353; 1892, § 82; 1906, § 83; *Hemingway's* 1917, § 63; 1930, § 64; 1942, § 1198; *Laws*, 1912, ch. 203; *Laws*, 1973, ch. 374, § 1; *Laws*, 1981, ch. 471, § 40; *Laws*, 1982, ch. 423, § 24, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws, 1982, ch. 423, § 29, provides as follows:

"SECTION 29. Sections 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 27 and 28 of this act shall take effect and be in force from and after March 31, 1982. Sections 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of this act shall take effect and be in force from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act."

**Cross References** — As to appeal from judgment of justice of the peace in proceedings for partition of property, see § 11-21-81.

Appeals from county court, see § 11-51-79.

Appeals to county court, see § 11-51-81.

Written demand for appeal in certain cases, see § 11-51-103.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

Appeal from judgment of justice of the peace under state stock law, see § 69-13-23.

Appeals in proceedings against tenants holding over, see § 89-7-47.

Appeals from party wall proceedings before justice of the peace, see § 89-15-9.

Restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

## JUDICIAL DECISIONS

1. In general.
2. Jurisdiction of circuit court.
3. Amount in controversy.
4. Appeal bond.
5. —Validity of bond.
6. —Liability on bond.
7. Time for appeal.
8. Notice of appeal.
9. Persons entitled to appeal.
10. Effect of appeal.
11. Proceedings on appeal.
12. —Omissions in record, effect of.
13. —Evidence.
14. Nonsuit or dismissal of appeal.

### 1. In general.

This statute is mandatory and jurisdictional. *Carney v. Moore*, 130 Miss. 658, 94 So. 890 (1923).

Judgment is "rendered" when pronounced in open court at conclusion of trial, and not at time it is entered on docket. *Simpson v. Boykin*, 118 Miss. 701, 79 So. 852 (1918).

Neither this section (§ 83, Code 1906) nor § 95, Code 1906 (Code 1942, § 1211) have any application to an appeal provided for by § 80 (Code 1942, § 1195), giving a right of appeal to any person aggrieved by the action of a municipality. *Polk v. City of Hattiesburg*, 110 Miss. 80, 69 So. 1005 (1915).

The statute (Code 1942, § 1147, *supra*) denying the right to appeal from a judg-

ment by confession or consent does not apply to the courts of justices of the peace. *James v. Woods*, 65 Miss. 528, 5 So. 106 (1888).

### 2. Jurisdiction of circuit court.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492 (1941), error overruled, 190 Miss. 882, 2 So. 2d 148 (1941).

The circuit court did not err in overruling a motion to dismiss an appeal on the ground that the defendant appellant had failed to introduce in evidence the judgment, appeal bond and other proceedings had in a justice of the peace court so as to show that the circuit court had jurisdiction of the appeal from the justice court, the transcript of the proceedings and judgment of the justice of the peace being properly a part of the record in the supreme court although not offered in evidence in the circuit court, there being no showing as to the absence of the tran-

script from the justice of the peace court when the case was tried in the circuit court nor on the record before the supreme court. *Myrick v. Mansell*, 184 Miss. 701, 184 So. 447 (1938).

On appeal from justice court, circuit court's jurisdiction is original, and case is tried *de novo*, though no written pleadings are required. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).

Circuit court has no jurisdiction of an appeal from justice court of prosecuting witness taxed with cost. *Town of Lumberton v. Peyton*, 143 Miss. 777, 109 So. 740 (1926).

Where a county is divided into two judicial districts and the district of a justice of the peace is partly in each of them, an appeal by a plaintiff from the justice court must be to the circuit court of the district of defendant's residence, the circuit court of the other district being without jurisdiction of such appeal. *Nations v. Lovejoy*, 77 Miss. 36, 25 So. 494 (1899).

The time prescribed for the appeal is a limitation of the jurisdiction of the circuit court and an appeal taken after the prescribed time is a nullity. *Kramer v. Holster*, 55 Miss. 243 (1877); *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175 (1927).

### 3. Amount in controversy.

Contradictory statements as to value or damage involved will not defeat circuit court's jurisdiction unless there was fraudulent undervaluation of property or damage for the purpose of conferring jurisdiction in the justice of the peace court. *Harper v. Adams*, 141 Miss. 806, 106 So. 354 (1925).

In appeal to Supreme Court amount in controversy is determined by value of the property replevied. *Gresham v. Kennedy*, 128 Miss. 469, 91 So. 129 (1922).

### 4. Appeal bond.

Where an appellant had timely filed a proper appeal bond, he ought not be deprived of his right of appeal through the dereliction of the justice of the peace in failing to properly certify the transcript and the appellant should be allowed reasonable time in which to have perfected the transcript of proceedings in the justice

of peace court. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490 (1951).

Appellant, if desiring to avail himself of arbitrary refusal of justice of peace to approve appeal bond, should leave bond with justice before expiration of time for appeal. *Tripp Furn. Co. v. Cox*, 160 Miss. 90, 133 So. 238 (1931).

Failure to deliver bond for appeal from justice of the peace within 10 days required dismissal, though delivery was impossible because of flood condition. *Lamas v. Renaldo*, 151 Miss. 325, 117 So. 331 (1928), modified, 152 Miss. 353, 118 So. 417 (1928).

Rejection by justice of appeal bond, after previous timely acceptance and approval, did not defeat appeal. *Helton v. Federal Credit Co.*, 147 Miss. 95, 113 So. 196 (1927).

Bond on appeal from justice being less than required by Code 1906 § 83 amended by Laws 1912 ch 203 denial of motion to dismiss appeal for insufficient bond without amendment or leave was error. *De Laval Separator Co. v. Cutts*, 142 Miss. 379, 107 So. 522 (1926).

Bond insufficient when purporting to refer to entirely different appeal where nothing in record shows it was executed to perfect appeal therein described. *Nevers v. Gullotta*, 96 So. 513 (Miss. 1923).

Failure to file appeal bond within ten days after rendition of judgment not excused by fact justice was absent from home during last three days of period. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36 (1922).

Where justice refused to approve bond, but offered to receive it and investigate, but it was not left with him or presented in due time, the appeal was properly dismissed. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36 (1922).

Plaintiff appealing from justice's court need not give bond in double value of property where defendant in possession. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36 (1922).

Appeal from circuit court in case originating in justice's court dismissed where there was no bond in the record on appeal from the justice to the circuit court. *Gaines v. State*, 48 So. 182 (Miss. 1909).

When an appeal bond has been tendered to a justice of the peace, the names



of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing which he cannot afterward invalidate. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

Filing a bond in accordance with the statute within the time, with a justice of the peace, operates to remove a civil case to the circuit court. A justice cannot defeat the appeal by demanding a bond in a greater sum than that required by statute or by refusing to approve a proper bond. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

Failure by a justice of the peace to endorse his approval of an appeal bond within five days will not affect the validity of the appeal if his subsequent approval endorsed thereon shows that the bond was filed within five days. *Winner & Meyer v. Williams*, 82 Miss. 669, 35 So. 308 (1903).

An appeal bond is not bad because made before and in anticipation of the adverse judgment. *James v. Woods*, 65 Miss. 528, 5 So. 106 (1888).

One who sues in forma pauperis cannot appeal without bond. *Woods v. Davidson*, 57 Miss. 206 (1879).

### 5. —Validity of bond.

Although the approval of an appeal bond by the constable did not meet the requirements of the statutes, when the justice of peace accepted the bond and treated it as a valid appeal bond and filed it, along with other papers in the cause, in office of the clerk of the circuit court, the court had a right to permit the bond to be amended to conform with the statutory requirements, and to permit the justice of the peace to approve the bond, notwithstanding the expiration of the ten day period of time allowed by statute for the filing of such appeal bond. *Pennyman v. Alexander*, 229 Miss. 704, 91 So. 2d 728, 59 A.L.R.2d 1321 (1957).

Where bond on appeal to county court from justice court was approved, although it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication.

*Keys v. Borden*, 178 Miss. 173, 171 So. 887 (1937).

Bond must be presented to and approved by justice who tried the case, and where case was begun before one justice, who because of disqualification transferred it to another justice as provided by law, an appeal bond filed with and approved by the first was of no effect. *McPhail v. Blaum*, 95 Miss. 53, 48 So. 725 (1909).

An appeal bond in a penalty less than the minimum sum required by law is not void but may be amended under Code 1892 § 92. *Denton v. Denton*, 77 Miss. 375, 27 So. 383 (1900).

### 6. —Liability on bond.

Partner held not liable as surety on appeal bond from justice of peace court, which bond partner had not signed and had not authorized to be signed, and of which he had no knowledge, and did not acquiesce in signing of his name to bond by clerk of partnership. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225 (1935).

Partner held not liable on appeal bond from justice of peace court which was signed with authority of copartner in name of partnership, where partnership was mercantile firm not engaged in business of making surety bonds and copartner was without authority to bind partner unless authorized so to do by scope of partnership, or by partner. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225 (1935).

A surety on an appeal bond ceases to be liable when pending the appeal the principal is discharged, his liability as surety not being continued by Bankrupt Act 1898 § 16. *Goyer Co. v. Jones*, 79 Miss. 253, 30 So. 651 (1901).

If a defendant appeal to the circuit court and there dismiss his appeal, the plaintiff is entitled to judgment on the appeal bond for his debt, damages, and costs. *Pass v. Payne*, 63 Miss. 239 (1885).

### 7. Time for appeal.

Motion to set aside justice court judgment and appeal, made and taken over 10 days after rendition of judgment, were void and did not justify sheriff's refusal to levy execution issued on judgment. *Womack v. Richardson*, 168 Miss. 347, 151 So. 173 (1933).

The time prescribed for the appeal is a limitation of the jurisdiction of the circuit court and an appeal taken after the prescribed time is a nullity. *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175 (1927); *Kramer v. Holster*, 55 Miss. 243 (1877).

The limitations of time on appeals from justices' courts to the circuit court, prescribed by Code 1892 §§ 82 and 84 do not apply to criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

### 8. Notice of appeal.

Notice of appeal from justice of the peace to the circuit court, unnecessary. *Corry v. Buddendorff*, 98 Miss. 98, 54 So. 84 (1911).

Where appellant on appeal from a justice gave the bond required by the statute and the record and papers were sent up, no notice of appeal was necessary. *Rowe v. W.D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146 (1904).

When a bond is executed and the record transmitted, the case stands for trial de novo in the circuit court without new process to the appellee. *Rowe v. W.D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146 (1904).

### 9. Persons entitled to appeal.

A plaintiff whose suit before a justice of the peace has been dismissed because of his absence and failure to prosecute may appeal to the circuit court from the judgment of dismissal. *Horn v. McKinnon*, 78 Miss. 307, 29 So. 149 (1901).

When a judgment was rendered by a justice of the peace against three persons, only two of whom executed an appeal-bond, the appeal was good as to the two and the judgment remained in force as to the defendant who did not give bond. *Roberts v. Weiler & Haas*, 52 Miss. 299 (1876).

### 10. Effect of appeal.

Justice court's judgment is vacated or superseded by appeal to circuit court, although revived by dismissal of appeal. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).

### 11. Proceedings on appeal.

On appeal from justice court, transcript is presumptively correct, there being no

suggestion from either party that anything is omitted. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

Circuit court may dismiss an appeal from conviction before a justice for failure to appear without inquiring into the trial affidavit's validity. *Gillie v. State*, 126 Miss. 832, 89 So. 665 (1921).

Where the next term of the circuit court after trial of claimant's issue on November 13th convened on November 17th, and bond and papers in the case were not filed in the circuit court at that term, and there was no proceeding to require justice to send them up, a motion in the following March term to dismiss the appeal for want of prosecution was properly denied. *Dalee Bros. v. Wigginton*, 111 Miss. 749, 72 So. 149 (1916).

### 12. —Omissions in record, effect of.

Where justice did not file in circuit court certified transcript of record, judgment on appeal from circuit court will be reversed and remanded. *Gordon v. Sykes*, 155 Miss. 705, 125 So. 85 (1929).

Failure of justice to certify record in bastardy proceedings did not defeat jurisdiction of circuit court, justice proceedings being preliminary. *Shelby v. Harvey*, 152 Miss. 180, 118 So. 896 (1928).

Order overruling motion to dismiss appeal from justice court will be affirmed, where record does not contain testimony introduced thereon. *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175 (1927).

Where record in case originating in justice's court contains no transcript of proceedings therein, judgment of court below must be reversed and case remanded. *Burrow v. State*, 143 Miss. 221, 108 So. 505 (1926).

Where neither justice's transcript nor original papers certified by the justice showed service of process supporting default judgment, an execution on the judgment was properly quashed and the garnishment discharged by circuit court on appeal. *Carrollton Hdwe. & Implement Co. v. Marshall*, 117 Miss. 224, 78 So. 7 (1918).

Where transcript fails to show any judgment rendered in justice court where the action originated, or that any appeal bond was given, appeal will be dismissed for



want of jurisdiction. *Kimball v. Louisville & N.R. Co.*, 94 Miss. 396, 48 So. 230 (1909).

Where record does not show any appeal from the justice nor any judgment there, the Supreme Court is without jurisdiction. *Bush v. Ross*, 90 Miss. 32, 43 So. 70 (1907).

Where the sum demanded is less than \$200 in a case at law and the record does not show that it was appealed from a justice court to the circuit court, the Supreme Court of its own motion will dismiss the appeal to it for want of jurisdiction, although the stenographer's notes recite that the case was appealed to the circuit court from a justice court. *Gardner v. New Orleans & N.E.R. Co.*, 78 Miss. 640, 29 So. 469 (1901).

After the submission of such a case, the Supreme Court will remand it to the docket and award a certiorari to perfect the record only on condition that the appellant pay all costs of the appeal. *Gardner v. New Orleans & N.E.R. Co.*, 78 Miss. 640, 29 So. 469 (1901).

If on appeal the record shows the amount in controversy to be below the original jurisdiction of the circuit court and does not show that the case originated in a justice court, the Supreme Court will reverse the judgment and dismiss the proceedings in the circuit court, leaving the judgment in the justice court, if any, to stand. *Andrews v. Wallace*, 72 Miss. 291, 16 So. 204 (1894).

### 13. —Evidence.

On appeal from justice court, alleged defect in transcript, or omission of essen-

tial parts, cannot be supplied by oral testimony. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held inadmissible over objection in circuit court, notwithstanding plaintiff testified that he filed notes with declaration. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

### 14. Nonsuit or dismissal of appeal.

Where bond on appeal to county court from justice court was approved, although it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication. *Keys v. Borden*, 178 Miss. 173, 171 So. 887 (1937).

Although a dismissal of an appeal from justice court to circuit court revives the judgment in the justice court, plaintiff could suffer voluntary nonsuit without thereby reinstating justice court's judgment so as to render it *res judicata*. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).

If a defendant appeal to the circuit court and there dismiss his appeal, the plaintiff is entitled to judgment on the appeal bond for his debt, damages and costs. *Pass v. Payne*, 63 Miss. 239 (1885).

## ATTORNEY GENERAL OPINIONS

Party who perfects civil appeal is not required to prepay any costs into Circuit Court Clerk's office as condition of perfecting said appeal; all costs involved in civil appeal from Justice Court are required to be included in amount of appeal bond which is conditioned for payment of such judgment and costs as Judge may levy, said costs are not due until final determi-

nation of appeal. *Barnette*, July 29, 1992, A.G. Op. #92-0567.

The 10-day rule in Section 11-51-85 does not apply to replevins; someone wishing to appeal a replevin has 30 days to file a notice of appeal with the circuit court under Rule 5.04 of the Uniform Rules of Circuit and County Court Practice. *Aldridge*, May 13, 2005, A.G. Op. 05-0180.

## RESEARCH REFERENCES

**Am Jur.** 5 *Am. Jur.* 2d (Rev), Appellate Review §§ 231-251, 578-592.

47 *Am. Jur.* 2d (Rev), Justices of the Peace §§ 48 et seq.



**CJS.** 4 C.J.S., Appeal and Error §§ 237, 51 C.J.S., Justices of the Peace §§ 129  
238, 246.  
4 C.J.S., Appeal and Error § 357.

## § 11-51-87. Copy of record to be transmitted.

The justice court judge may prepare and certify his record to the following effect, viz.:

"Copy of the record of the proceedings before \_\_\_\_\_, a justice court judge of \_\_\_\_\_ county, in the case therein set forth, to wit: (here copy the entries on the docket and certify as follows, viz.):

"State of Mississippi, \_\_\_\_\_ County:

"I, \_\_\_\_\_, a justice court judge of the said county, certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

"Given under my hand, this the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_.

\_\_\_\_\_  
Justice Court Judge"

**SOURCES:** Codes, 1880, § 2241; 1892, § 83; 1906, § 84; Hemingway's 1917, § 64; 1930, § 65; 1942, § 1199; Laws, 1981, ch. 471, § 41; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

**Editor's Note** — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

## JUDICIAL DECISIONS

1. Certification of record.
2. —Waiver of defective certification.
3. Transcript, necessity and sufficiency of.
4. Evidence.

### 1. Certification of record.

The many cases cited under this section [Code 1972, § 11-51-87] holding that the Supreme Court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in

the record on appeal are overruled because of two statutes—Code 1972, §§ 11-3-35 and 99-35-143 which were apparently overlooked by the early cases. *Avera v. State*, 300 So. 2d 787 (Miss. 1974).

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original pa-

pers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515 (1953).

Where the supreme court affirmed a judgment of the circuit court dismissing the appeal of defendant from conviction in a mayor's court for selling beer to a minor, and granting a writ of procedendo to the mayor's court, to be issued "unless appellant shall perfect the record of the certificate of the mayor's court," and the circuit court dismissed appellant's motion thereafter to reinstate the cause in the circuit court and to issue a writ of certiorari to compel the mayor to certify the transcript to the circuit court on the ground that the writ was not applied for within the six months allowed by law, such appellant was entitled to have the cause reinstated in the circuit court and to an issuance of the writ of certiorari, since the fact remained that the appellant had never been able to obtain a trial of the cause in the circuit court on its merits. *Fassman v. Town of Centreville*, 184 Miss. 520, 186 So. 641 (1939).

Justice certifying at bottom of a petition for appeal, that the same had been filed and appeal granted as of a certain date, will not be permitted to impeach his own certificate. *Town of Purvis v. Rees*, 99 Miss. 636, 55 So. 481 (1911).

A copy of the record must be certified to by the justice of the peace or police justice, and certification by the city clerk is insufficient. *Rodgers v. City of Hattiesburg*, 99 Miss. 639, 55 So. 481 (1911).

Where proceedings in justice court are not certified as required and are not shown in any manner, circuit court is without jurisdiction. *Levis-Zukoski Mercantile Co. v. McIntyre*, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

Where a copy of the justice's docket entries, judgment, affidavit and appeal bond were filed in the circuit court, defendant, after a trial and conviction in the circuit court cannot raise the objection that there was no certificate of the justice

to his record. *Calhoun v. State*, 86 Miss. 553, 38 So. 660 (1905).

It is a copy of the docket entries and judgments which the justice of the peace is to certify. *Hughston v. Cornish*, 59 Miss. 372 (1882).

## **2.—Waiver of defective certification.**

Defective certification of record by justice may not be cured or waived. *Xydias v. Pellman*, 121 Miss. 400, 83 So. 620 (1920).

## **3. Transcript, necessity and sufficiency of.**

The many cases cited under this section [Code 1972, § 11-51-87] holding that the Supreme Court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in the record on appeal are overruled because of two statutes—Code 1972, §§ 11-3-35 and 99-35-143 which were apparently overlooked by the early cases. *Avera v. State*, 300 So. 2d 787 (Miss. 1974).

Justice court record of conviction which included copy of affidavit charging unlawful possession of liquor, warrant for arrest, appearance bond, and judgment followed by justice's certificate that such was true copy of record was sufficient to give circuit court jurisdiction of appeal under statute. *Stewart v. State*, 179 Miss. 31, 174 So. 579 (1937).

Transcript of proceedings of unlawful entry and detainer court held to show substantial compliance with statute, conferring jurisdiction on circuit court on appeal thereto, although justice did not precede his record with statement that it was copy of record of proceedings had before him. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936).

Failure of judgment of justice of peace on appeal to circuit court, to set forth judicial district, did not invalidate it. *Dotson v. State*, 156 Miss. 365, 126 So. 38 (1930).

Where justice did not file in circuit court certified transcript of record, judgment on appeal from circuit court will be reversed and remanded. *Gordon v. Sykes*, 155 Miss. 705, 125 So. 85 (1929).

On failure of record to show judgment of justice, certificate or transcript, circuit court has not jurisdiction of prosecution

for assault and battery. *Cook v. State*, 144 Miss. 519, 110 So. 443 (1926).

Where record shows that circuit court did not have jurisdiction because transcript was not filed at time case was tried, but shows that since the circuit court trial, such transcript had been filed, the Supreme Court must reverse and remand the case for a new trial. *Salers v. State*, 142 Miss. 88, 107 So. 375 (1926).

Transcript of proceedings before justice of the peace is essential to jurisdiction of appeal to circuit court; in case appealed from justice of the peace court to circuit court, judgment of latter court must be reversed, where record does not show transcript of first named court was in circuit court at time of trial. *Dorsey v. State*, 141 Miss. 600, 106 So. 827 (1926).

Appeal from the circuit court, which was without jurisdiction because of insufficiency of the record, will be heard in the Supreme Court only where the record is perfected by certiorari. *Levis-Zukoski Mercantile Co. v. McIntyre*, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

A circuit court has no jurisdiction of an appeal taken from a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. *Ball, Brown & Co. v. Sledge*, 82 Miss. 747, 35 So. 214 (1903).

If appellants do not have the transcript show a judgment of justice of the peace and bond for appeal to the circuit court,

the Supreme Court will dismiss an appeal to it from the circuit court with leave to reinstate only upon completing the record and paying all costs of appeal. *Gardner v. New Orleans & N.E.R. Co.*, 78 Miss. 640, 29 So. 469 (1901).

#### 4. Evidence.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492 (1941), error overruled, 190 Miss. 882, 2 So. 2d 148 (1941).

On appeal it must be assumed that certification of record of justice claimed to have been made but lost was not established, and that circuit court did not have jurisdiction, there being no judgment of the circuit court showing such establishment. *Brasham v. State*, 140 Miss. 712, 106 So. 280 (1925).

Record certified to circuit court on appeal from justice of the peace, including copy of the judgment of justice, is competent evidence in the circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808 (1925).

### RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 419 et seq., 259 et seq., 449.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 546.1 (notice to clerk — to prepare record — clerk's and reporter's

transcripts — selective reporter's transcript and designated papers for clerk's transcript).

**CJS.** 4 C.J.S., Appeal and Error § 554.

## § 11-51-89. Justice, mayor, or police justice to deliver papers to circuit clerk.

The justice of the peace, mayor or police justice of any city, town or village from whose decision an appeal shall be taken, shall at once transmit to the clerk of that court a certified copy of the record of the proceedings, with all the original papers and process in the case, and the original appeal bond given by the appellant, and the clerk shall docket the same, and shall be entitled to the



same fees, upon such appeals, as for similar services in suits originating in said court. The justice, mayor, or police justice of any city, town or village shall, at all times, be allowed to amend his return according to the facts.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 3; 1857, ch. 58, art. 24; 1871, § 1333; 1880, § 2353; 1892, § 84; 1906, § 85; Hemingway's 1917, § 65; 1930, § 66; 1942, § 1200.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Appeals to county court, see § 11-51-81.

## JUDICIAL DECISIONS

1. Transmission of record.
2. —Certificate of justice.
3. Failure to transmit record.
4. Jurisdiction on appeal.
5. Omissions in record, effect of.
6. Notice of appeal.
7. Time for appeal.
8. Evidence.
9. Amendment of return.

### 1. Transmission of record.

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515 (1953).

Where a justice of the peace had not certified record made in his court as required by statute, and there was no objection made at the trial, the objection could not be made for the first time in the Supreme Court. *Laird v. Forbes*, 214 Miss. 250, 58 So. 2d 660 (1952).

On appeal from justice court, transcript is presumptively correct; there being no suggestion from either party that anything is omitted. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

This section [Code 1942, § 1200] is so modified by Code 1892, § 2432 (Code 1906, § 2763) that an appeal may be

heard after the term following, provided the record is sent up by the successor of a justice of the peace who died after appeal taken but before the record had been sent up. *Brennan v. Straas*, 85 Miss. 341, 37 So. 956 (1905).

The record of which the justice is to transmit a copy is his docket entries and judgments. *Hughston v. Cornish*, 59 Miss. 372 (1882).

### 2. —Certificate of justice.

The circuit court acquires no jurisdiction of a cause appealed from the justice of peace court where the transcript of the proceedings in the latter court, filed in the circuit court, is not authenticated by the certificate of the justice of peace. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490 (1951).

Where an appellant timely filed a proper appeal bond, he ought not to be deprived of his right of appeal through the dereliction of the justice of peace in failing to properly certify the transcript and the appellant should be allowed reasonable time in which to have perfected the transcript of proceedings in the justice of peace court. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490 (1951).

A copy of the record must be certified to by the justice of the peace or police justice, and certification by the city clerk is insufficient. *Greenwood v. Weaver*, 96 Miss. 604, 50 So. 981 (1910); *Allen v. State*, 98 Miss. 192, 53 So. 498 (1910); *Rodgers v. Hattiesburg*, 99 Miss. 639, 55 So. 481 (1911).

Where, on appeal, a copy of the justice's docket entries, judgment, affidavit and appeal bond were filed in the circuit court,

defendant, after trial and conviction in the circuit court cannot raise objection that there was no certificate of the justice to his record. *Calhoun v. State*, 86 Miss. 553, 38 So. 660 (1905).

### 3. Failure to transmit record.

Circuit court may issue necessary writ to compel justice of peace to send up record to circuit court. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

Such a writ though commonly called a *certiorari* is not a *certiorari*. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

It may be issued without appellant giving any other than the appeal bond and when performance of duty by a justice is effected the trial will be *de novo*. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010 (1905).

### 4. Jurisdiction on appeal.

While it is true that on appeal to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492 (1941), error overruled, 190 Miss. 882, 2 So. 2d 148 (1941).

Certificates must be attached to record of proceedings before justice of peace to warrant circuit court jurisdiction on appeal. *Pierce v. Jernigan*, 151 Miss. 758, 118 So. 898 (1928).

When the circuit court acquired no jurisdiction on appeal from a police justice of a city, the Supreme Court has no jurisdiction. *Rodgers v. City of Hattiesburg*, 99 Miss. 639, 55 So. 481 (1911).

Where the proceedings in justice court are not certified and are not shown in any manner, the circuit court is without jurisdiction. *McPhail v. Blann*, 47 So. 666 (Miss. 1908); *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178 (1908).

A circuit court has no jurisdiction of an appeal taken from a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace

and an appeal bond executed. *Ball, Brown & Co. v. Sledge*, 82 Miss. 747, 35 So. 214 (1903).

### 5. Omissions in record, effect of.

Where, on appeal from justice court, no certified transcript appeared in record, and objection raising such question was specifically made in circuit court, such court had no authority to render judgment on merits, but should dismiss appeal. *Land v. Coffey*, 171 Miss. 91, 157 So. 89 (1934).

Not necessary that judgment of police court by mayor pro tempore show mayor's absence or incapacity. *City of Pascagoula v. Sharp*, 136 Miss. 756, 101 So. 683 (1924).

Defendant convicted of misdemeanor in the circuit court, on appeal from justice of peace cannot complain on motion in arrest of judgment of absence of a duly certified copy of the proceedings of the justice of the peace, if there be on file in the circuit court the affidavit, a copy of the judgment, and his appeal bond. *Calhoun v. State*, 86 Miss. 553, 38 So. 660 (1905).

If appellants do not have the transcript show a judgment of the justice of the peace and bond for appeal to the circuit court, the Supreme Court will dismiss an appeal to it from the circuit court with leave to reinstate only upon completing the record and paying all costs of appeal. *Gardner v. New Orleans & N.E.R. Co.*, 78 Miss. 640, 29 So. 469 (1901).

### 6. Notice of appeal.

When a bond is executed and the record transmitted, the case stands for trial *de novo* in the circuit court without new process to the appellee. *Rowe v. W.D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146 (1904).

### 7. Time for appeal.

The limitations of time on appeals from justices' courts to the circuit court, prescribed by Code 1892, §§ 82, 84, do not apply to criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

### 8. Evidence.

On appeal from justice court, alleged defect in transcript, or omission of essential parts, cannot be supplied by oral tes-

timony. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held inadmissible over objection in circuit court, notwithstanding plaintiff testified that he filed notes with declaration. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

Record certified to the circuit court on appeal from justice court, including copy of judgment of justice of peace is competent evidence in the circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808 (1925).

Where the record shows that the judgment was rendered several days after the return day of the summons, it is presumed, nothing appearing to the contrary, that the court met on the return day and adjourned from day to day until the judgment was entered. *Leavenworth v. Crittenden*, 62 Miss. 573 (1885).

#### 9. Amendment of return.

Under this section [Code 1942, § 1200], circuit court properly permitted police justice to amend printed form used for certifying to transcript of proceedings had before him, which amendment consisted of

striking out printed words "Ex officio Justice of the Peace" as they appeared underneath signature of person who had tried case as police justice, and inserting in lieu thereof the words "Police Justice of said City," caption of transcript having been changed from "State of Mississippi" to "City of Brookhaven," amendment being made according to facts. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

Justice of the peace should have been permitted to amend the affidavit for appeal in accordance with the facts, by affixing his signature and the date, and a refusal to allow such amendment required reversal of the judgment of dismissal of the appeal. *Green v. Boon*, 57 Miss. 617 (1880).

The power to allow amendments should be liberally exercised. *Weddell v. Seal*, 45 Miss. 726 (1871); *Green v. Boon*, 57 Miss. 617 (1880).

Mere omission, in affidavit for an appeal from the judgment of a justice of the peace, of the date of the affidavit, if in fact the affidavit was made and filed in proper time, may be amended to show the true date. *Weddell v. Seal*, 45 Miss. 726 (1871).

### RESEARCH REFERENCES

**ALR.** Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 441-451, 456, 467.

**CJS.** 4 C.J.S., Appeal and Error §§ 564, 565-572.

## § 11-51-91. Trial of cases on appeal from justice of the peace.

On appeal from a justice of the peace court to the circuit court the case shall be tried anew, in a summary way, without pleadings in writing, at the first term, unless cause be shown for a continuance; provided, however, that the circuit court shall have the authority and power of its own motion or on motion of any party to require that defenses to the action shall be set up by way of answer in like manner as is required by Section 11-7-59, Mississippi Code of 1972.

If it appear on the trial that the suit was brought before a justice of the peace not having jurisdiction thereof, the circuit court shall reverse the judgment of the justice and dismiss the case. If the defendant be the appellant and judgment be rendered for the plaintiff in the original suit for a sum equal to or greater than he recovered before the justice of the peace, ten per cent



(10%) damages upon the amount thereof shall be included in such judgment; and similarly, when there has been an appeal from a justice of the peace court to a county court, and any judgment against an appellant shall be rendered against the principal and his sureties jointly and when there shall be an appeal from the county court to the circuit court and the same shall be affirmed, then, there shall be added five per cent (5%) damages, and judgment shall be rendered against the principal and the sureties on the appeal bond jointly. In all such cases where the amount in controversy exceeds the sum of Fifty Dollars (\$50.00), either party shall be entitled to an appeal to the supreme court as in cases originating in the circuit court, and the plaintiff may also appeal to the supreme court in cases where the difference between his demand and the judgment in his favor shall exceed said sum.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 2 (19); 1857, ch. 58, art. 25; 1871, § 1334; 1880, § 2354; 1892, § 85; 1906, § 86; Hemingway's 1917, § 66; 1930, § 67; 1942, § 1201; Laws, 1964, ch. 301, § 1.

**Editor's Note** — Section 11-7-59 referred to in this section was repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Appeals from county court, see § 11-51-79.

Appeals to county court, see § 11-51-81.

Costs in case of appeal from justice of the peace, see § 11-53-51.

Taxation of costs in case appealed from inferior tribunal, see § 11-53-71.

Procedural requirements for appeals to circuit courts, see Miss. Uniform Circuit and County Court Rule 12.02.

## JUDICIAL DECISIONS

1. In general.
2. Appeal bond.
3. Jurisdiction of circuit court.
4. Appeals to Supreme Court.
5. —Amount in controversy, determination of.
6. —Consent of parties, effect of.
7. Effect of appeal.
8. Proceedings on appeal.
9. —Amendment.
10. —Parties.
11. —Evidence.
12. —Judgment.
13. —Damages.
14. Nonsuit or dismissal of appeal.

### 1. In general.

Under this section [Code 1972, § 11-51-91], when the circuit court determined on appeal that the justice court did not have jurisdiction of the defendants, the circuit court only had authority to reverse and dismiss the case against each defendant,

and jurisdiction could not be conferred upon the proper justice court by remand of the circuit court; such action would have been harmless if the second justice court had acquired jurisdiction independently of remand, by the filing of new affidavits in that court. *Avera v. State*, 305 So. 2d 359 (Miss. 1974).

On appeal of a cause by the defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for cost, since the case will be tried anew, as if never tried before, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff, who must now prosecute his case anew, enjoys the privilege of seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647 (1942).

Code 1892, § 79 (Code 1942, § 1195) allows appeal from board of supervisors to the circuit court for final judgment there. This section [Code 1942, § 1201] (§ 85, Code 1892) limits appeals from the circuit court to cases where amount in controversy exceeds \$50 if originating in the courts of justices of the peace. There is no such limitation as to boards of supervisors, and the board may appeal from a judgment without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007 (1906).

This section [Code 1942, § 1201] applies in bastardy proceedings. *Norton v. Wicker*, 87 Miss. 365, 39 So. 809 (1906).

## 2. Appeal bond.

Where bond on appeal to county court from justice court was approved, although it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication. *Keys v. Borden*, 178 Miss. 173, 171 So. 887 (1937).

Partner held not liable as surety on appeal bond from justice of peace court, which bond partner had not signed and had not authorized to be signed, and of which he had no knowledge, and did not acquiesce in signing of his name to bond by clerk of partnership. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225 (1935).

Partner held not liable on appeal bond from justice of peace court which was signed with authority of copartner in name of partnership, where partnership was mercantile firm not engaged in business of making surety bonds and copartner was without authority to bind partner unless authorized so to do by scope of partnership, or by partner. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225 (1935).

## 3. Jurisdiction of circuit court.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not

necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492 (1941), error overruled, 190 Miss. 882, 2 So. 2d 148 (1941).

On appeal from justice court, circuit court's jurisdiction is original, and case is tried *de novo*, though no written pleadings are required. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).

Jurisdictional amount may be supplied by counterclaim. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Circuit court on appeal from justice court has jurisdiction if justice court had jurisdiction. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764 (1925).

Where the district of a justice of the peace is partly in each of two circuit court districts, an appeal must be prosecuted to the circuit court of the district of defendant's residence. *Woods v. Speer*, 127 Miss. 593, 90 So. 322 (1922).

On appeal from a judgment of a justice of the peace, rendered without service of summons or appearance of defendant, the circuit court had no other jurisdiction than the justice of the peace had, the appellant's appearance in the circuit court conferring no original jurisdiction on that court. *Dufour v. Chapotel*, 75 Miss. 656, 23 So. 387 (1898).

Under this section [Code 1942, § 1201] it is only where the justice has no jurisdiction and not where he makes an erroneous decision within his jurisdiction that the case is to be dismissed by the circuit court on appeal. *Goodbar v. Owen*, 70 Miss. 840, 12 So. 556 (1893).

If the plaintiff loses an attachment suit in the justice court and appeals, the circuit court has jurisdiction, though after dismissal by the plaintiff, to allow claimant's issues to be made up and tried, although no trial thereof was had in the justice's court, for the appeal of the plaintiff on the main issues carries with it all such ancillary issues as are necessary to determine the proper disposition of the property. *Dreyfus v. Mayer*, 69 Miss. 282, 12 So. 267 (1891).

The appearance of the defendant before a justice of the peace is not a waiver of his



right to raise the question of jurisdiction in the circuit court. *Heggie v. Stone*, 70 Miss. 39, 12 So. 253 (1892).

The circuit court has no other jurisdiction than such as the justice had. *Glass v. Moss*, 2 Miss. (1 Howard) 519 (1837); *Crapoo v. Grand Gulf*, 17 Miss. (9 S. & M.) 205 (1848); *Stier v. Surget*, 18 Miss. (10 S. & M.) 154 (1848); *Scofield v. Pensons*, 26 Miss. 402 (1853), overruled in part, *McLendon v. Pass*, 66 Miss. 110, 5 So. 234 (1888); *Richardson v. Davis*, 59 Miss. 15 (1881); *Askew v. Askew*, 49 Miss. 301 (1873).

#### 4. Appeals to Supreme Court.

Appeal from circuit court of case arising in justice court held not allowable, where not allowed by circuit court or Supreme Court judge. *Gray v. Crump*, 162 Miss. 251, 139 So. 463 (1932).

In case originating in justice court where plaintiff's demand exceeds \$50, and on appeal to circuit court, he recovers less than \$50 he may appeal to the Supreme Court, if the difference between demand and judgment exceeds \$50. *Home Ins. Co. v. McFarland*, 142 Miss. 555, 107 So. 383 (1926).

Amount in controversy on appeal by defendant from judgment for plaintiff in circuit court for \$25 does not exceed \$50 necessary for appeal to Supreme Court, though in justice court, plaintiff had judgment for \$150. *Kelley v. Ladies' Aid Soc.*, 140 Miss. 580, 106 So. 627 (1926).

Where Supreme Court is without jurisdiction, it will, of its own motion, raise it, and dismiss appeal. *Kelley v. Ladies' Aid Soc.*, 140 Miss. 580, 106 So. 627 (1926).

No appeal can be had where the judgment is for only \$50. *City of Pass Christian v. Lizana*, 106 Miss. 470, 64 So. 209 (1914).

Appeal to Supreme Court from circuit court in a case originating in justice court will be dismissed where the judgment appealed from is less than \$50. *Leake County v. Carr*, 100 Miss. 91, 56 So. 345 (1911).

An appeal lies to the Supreme Court from the judgment of a circuit court for \$50, in a cause brought therein, this section [Code 1942, § 1201] limiting the right of appeal to cases where the judgment exceeds said sum, having reference

only to suits begun before justices of the peace. *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834 (1901).

Where the property claimed by a claimant exceeds \$50 in value, and on appeal from a justice court has been subjected by the circuit court to an execution for more than that sum, the Supreme Court has jurisdiction of an appeal by the claimant, although the amount in the controversy in the original suit was less than \$50. *Andrews v. Partee*, 79 Miss. 80, 29 So. 788 (1901).

If on appeal from the circuit court the record shows the amount in controversy to be below its original jurisdiction and contains nothing to show that the case originated in a justice court, the Supreme Court will reverse the judgment and dismiss the proceedings in the circuit court, leaving the judgment in the justice court, if any, to stand. *Andrews v. Wallace*, 72 Miss. 291, 16 So. 204 (1894).

If the circuit court judgment be less than fifty dollars, an appeal cannot be taken by the defendant to the Supreme Court, and this even if the amount demanded and recovered in the justice's court be greater. *Ward v. Scott*, 57 Miss. 826 (1880); *Wimbush v. Chinault*, 58 Miss. 234 (1880).

If the plaintiff recover verdict for more than fifty dollars, he cannot remit the excess for the purpose of, and thereby prevent the defendant from, appealing; but if, on motion for a new trial before judgment, the plaintiff enter a remittitur because the court expressed the opinion that the judgment was excessive, the defendant will not be entitled to an appeal. *Wimbush v. Chinault*, 58 Miss. 234 (1880).

#### 5. —Amount in controversy, determination of.

The amount in controversy is limited to the principal of the claim, exclusive of interest, in determining the minimum amount requisite to an appeal from justice court to the Supreme Court. *Gardner v. Bookout*, 200 Miss. 158, 26 So. 2d 343 (1946).

In replevin action in justice of peace court to recover horse worth \$50, in which defendant filed counterclaim for \$185 for wrongful suing out of writ, counterclaim gave Supreme Court jurisdiction of ap-



peal. *Garner v. Broom*, 161 Miss. 734, 138 So. 336 (1931).

Difference between amount sued on in justice court, with interest, and amount claimed by defendant by way of recoupment, held not amount involved, as respects Supreme Court's jurisdiction of appeal. *James v. Williams Furn. Co.*, 161 Miss. 358, 137 So. 101 (1931).

Jurisdictional amount may be supplied by counterclaim. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

In an appeal in replevin the amount in controversy is determined by the value of the property replevied. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36 (1922); *Gresham v. Kennedy*, 128 Miss. 469, 91 So. 129 (1922).

The jurisdiction of the Supreme Court of an issue made before a justice of the peace under Code 1906, § 2866, after seizure under a landlord's attachment for rent or supplies, is determinable on his appeal by the sum for which he might have obtained judgment, there having been no trial on the merits in the circuit court. *Schlicht v. Callicott*, 76 Miss. 487, 24 So. 869 (1899).

Upon an appeal to the Supreme Court from a judgment of the circuit court in favor of a landlord in an action of replevin by the tenant for property distrained for rent, begun in a justice court, the amount in controversy is determined by the rent due as adjudged by the circuit court, and not by the value of the property seized. *Bittle v. Paine*, 74 Miss. 494, 21 So. 250 (1897).

The limit provided for an appeal has reference to the debt, demand, or damages in litigation, and not to interest on the judgment, or the costs or per centum added to the judgment. *New Orleans, J. & G.N.R.R. v. Evans*, 49 Miss. 785 (1874); *Jackson v. Whitfield*, 51 Miss. 202 (1875); *Ward v. Scott*, 57 Miss. 826 (1880); *Davis v. Holberg*, 59 Miss. 362 (1882); *Kiernan v. Germaine*, 62 Miss. 75 (1884); *James v. Williams Furn. Co.*, 161 Miss. 358, 137 So. 101 (1931).

#### 6. —Consent of parties, effect of.

Where amount in controversy is insufficient under the statute to give Supreme Court jurisdiction, it cannot be given it by consent of parties. *Kelley v. Ladies' Aid*

*Soc.*, 140 Miss. 580, 106 So. 627 (1926); *James v. Williams Furn. Co.*, 161 Miss. 358, 137 So. 101 (1931).

#### 7. Effect of appeal.

Where a judgment rendered in the court of a justice of the peace against a garnishee was later set aside by the justice without authority, and an appeal subsequently taken, the trial in the circuit court should have been de novo, the judgment there rendered superseding that of the justice of the peace, and should have been that the petition be dismissed, leaving the original judgment rendered by the justice of the peace in the same force and effect it had been when the petition for setting it aside was filed. *Lott v. Illinois Cent. R. Co.*, 193 Miss. 443, 10 So. 2d 96 (1942).

Justice court's judgment is vacated or superseded by appeal to circuit court, although revived by dismissal of appeal. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).

#### 8. Proceedings on appeal.

Debtors could not simply fail to defend a suit to collect a debt and also fail to appeal the default judgment entered against them, and then file suit and argue that the judgment, though not in dispute, was the result of fraud or abuse of process, especially in circumstances where their allegations of fraud and abuse of process were without merit; the proper avenue available to attack the judgment, the attorney's fees awarded, and the alleged fraud, was to have defended the action in justice court or to make a timely appeal of the judgment to the circuit court, thus, the debtors were procedurally barred by the doctrine of res judicata from bringing any action concerning the default judgments of the justice court. *Franklin Collection Serv. v. Stewart*, 863 So. 2d 925 (Miss. 2003).

Recoupment may be interposed for the first time on the appeal to the circuit court, and no pleading is necessary. *Criss v. Bailey*, 243 Miss. 130, 137 So. 2d 160 (1962).

On appeal to circuit court from judgment against defendant in civil action in justice of peace court, defendant cannot challenge jurisdiction of justice of peace over his person when he appeared in jus-

tice court, offered evidence and argued case before entry of judgment. *Beck v. Kersh*, 208 Miss. 879, 45 So. 2d 730 (1950).

Criminal case, in which justice was disqualified because of interest, must, on appeal to county court, be tried de novo. *State v. Dearman*, 152 Miss. 6, 118 So. 349 (1928).

Where appeal bond correctly recites appeal to the proper circuit court district, but appeal papers filed in other court district, it is error to dismiss the case. *Woods v. Speer*, 127 Miss. 593, 90 So. 322 (1922).

Where next term of circuit court after trial of claimant's issue on November 13 convened on November 17, and bond and papers in the case were not filed in the circuit court at that term, and there was no proceeding to require the justice to send them up, a motion in the following March term to dismiss the appeal for want of prosecution was properly denied. *Dalee Bros. v. Wigginton*, 111 Miss. 749, 72 So. 149 (1916).

Appellant is not precluded from making an attack from the judgment rendered by a justice of the peace merely because he has executed an appeal bond to the circuit court. *Adams v. Fidelity Mut. Life Ins. Co.*, 94 Miss. 433, 49 So. 119 (1909).

A defendant who has been tried and convicted of a misdemeanor in the circuit court, on his appeal from the judgment of a justice of the peace, cannot complain on motion in arrest of judgment of the absence of a duly certified copy of the proceedings of the justice of the peace, if there be on file in the circuit court the affidavits on which he was tried, a copy of the judgment of the justice of the peace convicting him, and his appeal bond. *Calhoun v. State*, 86 Miss. 553, 38 So. 660 (1905).

Appeals from judgments of justices of the peace are to be tried anew, as if never tried before, and any evidence may be set up for the first time in the circuit court. *Illinois Cent. R.R. v. Andrews*, 61 Miss. 474 (1883); *Amory Indep. Tel. Co. v. Cox*, 103 Miss. 541, 60 So. 641 (1913).

### 9. —Amendment.

Circuit court is authorized on appeal from justice of the peace to allow amendments to answers of garnishees, changing

admission of indebtedness to attachment or judgment debtor to denial of such indebtedness. *Wymond v. Gaude Serv.*, 168 Miss. 678, 152 So. 60 (1934).

Garnishee may amend answer in circuit court after appeal thereto from justice court. *Green v. Western Union Tel. Co.*, 146 Miss. 703, 111 So. 750 (1927).

Denial of motion to dismiss appeal for insufficient bond, without amendment of bond on request made and allowed, was error. *De Laval Separator Co. v. Cutts*, 142 Miss. 379, 107 So. 522 (1926).

Statement of cause of action may be amended after appeal to circuit court to show true amount of damage. *Harper v. Adams*, 141 Miss. 806, 106 So. 354 (1925).

Circuit court will not dismiss cause appealed from justice court because plaintiff without authority of court added item accruing subsequent to filing suit. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764 (1925).

On appeal from justice court to circuit court, amount cannot be amended so as to increase the amount above justice court's jurisdiction. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764 (1925).

Suit in partnership name may be amended in the circuit court by inserting names of partners, and refusal to allow such amendment on application therefor is reversible error. *McCullar & Co. v. Mink*, 121 Miss. 829, 83 So. 907 (1920).

### 10. —Parties.

Circuit court on appeal from justice may add other joint owner as coplaintiff. *American Ry. E. Co. v. Roby*, 129 Miss. 120, 91 So. 449 (1922).

### 11. —Evidence.

Record certified to circuit court on appeal from justice's court, including copy of judgment of justice, is competent evidence in circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808 (1925).

Evidence in support of a set-off, filed for the first time in the circuit court, should not be admitted, it being a cross-action. *Marx v. Trussell*, 50 Miss. 498 (1874).

### 12. —Judgment.

On appeal to circuit court from judgment against defendant in justice of peace court in suit for breach of warranty, aris-



ing out of contract, amount involved being definite and fixed sum, on motion by plaintiff for default judgment, court properly entered judgment for amount sued for without awarding writ of inquiry and having jury assess amount of damages, defendant never having filed any kind of plea or denial. *Beck v. Kersh*, 208 Miss. 879, 45 So. 2d 730 (1950).

Where defendant did not prosecute a cross-appeal from a judgment assessing him with costs of the appeal to circuit court and the cost of the trial de novo therein, such judgment is final, even if the cause should be affirmed. *Douglas v. Warren*, 44 So. 2d 853 (Miss. 1950).

Judgment against appellant on appeal from justice need not be against his sureties also, but, if against one surety must also be against the other. *Helmer Bros. v. Hastings*, 142 Miss. 403, 107 So. 551 (1926).

Judgment in attachment suit for plaintiff affirmed on debt issue on appeal should be against both defendant and surety on appeal bond. *Laurel Mills v. Ward*, 137 Miss. 221, 102 So. 263 (1924).

A judgment against appellant and only one of his two sureties is void and may be vacated on subsequent motion and the cause reinstated for hearing. *Leathers v. Fred O. Howe & Co.*, 108 Miss. 1, 66 So. 280 (1914).

A surety on an appeal bond, against whom judgment has been jointly rendered, is a "codebtor" within the bankrupt act. *Bailey v. Reeves*, 102 Miss. 438, 59 So. 802 (1912).

### 13. —Damages.

Where there was a judgment in the justice of the peace court for \$85 from which defendant prosecuted an appeal to the circuit court, where there is a jury verdict and judgment, also for \$85, 10 per centum damages should have been added by the circuit court. *Harper v. Adams*, 141 Miss. 806, 106 So. 354 (1925).

The circuit court rendered a judgment for the plaintiff for the full amount of his claim plus ten per cent damages. This was an error, as this section [Code 1942, § 1201] has no application to an appeal of a defeated plaintiff. *Galloway v.*

*Champlin*, 101 Miss. 822, 58 So. 710 (1912).

Where defendant's appeal is dismissed the circuit court should enter judgment against appellant and the sureties on his bond for the amount for which judgment was rendered by the justice of the peace, with statutory damages and costs. *Jacobs v. Johnson*, 84 Miss. 450, 36 So. 544 (1904).

It is only where the defendant appeals to the circuit court and plaintiff there recovers as much or more than the judgment in the justice court that damages can be added to the judgment. *Louisville & N.R. Co. v. Pool*, 72 Miss. 487, 16 So. 753 (1895).

### 14. Nonsuit or dismissal of appeal.

In an appeal from an entry of a default judgment by a justice court, a circuit court, in dismissing the appeal, addressed a husband's claim that he had not been properly served by a collection agency. The circuit court correctly found that not only had the husband failed to produce credible evidence to support his claim, but that the husband failed to timely challenge the service of process and, thus, waived his right to dispute the sufficiency of the process. *Laffitte v. Southern Fin. Sys.*, 30 So. 3d 1236 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

In an appeal from an entry of a default judgment by a justice court, a circuit court, in dismissing the appeal, addressed a wife's claim that, while she had been personally served with process, the summons itself was defective. The circuit court correctly found that the wife had waived her right to dispute the sufficiency of the process by failing to timely challenge the service of process. *Laffitte v. Southern Fin. Sys.*, 30 So. 3d 1236 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

On appeal from justice court to circuit court, plaintiff could suffer voluntary nonsuit without thereby reinstating justice court's judgment so as to render it res judicata. *Lucedale Com. Co. v. Strength*, 163 Miss. 346, 141 So. 769 (1932).



RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d, Appellate Review §§ 618-624.

**CJS.** 5 C.J.S., Appeal and Error §§ 886-899.

**§ 11-51-93. Certiorari proceedings in circuit court.**

All cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from justices of the peace; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent, or may then try the cause anew on its merits, and may in proper cases enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution. The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby; and, in case of nonresidents, he may make publication for them as in other cases.

**SOURCES:** Codes, Hutchinson's 1848, ch. 50, art. 9; 1857, ch. 58, art. 28; 1871, § 1336; 1880, § 2358; 1892, § 89; 1906, § 90; Hemingway's 1917, § 72; 1930, § 72; 1942, § 1206.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Powers of county judge to order issuance of writs of certiorari, see § 9-9-23.

Costs in cases of certiorari from inferior tribunals, see § 11-53-53.

Restrictions on who may sign bonds and procedural requirements for appeals to circuit courts, see Miss. Uniform Circuit and County Court Rules 1.07, 12.02 et seq.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction.
3. Issuance of certiorari in general.
4. Matters appealable by certiorari.
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13. Dismissal of certiorari.

**1. In general.**

A former university employee could not bring a breach of contract action against the university following the termination of his employment where he had no written contract of employment; the employee was afforded statutory protections and procedures for the purpose of appealing employment decisions and was required to seek review by writ of certiorari. *Smith*

v. University of Miss., 797 So. 2d 956 (Miss. 2001).

Notions of due process would be impugned by requiring a state university employee to pursue a breach of contract claim against the university's personnel action review board in an administrative tribunal ultimately answerable to the board itself and subject to the limited review of the circuit court allowed under this section. Board of Trustees of State Insts. of Higher Learning v. Brewer, 732 So. 2d 934 (Miss. 1999).

Since neither Rule 7.03 nor any other part of the Uniform Criminal Rules of Circuit Court Practice has abolished or supplanted the certiorari procedure, the writ of certiorari is still available to obtain a full review in the circuit court to one convicted of a misdemeanor in the justice court. Merritt v. State, 497 So. 2d 811 (Miss. 1986).

Application for a writ of certiorari under § 11-51-93 is addressed to the sound discretion of the circuit court. Merritt v. State, 497 So. 2d 811 (Miss. 1986).

One against whom judgment is recovered by default in justice court without process can enjoin execution or take cause to circuit court on certiorari. Turner v. Williams, 162 Miss. 258, 139 So. 606 (1932).

Proceeding by certiorari to remove a cause from justice court to circuit court is not commencement of suit, but more in nature of a writ of error to have reviewed record of cause determined in inferior court. Citizens' Bank v. Ratliff & Bradshaw, 142 Miss. 866, 108 So. 146 (1926).

A writ issued by the circuit court to compel a justice to transmit a certified copy of the record and the original papers when an appeal has been perfected from a judgment of the justice is not a writ of certiorari within the section. Redus v. Gamble, 85 Miss. 165, 37 So. 1010 (1905).

The remedy by certiorari is merely to secure correction of the judgment and when secured there is no liability on the sureties on the bond, neither is the judgment debtor liable for the costs accruing. McInnis v. Graves, 80 Miss. 632, 31 So. 902 (1902).

## 2. Jurisdiction.

Failure to post the required appeal bond is a jurisdictional issue. Board of Trustees

of State Insts. of Higher Learning v. Brewer, 732 So. 2d 934 (Miss. 1999).

An appeal from a circuit court order reversing an order of the Employee Appeals Board, which granted a state service employee's motion to collaterally estop her employer-the Mississippi Department of Corrections (MDOC)-from relitigating factual issues decided in the employee's unemployment claim, would be dismissed for lack of jurisdiction since no appeal to the circuit court by an administrative agency is authorized by § 25-9-132, and the MDOC did not comply with the statutory requisites for certiorari pursuant to §§ 11-51-93 and 11-51-95 where the MDOC filed only a brief in support of review and failed to file a petition supported by affidavit. Bertucci v. Mississippi Dep't of Cors., 597 So. 2d 643 (Miss. 1992).

Circuit court was without jurisdiction to order the reinstatement of a park manager who had filed no appeal bond with his petition to the circuit court for appeal and for writ of certiorari. Grand Gulf Military Monument Comm'n v. Cox, 492 So. 2d 287 (Miss. 1986).

The Circuit Court erred in granting petitioner's writ of certiorari without his having filed a bond, pursuant to the requirements of §§ 11-51-95, 11-51-93 and 11-51-53 [Repealed], since the failure of petitioner to file the appeal bond within the statutory period defeated the jurisdiction of the Circuit Court to act. Mississippi State Personnel Bd. v. Armstrong, 454 So. 2d 912 (Miss. 1984).

If the justice's court had no jurisdiction, the circuit court has none. McDugle v. Filmer, 79 Miss. 53, 29 So. 996, 89 Am. St. R. 582 (1901).

A justice of the peace cannot serve a summons and a judgment by default based on a summons served by him is void and on certiorari the circuit court acquires no jurisdiction. McDugle v. Filmer, 79 Miss. 53, 29 So. 996, 89 Am. St. R. 582 (1901).

Unless the amount in controversy exceed \$50 in cases brought by certiorari from a justice of the peace to the circuit court, an appeal will not be allowed from the circuit court in such case to the Supreme Court. O'Leary v. Harris, 50 Miss. 13 (1874).

### 3. Issuance of certiorari in general.

A motorist whose operator's license was revoked following his conviction for driving while intoxicated was not entitled to proceed by writ of certiorari in the circuit court to review the action of the commissioner of public safety when he had previously failed to exhaust the administrative remedies provided by Code 1942, § 8105. *Mississippi State Dep't of Pub. Safety v. Berry*, 217 So. 2d 11 (Miss. 1968); *Mississippi State Dep't of Pub. Safety v. Brown*, 217 So. 2d 13 (Miss. 1968) (followed in *Mississippi State Dep't of Pub. Safety v. Johnson*, 217 So. 2d 13 (Miss. 1968)).

Where the supreme court affirmed a judgment of the circuit court dismissing the appeal of defendant from conviction in a mayor's court, to be issued "unless appellant shall perfect the record of the certificate of the mayor's court," and the circuit court dismissed appellant's motion thereafter to reinstate the cause in the circuit court and to issue a writ of certiorari to compel the mayor to certify the transcript to the circuit court on the ground that the writ was not applied for within the six months allowed by law, such appellant was entitled to have the cause reinstated in the circuit court and to an issuance of the writ of certiorari, since the fact remained that the appellant had never been able to get a trial of the cause in the circuit court on its merits. *Fassman v. Town of Centreville*, 184 Miss. 520, 186 So. 641 (1939).

In petition for certiorari to review order of supervisors, it is only where ground for reversal appears from the record that circuit court can grant hearing on merits. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Writ to review order of supervisors ordering an election on the question of prohibiting sale and distribution of beer and wine in the county, held improvidently issued where exhibits attached to petition recited all necessary jurisdictional facts entitling board to act. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Writ of certiorari to review order of supervisors, although improperly issued because of failure to show good cause, held not void where judge had jurisdiction to issue it. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Certiorari to remove to circuit court case decided by justice should be denied, no question of law appearing for review. *Henderson v. Grantham*, 148 Miss. 521, 114 So. 323 (1927).

The writ cannot properly issue without good grounds shown by petition, but appearance in the circuit court, and entry upon trial without noticing the defects in the petition is a waiver of all objections to the writ. *Moore v. Ernst*, 54 Miss. 642 (1877).

Where a certiorari has been improperly awarded it may be dismissed by the circuit court upon motion. *Leech v. Irwing*, 3 Miss. (2 Howard) 887 (1838).

### 4. Matters appealable by certiorari.

Although the circuit court did not have the authority, under § 25-9-132, to hear the Department of Wildlife Conservation's (DWC) appeal of a final decision of the Employee Appeals Board (EAB), limited judicial review via writ of certiorari was available to the DWC under § 11-51-93, since the EAB is a "tribunal inferior" within the meaning of § 11-51-95. *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586 (Miss. 1990).

Order of county board of supervisors providing for election to determine whether sales of beer and light wines should be abolished held appealable by certiorari. *Mohundro v. Board of Supvrs.*, 174 Miss. 512, 165 So. 124 (1936).

Appellant may have writ of certiorari issued to trial court clerk to send up parts omitted from transcript. *Aluminum Cooking Utensil Co. v. Shivers*, 149 Miss. 197, 115 So. 345 (1928).

Certiorari lies to the circuit court to review assessments of board of railroad assessors, and test the legality thereof. *Illinois Cent. R.R. v. Miller*, 141 Miss. 223, 106 So. 636 (1926).

Where minutes of court show that a pleading and exhibit were filed and left out of the record on appeal, certiorari will be granted to bring such papers up as a part of the record. It is incompetent to contradict minutes by evidence of the clerk and attorneys or other officers of the court. *Yazoo & Miss. V. Ry. v. M. Levy & Sons*, 141 Miss. 196, 106 So. 524 (1925).

Writ of certiorari will not lie to review order of railroad commission fixing tele-



phone rates. *Cumberland Tel. & Tel. Co. v. State*, 135 Miss. 835, 100 So. 378 (1924).

If justice of the peace, on appeal to the circuit court, refuses to approve the appeal bond and send up record, it may be brought up by certiorari. *Barrett v. Pickett*, 117 Miss. 825, 78 So. 777 (1918).

Certiorari may be had to correct mistaken findings of fact by the railroad commission induced by an error of law apparent on the record or the finding of a fact contrary to law or the making of an order beyond its power, although this section confines the courts on certiorari to questions of law appearing on the face of the record and proceedings. *Gulf & S.I.R.R. v. Adams*, 88 Miss. 772, 38 So. 348 (1905).

An interlocutory order entered by a justice of the peace will not warrant the carrying of the case by certiorari to the circuit court. *Morris v. Shryock & Rowland*, 50 Miss. 590 (1874).

#### 5. Limit of time.

The limitation of time within which cases may be removed to the circuit court by certiorari applies to both civil and criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741 (1902).

#### 6. Notice.

Where, on return of writ of garnishment, claim of exemption was allowed, and plaintiff secured writ of certiorari within proper time, issuing summons only for judgment defendant, failure to issue summons on garnishee within six-month statutory limit held not to bar proceedings as to him since petition and bond were filed and writ issued within statutory limits. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146 (1926).

The defendant in a certiorari proceeding must have notice. *Copeland v. Pate*, 7 Miss. (6 Howard) 275 (1842).

#### 7. Effect of certiorari.

Where a judgment is obtained in a justice court and real estate of the defendant levied upon, and the defendant thereafter removes the case to the circuit court by certiorari, which operates as a superseas, the lien of such judgment acquired by the levy is not destroyed but only stayed and may be enforced when the certiorari is dismissed. *Grayson v. Harris*,

102 Miss. 57, 58 So. 775, Am. Ann. Cas. 1914C,1219 (1912), error overruled, 102 Miss. 69, 59 So. 1, Am. Ann. Cas. 1914C,1219 (1912).

#### 8. Matters for review.

Circuit court properly refused a defendant's request for certiorari review of his trial, in absentia, for refusing to give a breath test because Miss. Code Ann. § 11-51-93 provided for certiorari review only when a pure question of law was presented; defendant was citing to a document in an attempt to support his argument that the municipal court date was changed, but the document was not part of the municipal court record. *Lott v. City of Bay Springs*, 960 So. 2d 525 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 405 (Miss. 2007).

It may be doubted that the contention that the verdict in the justice court was against the weight of the evidence is one which presents a sort of pure question of law reviewable on certiorari by means of the procedure authorized in § 11-51-93. *Merritt v. State*, 497 So. 2d 811 (Miss. 1986).

Certiorari is statutory remedy designed for purpose of bringing into review acts of inferior tribunal upon record made by such tribunal on questions of law, but upon hearing in reviewing court evidence may be heard to make manifest the error of law committed by inferior tribunal. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902 (1949).

Petitioner for writ of certiorari to review proceedings of board of supervisors of county divided into two court districts has right to show that board has never adopted order for holding of regular meetings in second district on second Monday of each month and on failure to make such showing he cannot contend orders of board of supervisors are void because they fail to show lawful authority for holding meetings at which orders were adopted. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902 (1949).

Where the circuit court petitioned by way of certiorari, after a decree in chancery court validating the issuance of county funding bonds, was confined to the same record, made by the board of super-

visors, which the chancery court had before it in the validation proceedings, disposition of an appeal from the chancery court would not be stayed. *In re Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26 (1940).

Statute permitting circuit court on certiorari to review only questions of law appearing on face of record and proceedings held not to authorize examination of transcript of evidence on review of Railroad Commission's decision granting certificate of convenience and necessity. *Yazoo & Miss. V. Ry. v. Mississippi R.R. Comm'n*, 169 Miss. 131, 152 So. 649 (1934).

Word "proceedings" within Code includes only such proceedings as must appear of record, and does not include the evidence on which the inferior tribunal acted. *Yazoo & Miss. V. Ry. v. Mississippi R.R. Comm'n*, 169 Miss. 131, 152 So. 649 (1934).

Circuit court and Supreme Court were confined to examination of questions of law arising or appearing on face of record and proceedings in court of justice of peace. *Simpson v. Phillips*, 164 Miss. 256, 141 So. 897 (1932).

Under this section [Code 1942, § 1206], the court to which a case has been removed by a writ of certiorari is confined to the examination of questions of law arising or appearing on the face of the record and proceedings. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 489, 120 So. 173 (1929); *Simpson v. Phillips*, 164 Miss. 256, 141 So. 897 (1932); *Federal Credit Co. v. Rogers*, 166 Miss. 559, 148 So. 353 (1933); *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938); *In re Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26 (1940); *Viator v. State Tax Comm'n*, 193 Miss. 266, 5 So. 2d 487 (1942), cert. denied, 316 U.S. 643, 62 S. Ct. 1036, 86 L. Ed. 1728 (1942).

Under writ of certiorari from circuit court to county court, return should not have included transcript of evidence. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114 (1929), opinion corrected, 153 Miss. 498, 121 So. 858 (1929).

## 9. Proceedings on certiorari.

Judgment creditor, having issued certiorari within time after exemption allowed

on return of garnishment, not estopped to prosecute the writ because garnishee had paid out money in its hands before filing petition. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146 (1926).

Circuit court should not award trial by jury to determine whether garnishee had or had not made answer in justice court exempting him from judgment by default in plaintiff's favor, although record, failing to contain answer, showed a notation by the justice that the garnishee's answer denied all indebtedness, followed by a default judgment against him. *Arky v. Cameron*, 92 Miss. 632, 46 So. 54 (1908), on suggestion of error, 92 Miss. 636, 46 So. 170 (1908).

It is the duty of the party who sues out a certiorari to appear in the circuit court and point out the errors if any exist; and if he fail to do so, he cannot complain in the Supreme Court of a judgment by default affirming the justice's judgment rendered in the circuit court. *O'Leary v. Bolton*, 50 Miss. 172 (1874).

## 10. —Pleading.

Reviewing court found no abuse of discretion in a trial court's decision to grant a writ of certiorari to the Mississippi Department of Corrections to review an order of the Employee Appeals Board requiring that an employee be reinstated even though the petition only complained about the Employee Appeals Board's decision in a general way. *Miss. Dep't of Corr. v. Smith*, 883 So. 2d 124 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

On petition for certiorari to review an order of a board of supervisors ordering an election on the question of prohibiting sale of beer and wine in the county, the averment of exhibits attached to petition control. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Refusal to allow amendment of pleadings, whereby it was sought to have registration books and pool books, and other records, brought up to ascertain percentage of qualified electors signing petition for election, held not error, since evidence and testimony considered by an inferior tribunal are no part of the record on certiorari. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).



The circuit judge has the sole power to determine the sufficiency of the petition; its insufficiency cannot be assigned for error in the Supreme Court. *Loomis v. Commercial Bank*, 5 Miss. (4 Howard) 660 (1840).

### 11. —Evidence.

In certiorari proceeding to review case commenced in justice court, evidence contradicting record was inadmissible. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773 (1929).

District court could not look to evidence in case transferred from county court by writ of certiorari. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114 (1929), opinion corrected, 153 Miss. 498, 121 So. 858 (1929).

### 12. —Judgment.

After the election on the question of prohibiting sale and distribution of beer and wine in the county was had pursuant to order of the board of supervisors, while certiorari proceedings were pending, the court properly affirmed supervisors' order, in absence of error appearing on face of record. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Supreme court, reversing circuit court judgment reversing county court judgment, cannot render summary judgment on appeal bond carrying case from county to circuit court. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 498, 121 So. 858 (1929).

Judgment on certiorari reversing judgment of state tax commission held "final judgment." *Illinois Cent. R.R. v. Miller*, 141 Miss. 223, 106 So. 636 (1926).

On certiorari, it was error to render judgment against alleged surety, when no bond was before the court. *Addington v. Ashford*, 97 So. 515 (Miss. 1923).

In replevin in justice's court, where defendant asked writ of certiorari in the circuit court, the proper judgment to be entered was either one of affirmance or of reversal, and if reversal a proper judgment entry was required to be made under this section. *Williams v. Williams*, 117 Miss. 251, 78 So. 152 (1918).

Circuit court on certiorari should reverse judgment against and discharge garnishee who has filed, before justice, an uncontested answer denying liability. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790 (1910).

When on reversal it is apparent from the record and proceedings alone what final judgment the justice should have entered, the circuit court should enter that judgment. Otherwise there must be trial anew on the whole merits. *Evans v. Southern Ry.*, 74 Miss. 230, 21 So. 15 (1896).

The judgment of the circuit court if the writ were properly awarded on the petition should be either an affirmance or a reversal of the justice's judgment and not a dismissal of the writ. *Burrow v. Sanders*, 57 Miss. 211 (1879).

### 13. Dismissal of certiorari.

The dismissal of a writ of certiorari is a bar to the granting of a new writ of the same character to the same party in the same case. *Williams v. Williams*, 34 Miss. 143 (1857).

## RESEARCH REFERENCES

**ALR.** Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari. 5 A.L.R.2d 675.

Applicability of statute of limitations or doctrine of laches to certiorari. 40 A.L.R.2d 1381.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud. 59 A.L.R.3d 1222.

Admissibility of videotape film in evidence in criminal trial. 60 A.L.R.3d 333.

**Am Jur.** 5A Am. Jur. Pl & Pr Forms (Rev), Certiorari, Forms 41 et seq. (judicial proceedings-for review of inferior court proceedings).

**CJS.** 4 C.J.S., Appeal and Error §§ 667-669.



## § 11-51-95. Certiorari to all other inferior tribunals.

Like proceedings as provided in Section 11-51-93 may be had to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not. However, petitions for a writ of certiorari to the circuit court for review of a decision of a municipal civil service commission created under Section 21-31-1 et seq. or Section 21-31-51 et seq. shall be filed within thirty (30) days after the entry of the judgment or order of the commission.

**SOURCES:** Codes, 1892, § 90; 1906, § 91; Hemingway's 1917, § 73; 1930, § 73; 1942, § 1207; Laws, 1984, ch. 521, § 5, eff from and after July 1, 1984.

**Cross References** — Restrictions on who may sign bonds and procedural requirements for appeals to circuit courts, see Miss. Uniform Circuit and County Court Rules 1.07, 12.02 et seq.

### JUDICIAL DECISIONS

1. In general.
2. Inferior tribunals.
3. Issuance of certiorari in general.
4. Matters appealable by certiorari.
5. Effect of certiorari.
6. Matters for review.
7. Proceedings on certiorari.
8. —Pleading.
9. —Parties.
10. —Judgment.

#### 1. In general.

Mississippi Transportation Commission (MTC) was not an inferior tribunal, and its decision to terminate the memorandum of understanding with the engineering firm was administrative in nature and not akin to a judgment rendered in a judicial or quasi-judicial proceeding; the findings were from a MTC meeting and there was no hearing on the merits, and witnesses were neither sworn in nor guided through questioning, and the minutes of the meeting were recorded on an audio tape that was transcribed for submission to the circuit court such that the meeting was purely administrative and a writ of certiorari was not the appropriate method of appeal in this case. Miss. Transp. Comm'n v. Eng'g Assocs., 39 So. 3d 6 (Miss. Ct. App. 2009), reversed by 39 So. 3d 1, 2010 Miss. LEXIS 294 (Miss. 2010).

In a disciplinary case involving a fraternity and two students, because the fratern-

ity and the students failed to strictly comply with Miss. Code Ann. § 11-51-95 by failing to file a petition of certiorari and to post a bond with security, the trial court did not have jurisdiction to hear their motion for injunctive relief against the university's decision upholding the disorderly conduct finding against the fraternity and the students and their punishment. Jackson State Univ. v. Upsilon Epsilon Chptr. of Omega Psi Phi Fraternity, Inc., 952 So. 2d 184 (Miss. 2007).

The circuit court lacked jurisdiction to review a university's employment decision where the plaintiff former employee failed to submit a petition supported by an affidavit and post a bond, with security, within six months of the decision of the university's personnel action review board per the requirements of the statute. Smith v. University of Miss., 797 So. 2d 956 (Miss. 2001).

The Circuit Court erred in granting petitioner's writ of certiorari without his having filed a bond, pursuant to the requirements of §§ 11-51-95, 11-51-93 and 11-51-53 [Repealed], since the failure of petitioner to file the appeal bond within the statutory period defeated the jurisdiction of the Circuit Court to act. Mississippi State Personnel Bd. v. Armstrong, 454 So. 2d 912 (Miss. 1984).

This section [Code 1942, § 1207] is superseded, as to appeals under the Public

Utility Act of 1956, by Code 1942, § 7716-26. *Mississippi Valley Gas Co. v. City of Jackson*, 236 Miss. 81, 109 So. 2d 637 (1959).

Evidence in the proceeding below cannot be examined on certiorari. *Mississippi Valley Gas Co. v. City of Jackson*, 236 Miss. 81, 109 So. 2d 637 (1959).

Certiorari is an extraordinary writ and should not be employed where the legislature has provided a plain, speedy and adequate remedy by direct appeal with a reporter's transcript of the testimony. *Mississippi Valley Gas Co. v. City of Jackson*, 236 Miss. 81, 109 So. 2d 637 (1959).

Statute (§ 4405, Code 1906) providing for a review of all proceedings of the board of supervisors in laying out, altering, or changing any public road and assessing damages therefor by an appeal to the circuit court, does not preclude the right to have such proceedings reviewed by certiorari as provided by this section [Code 1942, § 1207]. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927).

## 2. Inferior tribunals.

Although the circuit court did not have the authority, under § 25-9-132, to hear the Department of Wildlife Conservation's (DWC) appeal of a final decision of the Employee Appeals Board (EAB), limited judicial review via writ of certiorari was available to the DWC under § 11-51-93, since the EAB is a "tribunal inferior" within the meaning of § 11-51-95. *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586 (Miss. 1990).

Review by certiorari is confined to an examination of the questions of law arising and appearing on the face of the records and proceedings before the board of supervisors. *Stennis v. Board of Supvrs.*, 232 Miss. 212, 98 So. 2d 636 (1957).

Circuit court has power to review by certiorari decisions of the secretary of state on the sufficiency of initiative and referendum petitions. *Power v. Robertson*, 130 Miss. 188, 93 So. 769 (1922).

A case may be removed from a board of supervisors to the circuit court on a writ of certiorari. *Board of Supvrs. v. Melton*, 123 Miss. 615, 86 So. 369 (1920).

The railroad commission is an inferior tribunal within the meaning of this section [Code 1942, § 1207], whose judgment

may be reviewed by certiorari. *Gulf & S.I.R.R. v. Adams*, 88 Miss. 772, 38 So. 348 (1905).

## 3. Issuance of certiorari in general.

In petition for certiorari to review order of supervisors, it is only where ground for reversal appears from the record that circuit court can grant hearing on merits. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Writ to review order of supervisors, ordering an election on the question of prohibiting the sale and distribution of beer and wine in the county, held improvidently issued where exhibits attached to the petition recited all necessary jurisdictional facts entitling board to act. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Writ of certiorari to review order of supervisors, although improperly issued because of failure to show good cause, held not void where judge had jurisdiction to issue it. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Where no timely appeal or certiorari was taken to review judgment of board of supervisors that election to exclude sale of beer and wine was legal, that electors had voted to exclude, and prohibiting sale thereof, validity of judgment could not be questioned in proceeding to prohibit prosecution for selling beer and wine. *Blount v. Kerley*, 180 Miss. 863, 178 So. 591 (1938).

## 4. Matters appealable by certiorari.

Circuit court properly refused a defendant's request for certiorari review of his trial, in absentia, for refusing to give a breath test because Miss. Code Ann. § 11-51-93 provided for certiorari review only when a pure question of law was presented; defendant was citing to a document in an attempt to support his argument that the municipal court date was changed, but the document was not part of the municipal court record. *Lott v. City of Bay Springs*, 960 So. 2d 525 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 405 (Miss. 2007).

The circuit court properly denied a motion of the Civil Service Commission to quash a writ of certiorari where the Commission's quasi-judicial modification of a



penalty imposed upon a fireman presented a question of law upon the construction to be given to § 21-31-23. *Banks v. City of Greenwood ex rel. City Council*, 404 So. 2d 1038 (Miss. 1981), but see *Beasley v. City of Gulfport*, 724 So. 2d 883 (Miss. 1998).

Order of board of supervisors providing for election on abolition of beer and light wine held appealable by certiorari. *Mohundro v. Board of Supvrs.*, 174 Miss. 512, 165 So. 124 (1936).

Inferior tribunals' administrative and legislative orders cannot be removed to and re-examined by circuit court on writ of certiorari. *Anderson v. Franklin County Sch. Bd.*, 164 Miss. 646, 146 So. 134 (1933).

Writ of certiorari will not lie to circuit court from school board's order eliminating territory from school district; such order being legislative and judicial. *Anderson v. Franklin County Sch. Bd.*, 164 Miss. 646, 146 So. 134 (1933).

Writ of certiorari should not have been issued to county school board of education which organized consolidated school district; board's action being more legislative than judicial in character. *Board of Supvrs. v. Stephenson*, 130 So. 684 (Miss. 1930).

Order of board of supervisors directing road to be laid out and condemning land, held "final judgment," reviewable by certiorari. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927).

Certiorari will not lie to review order of railroad commission fixing intrastate freight rates under authority of law; determination of such rates being a legislative and not a judicial function. *Illinois Cent. R.R. v. Mississippi R.R. Comm'n*, 143 Miss. 805, 109 So. 868 (1926).

Certiorari lies to the circuit court to review assessments of board of railroad assessors and test the legality thereof. *Illinois Cent. R.R. v. Miller*, 141 Miss. 223, 106 So. 636 (1926).

Writ of certiorari will not lie to review order of railroad commission fixing telephone rates. *Cumberland Tel. & Tel. Co. v. State*, 135 Miss. 835, 100 So. 378 (1924).

Order of another board or tribunal cannot be reviewed by the circuit court in a case removed to it from a board of super-

visors, unless such order is the basis for a judgment rendered by the board of supervisors in a judicial proceeding. *Board of Supvrs. v. Melton*, 123 Miss. 615, 86 So. 369 (1920).

Mere administrative orders of an inferior tribunal cannot be removed to and be re-examined by a circuit court on a writ of certiorari, but only such as are of a judicial, or quasi-judicial, nature. *Board of Supvrs. v. Melton*, 123 Miss. 615, 86 So. 369 (1920).

### 5. Effect of certiorari.

Upon the filing of the proper petition and bond, and the issuance and service of the writ of certiorari removing the proceedings wherein the board of supervisors made an order directing the laying out of a road and the condemnation of land to the circuit court for review, all proceedings therein by the board of supervisors were thereby superseded, and any attempted orders or proceedings thereafter taken were improperly made a part of the transcript of the record transmitted to the circuit court, and a motion to strike such orders and proceedings should have been sustained. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927).

### 6. Matters for review.

Where the mayor and board of aldermen had by resolution adjudged that a property owner's proposed addition to a building did not violate the city's zoning ordinances, the trial court, on certiorari, erred in hearing testimony upon the issue. *Mayor & Bd. of Aldermen v. White*, 230 Miss. 698, 93 So. 2d 852 (1957).

Certiorari is statutory remedy designed for purpose of bringing into review acts of inferior tribunal upon record made by such tribunal on questions of law, but upon hearing in reviewing court evidence may be heard to make manifest the error of law committed by inferior tribunal. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902 (1949).

Petitioner for writ of certiorari to review proceedings of board of supervisors of county divided into two court districts has right to show that board has never adopted order for holding of regular meetings in second district on second Monday of each month and on failure to make such



showing he cannot contend orders of board of supervisors are void because they fail to show lawful authority for holding meetings at which orders were adopted. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902 (1949).

Where the circuit court petitioned to act by way of certiorari, after a decree in chancery court validating the issuance of county funding bonds, was confined to the same record, made by the board of supervisors, which the chancery court had before it in the validation proceedings, disposition of an appeal from the chancery court would not be stayed. *In re Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26 (1940).

Statute held not to authorize examination of transcript of evidence on review of Railroad Commission's decision granting certificate of convenience and necessity. *Yazoo & Miss. V. Ry. v. Mississippi R.R. Comm'n*, 169 Miss. 131, 152 So. 649 (1934).

Under this section [Code 1942, § 1207], the court to which a case has been removed by a writ of certiorari is confined to the examination of questions of law arising or appearing on the face of the record and proceedings. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 489, 120 So. 173 (1929); *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938); *In re Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26 (1940); *Viator v. State Tax Comm'n*, 193 Miss. 266, 5 So. 2d 487 (1942), cert. denied, 316 U.S. 643, 62 S. Ct. 1036, 86 L. Ed. 1728 (1942).

District court could not look to evidence in case transferred from county court by writ of certiorari. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114 (1929), opinion corrected, 153 Miss. 498, 121 So. 858 (1929).

Under writ of certiorari from circuit court to county court, return should not have included transcript of evidence. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114 (1929), opinion corrected, 153 Miss. 498, 121 So. 858 (1929).

## 7. Proceedings on certiorari.

If a case removed to the circuit court by a writ of certiorari is there tried anew on its merits, the procedure is the same as

that in cases tried de novo in ordinary appeals to the circuit court. *Board of Supvrs. v. Melton*, 123 Miss. 615, 86 So. 369 (1920).

## 8. —Pleading.

An appeal from a circuit court order reversing an order of the Employee Appeals Board, which granted a state service employee's motion to collaterally estop her employer—the Mississippi Department of Corrections (MDOC)—from relitigating factual issues decided in the employee's unemployment claim, would be dismissed for lack of jurisdiction since no appeal to the circuit court by an administrative agency is authorized by § 25-9-132, and the MDOC did not comply with the statutory requisites for certiorari pursuant to §§ 11-51-93 and 11-51-95 where the MDOC filed only a brief in support of review and failed to file a petition supported by affidavit. *Bertucci v. Mississippi Dep't of Cors.*, 597 So. 2d 643 (Miss. 1992).

On petition for certiorari to review an order of a board of supervisors ordering an election on the question of prohibiting the sale and distribution of beer and wine in the county, the averment of exhibits attached to petition control. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Refusal to allow amendment of pleadings, whereby it was sought to have registration books and poll books, and other records, brought up to ascertain percentage of qualified electors signing petition for election, held not error. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

## 9. —Parties.

Signers of petitions to lay out or change road held not proper parties to certiorari for review of proceedings by board of supervisors pursuant thereto. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927).

## 10. —Judgment.

After election had, pursuant to the order of the board of supervisors on the question of prohibiting the sale and distribution of beer and wine in the county, while certiorari proceedings were pending, court properly affirmed supervisors' order, in absence of error appearing on face of record. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615 (1938).

Supreme court, reversing circuit court judgment reversing county court judgment, cannot render summary judgment on appeal bond carrying case from county

to circuit court. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 498, 121 So. 858 (1929).

### RESEARCH REFERENCES

**ALR.** Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari. 5 A.L.R.2d 675.

Applicability of statute of limitations or doctrine of laches to certiorari. 40 A.L.R.2d 1381.

**Am Jur.** 5A Am. Jur. Pl & Pr Forms (Rev), Certiorari, Forms 41 et seq. (judicial proceedings-for review of inferior court proceedings).

### § 11-51-97. New appeal bond.

In all appeals and in proceedings of certiorari to the circuit court, the said court, on motion of the appellee or obligee, may inquire into the sufficiency of the amount of the bond, and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

**SOURCES:** Codes, Hutchinson's 1848, ch. 56, art. 16 (7); 1857, ch. 42, art. 20; 1871, § 1596; 1880, § 2658; 1892, § 91; 1906, § 92; Hemingway's 1917, § 74; 1930, § 74; 1942, § 1208.

**Cross References** — Authority of court or judge to require new security, see § 11-1-23.

Effect of insufficiency of appeal bond in Supreme Court, see § 11-3-33.

### JUDICIAL DECISIONS

1. In general.
2. Amendment.
3. New or additional bond.

#### 1. In general.

Since the sheriff, who had been convicted of contempt of court, had made no effort whatever to give an appeal bond, this section [Code 1942, § 1208] did not apply. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924 (1956).

Where a sheriff, who had been adjudged guilty of contempt of county court, made no effort to file an appeal bond, and, after the time for appeal had expired, the county judge directed the issuance of a *capias pro fine* to the coroner, who took the sheriff into custody, but the sheriff had presented to the judge of the circuit court of the county a petition for habeas corpus, which was made returnable before the

county judge, the judge in the habeas corpus proceedings was without the authority to then permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924 (1956).

Where appeal-bond for less than statutory amount was approved, appeal from justice court to county court was not void but only defective, and county court could enter nonsuit on appellant's motion. *Keys v. Borden*, 178 Miss. 173, 171 So. 887 (1937).

Bank, which was depository of school funds, was not entitled to appeal without bond in action for mandamus to require payment of warrant on the funds. *Cleveland State Bank v. Cotton Exch. Bank*, 118 Miss. 768, 79 So. 810 (1918).

The justice of the peace, on appeal to the circuit court, refusing to approve the appeal bond and send up the record, it may be brought up by certiorari. *Barrett v. Pickett*, 117 Miss. 825, 78 So. 777 (1918).

## 2. Amendment.

Circuit court held authorized to permit amendment of \$100 appeal bond from unlawful entry and detainer court to meet statutory requirement for appeal bond of not less than \$200, or to permit execution of new bond. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936).

Where an appeal bond is defective in any respect, the circuit court should permit it to be amended. *Gaddis v. Palmer*, 60 Miss. 758 (1883); *Leavenworth v. Crittenden*, 62 Miss. 573 (1885); *James v. Woods*, 65 Miss. 528, 5 So. 106 (1888).

Where a county has two judicial districts, a bond reciting an appeal to the circuit court of the wrong district may be

amended by leave of the court of the proper district. *Nations v. Lovejoy*, 80 Miss. 401, 31 So. 811 (1902).

A bond in a penalty less than the minimum sum required by law is not void but may be amended. *Denton v. Denton*, 77 Miss. 375, 27 So. 383 (1900).

## 3. New or additional bond.

An appeal bond, defective because the penalty thereof was too small, was not a nullity and the appellant had the right to file a new bond. *Thorsen v. Illinois Cent. R.R.*, 112 Miss. 139, 72 So. 879 (1916).

An order requiring an additional appeal bond to be given within a limited time and providing that in default thereof the appeal be dismissed, being interlocutory, failure to give the bond within the time does not operate as a dismissal and the court retains jurisdiction until final judgment dismissing the appeal. *Nichols v. Kendrick*, 76 Miss. 334, 24 So. 534 (1898).

## RESEARCH REFERENCES

**ALR.** Applicability of statute of limitations or doctrine of laches to certiorari. 40 A.L.R.2d 1381.

**Am Jur.** 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 491.1 (no-

tice — motion for order that security is insufficient).

**CJS.** 4 C.J.S., Appeal and Error §§ 445, 447, 448.

## § 11-51-99. How executors, administrators, guardians, and conservators appeal.

The chancery court, in its discretion, may allow executors, administrators, guardians and conservators to appeal money or property judgments or orders against their wards or estates with supersedeas under any existing bond or one set for that purpose; but they shall pay the costs of the lower court including the Supreme Court filing fee.

**SOURCES:** Codes, 1880, § 2334; 1892, § 92; 1906, § 93; *Hemingway's* 1917, § 75; 1930, § 75; 1942, § 1209; Laws, 1978, ch. 335, § 30; Laws, 2000, ch. 577, § 7, eff from and after July 1, 2000.

**Cross References** — Bond required of executor or administrator with the will annexed, see § 91-7-41.

Bond required of administrator, see § 91-7-67.

Bond required of guardian, see § 93-13-17.



## JUDICIAL DECISIONS

### 1. In general.

An appellant could not claim § 11-51-99 as a basis for not having to file a supersedeas bond on an appeal of a case concerning the distribution of an estate of which she had been the administratrix where she was no longer the administratrix of the estate. *Perkins v. Thompson*, 539 So. 2d 1029 (Miss. 1989).

Section 11-51-99 mandatorily requires supersedeas without bond for conservators appealing orders affecting the conservator in his or her fiduciary capacity, however, conservator is required to pay court costs and transcription costs. In re Conservatorship of Stallings, 523 So. 2d 49 (Miss. 1988).

In view of statute (§ 93-13-259) stating that conservators have same powers, rights and duties as guardians, statute (§ 11-51-99) governing appeals by guardians also governs appeals by conservators; accordingly, conservator appealing decree discharging conservator is entitled to do so with supersedeas without bond in accordance with § 11-51-99. *Harris v. King*, 480 So. 2d 1131 (Miss. 1985).

A decree that a devise had lapsed and that the property which was the subject of that devise became intestate property was an adjudication as to the rights of the litigants among themselves and was not an adjudication against the administratrix cum testamento annexo in her capac-

ity as a fiduciary or representative, and she was not, therefore, entitled to appeal under this section [Code 1942, § 1209]. *House v. Roberts*, 254 So. 2d 904 (Miss. 1971).

Where an administrator, appealing from a decree dismissing his bill of complaint, failed to file a written petition for the appeal with the clerk below or to file the record in the supreme court within the six months during which an appeal could be taken, appeal was barred by limitation before the record was filed, and should be dismissed upon motion. *Oswalt v. Austin*, 192 Miss. 653, 6 So. 2d 924 (1942).

While a petition in writing for an appeal to the supreme court filed with the clerk of the trial court is one method of obtaining an appeal, such a petition is not necessary to the validity thereof; and where no appeal bond is given or required, the appeal is considered to have been taken when, but not until, the transcript of the record in the case is filed with the clerk of the supreme court. *Oswalt v. Austin*, 192 Miss. 653, 6 So. 2d 924 (1942).

The section [Code 1942, § 1209] does not relieve an executor against whom a decree has been rendered to be satisfied de bonis propriis from giving bond. *Hudson v. Gray*, 58 Miss. 589 (1881).

But the appeal may be without bond if by the executor in his fiduciary character only. *Hudson v. Gray*, 58 Miss. 589 (1881).

## RESEARCH REFERENCES

**ALR.** Right of trustee or executor to appeal from decree or order of removal. 37 A.L.R.2d 751.

Right to allowance out of estate for attorneys' fees incurred on appeal in attempt to establish or defeat will. 40 A.L.R.2d 1407.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings. 41 A.L.R.2d 1324.

Right of executor or administrator to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

**CJS.** 4 C.J.S., Appeal and Error § 443.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

**§ 11-51-101. State, county, and municipality, and officials representing them, may appeal without bond; prepayment of costs in lower court; costs of record of trial court.**

(1) The state and any county or municipality of the state, and the officials representing the state, county or municipality, in any suit or action, and any state, county or municipal officer who is a party to any suit or action in his official character, in which suit or action the state, county or municipality is beneficially interested, and the several incorporated charitable or educational institutions established and maintained by the state, and all corporate instrumentalities wholly owned by the United States government, shall be entitled to appeal from a judgment, decree, decision or order of any court or judge from which an appeal may be taken without prepayment of costs in the lower court; however, the cost of the preparation of the record of the proceedings in the trial court shall be prepaid. In any such case, if a supersedeas is allowed and desired, a bond for supersedeas shall not be required.

(2) Any person who is a party to a suit or action in his individual capacity, which suit arises from allegedly tortious actions and deeds committed by him during the time he was a member, trustee, director, superintendent, official or employee, as the case may be, of the Department of Corrections, the State Penitentiary or the state psychiatric hospitals or institutions, and which allegedly tortious acts and deeds were committed by the person in the performance of his duties or employment, shall be entitled to appeal from a judgment, decree, decision or order of any court or judge from which an appeal may be taken without prepayment of costs in the lower court, including the costs of the preparation of the record of the proceedings in the trial court. In those cases, if a supersedeas is allowed and desired, a bond for supersedeas shall not be required. The provisions of this section shall not apply to any such judgment, decree, decision or order in favor of the State of Mississippi.

**SOURCES:** Codes, 1880, § 2333; 1892, § 93; 1906, § 94; Hemingway's 1917, § 76; 1930, § 76; 1942, § 1210; Laws, 1938, ch. 356; Laws, 1975, ch. 448; Laws, 1990, ch. 454, § 1; Laws, 2008, ch. 442, § 7, eff from and after July 1, 2008.

**Cross References** — Authority of state, county, or municipality to appeal from tax assessment without bond, see § 11-51-77.

Authority of state tax commission to appeal without bond, see § 27-3-33.

State of Mississippi's exemption from giving security to obtain a stay of judgment, see Miss. R. Civ. P. 62.

## JUDICIAL DECISIONS

1. In general.
2. Particular applications.

### 1. In general.

Election commissioners are officials within the meaning of § 11-51-101. *Fisher v. Crowe*, 289 So. 2d 921 (Miss. 1974).

This section [Code 1942, § 1210] was intended to apply to all persons representing State in judicial proceedings under delegated authority, and words "beneficially interested" are not limited to financial interest in particular suit, but include interest therein of State in governmental

capacity. *Love v. Mississippi Cottonseed Prods. Co.*, 174 Miss. 697, 159 So. 96 (1935).

Code 1892 § 79 (Code 1942, § 1195) allows appeals from board of supervisors to circuit court. Section 85 [Code 1942, § 1201] limits appeals from circuit court to cases where amount in controversy exceeds \$50 if originating in justices' court. There is no such limitation on board of supervisors, and the board may appeal without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007 (1906).

## 2. Particular applications.

Mississippi Regional Housing Authority was entitled to a stay pending appeal and was not required to post a supersedeas bond under Fed. R. Civ. P. 62(f), Miss. R. Civ. P. 62(f), and Miss. Code Ann. § 11-51-101 because: (1) Miss. Code Ann. 43-33-11, which provided that an authority constituted a public body corporate and politic, that exercised public and essential governmental functions, and had all the powers necessary or convenient to carry out and effectuate its purposes, supported the conclusion that the housing authority was entitled to the exemptions; (2) the housing authority and its functions were "integral parts" of Mississippi government; and (3) the Mississippi Supreme Court recognized that a housing authority was a "governmental entity" in another context. *Urban Developers, Inc. v. City of Jackson*, 227 F.R.D. 464 (S.D. Miss. 2005), remanded by 468 F.3d 281, 2006 U.S. App. LEXIS 26435 (5th Cir. Miss. 2006).

Municipal separate school district is agency exempted by § 11-51-101 from giving appeal bond; accordingly, cost of appeal bond posted by school board in appeal by board from decision of Chancery Court reversing board decision made under § 37-9-111 may not be assessed as court costs. *Board of Trustees v. Gates*, 467 So. 2d 216 (Miss. 1985).

County board of education, and its president, as agents of the estate, may appeal without giving bond. *County Bd. of Educ. v. Smith*, 239 Miss. 53, 121 So. 2d 139 (1960).

Since the sheriff, in his contemptuous acts, was not representing the county and it had no beneficial interest in his conviction or acquittal, the sheriff was not ex-

empt by this section [Code 1942, § 1210] from executing a bond upon appealing from contempt judgments. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924 (1956).

Action taken first by mayor in effecting appeal from judgment in mandamus proceedings requiring him to execute and deliver warrant on maintenance fund of municipal separate school district for payment of installment due under building contract for construction of a gymnasium and vocational building, and thereafter by a taxpayer entering into bond for costs and prosecuting the appeal from failure of the mayor to do so, constituted an appeal with supersedeas, especially where no appeal supersedeas was denied by the trial court. *Williams v. State ex rel. Att'y Gen.*, 209 Miss. 251, 46 So. 2d 591 (1950).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the supreme court. *Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219 (1941).

Where an effort had been made in good faith by a drainage district to perfect an appeal within six months, and there had been no intentional delay in having the records filed with the clerk of the Supreme Court, and only a short delay in filing it, with no damage or prejudice to the other party, the Supreme Court in its discretion overruled a motion to dismiss the appeal on the ground of inexcusable delay in filing the transcript in the Supreme Court, and granted the drainage district permission to file the proper appeal bond within ten days. *Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219 (1941).

In suit by superintendent of banks, in charge of liquidation of bank, for collection of debt allegedly due the bank, superintendent held entitled to appeal from adverse decree without bond. *Love v. Mississippi Cottonseed Prods. Co.*, 174 Miss. 697, 159 So. 96 (1935).

Bank, which was depository of school funds, was not entitled to appeal without bond in action for mandamus to require payment of warrant on the funds. *Cleve-*



land State Bank v. Cotton Exch. Bank, 118 Miss. 768, 79 So. 810 (1918).

A county may appeal from a decree overruling its demurrer to a bill in equity under Code 1892 § 33 (Code 1906, § 34), without giving bond. Jones v. Rogers, 85 Miss. 578, 38 So. 310 (1905).

A petition for a mandamus in behalf of the state to compel the board of supervisors of a county to hold a special election to locate the county site having been denied, the state can appeal without bond. State ex rel. Att'y Gen. v. Board of Supvrs., 64 Miss. 358, 1 So. 501 (1887).

## RESEARCH REFERENCES

**ALR.** Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 A.L.R.4th 1130.

Hospital's liability for mentally damaged patient's self-inflicted injuries. 36 A.L.R.4th 117.

Validity and construction of statute or ordinance limiting the kinds or amount of

actual damages recoverable in tort action against governmental unit. 43 A.L.R.4th 19.

Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body. 47 A.L.R.5th 553.

**CJS.** 4 C.J.S., Appeal and Error §§ 444.

## § 11-51-103. Written demand for appeal in certain cases.

In all cases where an appeal is desired without bond, from a judgment of a justice of the peace, and in cases of unlawful entry and detainer, by parties who are not required to give bond therefor, a written demand for the appeal shall be filed, in lieu of the bond required of others, within the time allowed for appeal in such cases.

**SOURCES:** Codes, 1892, § 94; 1906, § 95; Hemingway's 1917, § 77; 1930, § 77; 1942, § 1211.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Unlawful entry and detainer actions generally, see §§ 11-25-1 et seq.

Appeal from unlawful entry and detainer court, see § 11-51-83.

Criminal appeal without bond, see § 99-35-7.

## JUDICIAL DECISIONS

### 1. In general.

Neither this section [Code 1942, § 1211] (§ 95, Code 1906) nor § 83, Code 1906 (Code 1942, § 1198) has any appli-

cation to an appeal provided for by § 80 (Code 1942, § 1195). Polk v. City of Hattiesburg, 110 Miss. 80, 69 So. 1005 (1915).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review, §§ 325, 327, 373-375.

**CJS.** 4 C.J.S., Appeal and Error §§ 432-456.

## §§ 11-51-105 through 11-51-109. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-105. [Codes, Hemingway's 1921 Supp. § 211a; 1930, § 78; 1942, § 1212; Laws 1920, ch. 220; Am Laws, 1978, ch. 335, § 31]

§ 11-51-107. [Codes, Hemingway's 1921 Supp. § 211b; 1930, § 79; 1942, § 1213; Laws, 1920, ch. 220; Am Laws, 1978, ch. 335, § 32]

§ 11-51-109. [Codes, Hemingway's 1921 Supp. § 211c; 1930, § 80; 1942, § 1214; Laws, 1920, ch. 220; Am Laws, 1978, ch. 335, § 33]

**Editor's Note** — Former § 11-51-105 related to taxpayer liable for costs only — no petition for appeal required.

Former § 11-51-107 related to taxpayer liable for costs only — no petition for appeal by taxpayers.

Former § 11-51-109 related to notice to court reporter and other officers in appeal by taxpayers.

### **§ 11-51-111. Taking of appeal from courts of separate judicial districts in Harrison County.**

In Harrison County, a county having two judicial districts, all appeals, writs of error or other like remedies may be taken and prosecuted from the circuit, chancery and county courts of either of said districts to the Supreme Court, in the same manner and to the same extent and on the same terms as appeals, writs of error and other like remedies are authorized to be taken from the circuit, chancery and county courts holden in the different counties of the state.

**SOURCES:** Codes, 1942, § 2910-11; Laws, 1962, ch. 257, § 11, eff from and after passage (approved June 1, 1962).

### **§ 11-51-113. Repealed.**

Repealed by Laws of 1978, ch. 335, § 41, eff from and after July 1, 1978.  
[En Laws 1973, ch. 345, § 1]

**Editor's Note** — Former § 11-51-113 related to cash deposits in lieu of posting a penal bond.

## CHAPTER 53

### Costs

SEC.

- 11-53-1 through 11-53-3. Repealed.
- 11-53-5. How security given.
- 11-53-7. Security for costs before justice of the peace.
- 11-53-9. Costs paid from deposit.
- 11-53-11. Official bond covers deposit.
- 11-53-13. Security for costs shall not be required in certain suits.
- 11-53-15. Usee liable for costs—state as nominal plaintiff.
- 11-53-17. Poor persons may sue without security for costs.
- 11-53-19. Court may dismiss action of poor persons.
- 11-53-21. Judgment for costs against poor persons.
- 11-53-23. Costs on dismissal for want of jurisdiction.
- 11-53-25. Stale cases dismissed at cost of plaintiff.
- 11-53-27 through 11-53-29. Repealed.
- 11-53-31. Successful party liable for certain costs.
- 11-53-33. Costs not recovered in some cases — limited in others.
- 11-53-35. Repealed.
- 11-53-37. Costs in class suits.
- 11-53-39. Repealed.
- 11-53-41. Executors and administrators entitled to and liable for costs — when not individually liable.
- 11-53-43. Executors and administrators entitled to and liable for costs — in their administration.
- 11-53-45. Next friend of infant liable for costs.
- 11-53-47. Repealed.
- 11-53-49. Costs in cases of setoff.
- 11-53-51. Costs in cases of appeal from justices of the peace.
- 11-53-53. Costs in cases of certiorari and appeals from certain inferior tribunals.
- 11-53-55. Cases not expressly embraced by statute or Rule.
- 11-53-57. Repealed.
- 11-53-59 through 11-53-61. Repealed.
- 11-53-63. Repealed.
- 11-53-65. Bill of costs made and filed.
- 11-53-67. Fees not payable until bill produced.
- 11-53-69. Costs not due until suit ended.
- 11-53-71. Taxation of costs in cases from justices of the peace.
- 11-53-73. Execution for costs.
- 11-53-75. Bill of costs appended to execution.
- 11-53-77. Combining orders and decrees to save costs.
- 11-53-79. Table of fees to be posted conspicuously.
- 11-53-81. Recovery of attorney's fees in suit on open account.

### §§ 11-53-1 through 11-53-3. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-53-1. [Codes, Hutchinson's 1848, ch. 58, art. 1 (71); 1857, ch. 61, art. 54; 1871, § 571; 1880, § 2359; 1892, § 861; 1906, § 939; Hemingway's 1917, § 648; 1930, § 655; 1942, § 1566]

§ 11-53-3. [Codes, Hutchinson's 1848, ch. 58, art. 5 (6); 1857, ch. 61, art. 55; 1871, § 572; 1880, § 2360; 1892, § 862; 1906, § 940; Hemingway's 1917, § 649; 1930, § 656; 1942, § 1567]



**Editor's Note** — Former § 11-53-1 related to security for costs before suit commenced.

Former § 11-53-3 related to security for costs after suit commenced.

## § 11-53-5. How security given.

Security for costs may be given by recognizance entered into in open court, or by written undertaking indorsed on or filed with the papers in the cause, or by a deposit with the clerk of the court of the amount in cash or a certified check on any solvent bank in this state. The judgment, when rendered against the plaintiff or complainant, shall be rendered against the surety as well as against the plaintiff or complainant; and execution may be issued as in other cases for all costs for which the plaintiff or complainant may be liable in the cause. Additional security may be required by the court or the justice of the peace, if it appear that the security already taken is insufficient.

**SOURCES:** Codes, 1857, ch. 61, art. 56; 1871, § 573; 1880, § 2361; 1892, § 863; 1906, § 941; Hemingway's 1917, § 650; 1930, § 657; 1942, § 1568.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Appeal bonds where no supersedeas granted, see § 11-51-29.

Liability of clerk or justice of the peace on his official bond for money deposited for costs, see § 11-53-11.

Provision for additional cost to create court education and training fund, see §§ 37-26-1 et seq.

Appeal bonds in criminal cases, see § 99-35-105.

Deposit in lieu of bond in criminal cases, see § 99-35-107.

Requiring additional costs associated with the commencement of an action, see Miss. R. Civ. P. 3.

## JUDICIAL DECISIONS

### 1. In general.

Court, where parties during term tender deposit of money for costs, should set aside order of dismissal because of failure to give security. *Meeks v. Meeks*, 156 Miss. 638, 126 So. 189 (1930).

On reversal of decree for complainant, his bond, given under this section [Code

1942, § 1568], is liable for costs below and on appeal, and decree is against principal and surety. *Victory Sparkler & Specialty Co. v. Price*, 146 Miss. 192, 111 So. 437, 50 A.L.R. 1454 (1927).

## RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 85, 86.

Complaint, petition, or declaration — On undertaking for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 121.

Filing of bond for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 21-27.

**CJS.** 20 C.J.S., Costs §§ 77 et seq., 80 et seq.

**§ 11-53-7. Security for costs before justice of the peace.**

The foregoing provisions as to securing or paying costs before suit brought, and requiring security for costs after suit commenced, and as to rendering judgment against the plaintiff and surety, shall apply to justices of the peace, and the courts held by them as such, or in proceedings in unlawful entry and detainer, or in any other proceeding; but in those courts the security, when required after the commencement of a suit, shall be given within ten days after the order of the court made for that purpose.

**SOURCES:** Codes, 1880, § 2362; 1892, § 864; 1906, § 942; Hemingway's 1917, § 651; 1930, § 658; 1942, § 1569.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

**RESEARCH REFERENCES**

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 76 et seq.

7A Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 31 et seq. (filing of bond for costs).

7A Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 41 et seq. (dismissal for failure to give security).

Proceedings to require plaintiff to give security, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 1-14.

Filing of bond for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 21-27.

Dismissal for failure to give security, 7 Am. Jur. Pl & Pr Forms (Rev ed), Costs, Forms 31-38.

**CJS.** 20 C.J.S., Costs §§ 61, 62 et seq., 68 et seq., 80 et seq., 189-192 et seq.

**§ 11-53-9. Costs paid from deposit.**

In case of a deposit of money or certified check for costs, if the costs be adjudged against the party making the deposit, the clerk or justice shall pay the costs out of the deposit, and the residue to the party entitled thereto. If the party making the deposit be not liable for costs, the whole of the deposit shall be returned to him.

**SOURCES:** Codes, 1880, § 2364; 1892, § 866; 1906, § 943; Hemingway's 1917, § 652; 1930, § 659; 1942, § 1570.

**Cross References** — Provision that clerk shall pay the costs on appeal out of money deposited for that purpose, see § 11-51-69.

Unused cost deposits being promptly returned to the parties on a case-by-case basis, see Miss. Rule Civil Proc. 3.

**RESEARCH REFERENCES**

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 76 et seq.

**CJS.** 20 C.J.S., Costs § 78.

**§ 11-53-11. Official bond covers deposit.**

The clerk or justice of the peace shall be liable on his official bond to all persons having any claim to or interest in any money so deposited for costs, and for failure to pay over the same, as required, to the person entitled to it, shall, besides any other penalty provided, be liable to be dealt with for contempt by the court in which the deposit was made. A deposit in the hands of a clerk or justice at the expiration of his term of office shall be delivered to his successor.

**SOURCES:** Codes, 1880, § 2365; 1892, § 867; 1906, § 944; Hemingway's 1917, § 653; 1930, § 660; 1942, § 1571.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

## JUDICIAL DECISIONS

**1. In general.**

**1. In general.** Allegations held to state a cause of action on clerk's bond. *United States Fid. & Guar. Co. v. Young*, 128 Miss. 296, 91 So. 3 (1922).

## RESEARCH REFERENCES

**Am Jur.** 15A Am. Jur. 2d (Rev), Clerks of Court §§ 56, 57, 61-65.

**§ 11-53-13. Security for costs shall not be required in certain suits.**

Neither the state, nor any county, city, town, or village, nor any state board, nor any state, county, city, town, or village officer, suing in his official character, shall be required to pay costs before commencing a suit, nor to give security for costs before or after the commencement of a suit.

**SOURCES:** Codes, 1880, § 2366; 1892, § 868; 1906, § 945; Hemingway's 1917, § 654; 1930, § 661; 1942, § 1572.

## JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1572] merely relieves against the necessity of securing costs before bringing suit, but not against State Bd. of Registration for Professional Eng'rs v. Rogers, 239 Miss. 35, 121 So. 2d 720 (1960).

## ATTORNEY GENERAL OPINIONS

The fees of the constable must be paid if the process is served, therefore if the costs are not collected from the defendant, the county must pay them to the constable.



is unsuccessful in its case, it shall become immediately liable to pay the costs of the case. Thornton, December 6, 1995, A.G. Op. #95-0775.

Section 11-53-13 does not relieve the state of the duty of payment of court costs assessed against it by the court at the conclusion of the case. McCarty, December 7, 1995, A.G. Op. #95-0798.

Where a constable serves process in an action to collect a delinquent bill that is filed by the county, the constable is entitled to have his fee paid by the county if the defendant is unable to pay a judgment rendered against him. Massey, June 5, 1998, A.G. Op. #98-0322.

A constable is not entitled to receive a fee for service of process unless that pro-

cess is actually served; if the constable returns the process "unable to serve" or "not found," then he has not actually served the process and he is not entitled to a fee. Fortier, October 9, 1998, A.G. Op. #98-0599.

This section does not require the District Attorney, acting in his or her official capacity, to pre-pay fees in the Chancery or Circuit Courts; however, the Chancery Clerk may be entitled to fees upon adjudication and assessment of costs by the court. Jones, July 30, 1999, A.G. Op. #99-0369.

An entity of government is not required to prepay court costs prior to commencing a civil action. Erby, Apr. 29, 2005, A.G. Op. 05-0118.

### RESEARCH REFERENCES

**ALR.** Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 A.L.R.2d 1379.

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 34-40.

**CJS.** 20 C.J.S., Costs §§ 63, 65.

### § 11-53-15. Usee liable for costs—state as nominal plaintiff.

In suits in the name of the state or any person for the use of another, the usee may be required to secure or pay the costs, and shall be liable therefor; and in no case shall the state, as a nominal plaintiff, be liable for costs.

**SOURCES:** Codes, Hutchinson's 1848, ch. 58, art. 1 (23); 1857, ch. 61, art. 57; 1880, § 2367; 1892, § 869; 1906, § 946; Hemingway's 1917, § 655; 1930, § 662; 1942, § 1573.

**Cross References** — Liability for costs where information in quo warranto case is upon relation of private individual, see § 11-39-23.

Handling of costs in quo warranto case by judge before order for trial in vacation or afterward is made, see § 11-39-61.

### RESEARCH REFERENCES

**ALR.** Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 A.L.R.2d 1379.

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs § 21, 27.

**CJS.** 20 C.J.S., Costs §§ 4, 5.

### § 11-53-17. Poor persons may sue without security for costs.

A citizen may commence any civil action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit:

"I, \_\_\_\_\_, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about to commence (or which I have begun, as the case may be) and that, to the best of my belief, I am entitled to the redress which I seek by such suit."

**SOURCES:** Codes, 1880, §§ 2368, 2369; 1892, § 870; 1906, § 947; Hemingway's 1917, § 656; 1930, § 663; 1942, § 1574; Laws, 1936, ch. 251; Laws, 1991, ch. 573, § 87, eff from and after July 1, 1991.

**Cross References** — Appeals in criminal cases by one unable to give an appeal-bond or to deposit money to cover costs, see §§ 99-35-7, 99-35-105.

Provision that cost deposit, which ordinarily must accompany complaint, may be waived for paupers, see Miss. R. Civ. P. 3.

## JUDICIAL DECISIONS

### 1. In general.

In proceedings on remand for a new trial, a litigant may seek and obtain in forma pauperis status because the new trial proceeds de novo, or as if the case is being tried for the first time. *Blake v. Estate of Clein*, 37 So. 3d 622 (Miss. 2010).

Miss. Code Ann. § 11-53-17 authorized in forma pauperis proceedings in civil cases at the trial level only; therefore, the inmate should not have been allowed to appeal his claims under the Mississippi Tort Claims Act in forma pauperis. *Bessent v. Clark*, 974 So. 2d 928 (Miss. Ct. App. 2007).

The right to proceed in forma pauperis applies only at the trial court level; appellate court cautioned trial courts against allowing appeals in forma pauperis unless required by law. *Slaydon v. Hansford*, 830 So. 2d 686 (Miss. Ct. App. 2002).

Mississippi's post-deprivation remedies for civil in forma pauperis litigants (§ 11-53-17) satisfied the Due Process Clause, notwithstanding the rule requiring civil litigants to prepay appellate costs, since the state provided a procedure, not conditioned on the payment of any fee, through which an indigent litigant would be able to seek redress at the trial court level. *Nickens v. Melton*, 38 F.3d 183 (5th Cir. 1994), reh'g and suggestion for reh'g en banc denied, 43 F.3d 672 (5th Cir. 1994), cert. denied, 514 U.S. 1025, 115 S. Ct. 1376, 131 L. Ed. 2d 230 (1995).

The Mississippi rule requiring civil litigants to prepay appellate costs did not

violate the Equal Protection Clause with respect to litigants suing in forma pauperis (IFP) since IFP litigants are not a suspect class, and the rule requiring prepayment of costs for a civil appeal was rationally related to the state's legitimate interest in offsetting expenses associated with operating its appellate court system. *Nickens v. Melton*, 38 F.3d 183 (5th Cir. 1994), reh'g and suggestion for reh'g en banc denied, 43 F.3d 672 (5th Cir. 1994), cert. denied, 514 U.S. 1025, 115 S. Ct. 1376, 131 L. Ed. 2d 230 (1995).

Where an action is brought pursuant to § 11-53-17 and the court conducts a hearing on the issue of poverty to determine whether the action should be dismissed pursuant to § 11-53-19, it is entirely reasonable and in the interest of judicial economy that the pleading also be examined and the affiant questioned to determine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11, Miss. R. Civ. P. *Blanks v. State*, 594 So. 2d 25 (Miss. 1992).

While § 11-53-17 provides that persons who are truly indigent may proceed in civil actions as paupers, the statute authorizes in forma pauperis proceedings in civil cases at the trial level only. *Nelson v. Bank of Miss.*, 498 So. 2d 365 (Miss. 1986).

Statute permitting suit in forma pauperis applies only to a court of original jurisdiction and not to courts of appeal so as to permit setting down of a mandate on an affidavit in forma pauperis. *Life & Cas. Ins. Co. v. Walters*, 190 Miss. 761, 198 So. 746 (1940).

Delay for almost a year after granting of rule for security for costs did not justify court in striking affidavit of poverty and dismissing cause, in absence of showing that defendant was prejudiced by delay. *Bond v. Hattiesburg Am.*, 178 Miss. 122, 172 So. 509 (1937).

All persons satisfying court of inability to secure costs are entitled to maintain suit, though not able to give bond or

deposit money. *Meeks v. Meeks*, 156 Miss. 638, 126 So. 189 (1930).

Evidence held insufficient to warrant holding plaintiff pauper's affidavit was not true. *Carroll v. Louisville & N.R. Co.*, 154 Miss. 188, 122 So. 469 (1929).

A litigant who has sued in forma pauperis in a justice's court cannot appeal from an adverse judgment without bond. *Woods v. Davidson*, 57 Miss. 206 (1879).

## ATTORNEY GENERAL OPINIONS

This statute allows a citizen to commence "any civil action," which includes an action to enforce the Public Records Act in chancery court. *Peacock*, March 31, 1999, A.G. Op. #99-0109.

In a civil action where the plaintiff was allowed to proceed as an indigent, in the event the court declines to hold a hearing to inquire into the affidavit of poverty or if

the court holds a hearing and does not dismiss the complaint, the sheriff is required to deliver the summons and complaint in accordance with Rule 4 of the Mississippi Rules of Civil Procedure, and the county would bear the cost of the sheriff's fee. *McCormick*, May 27, 2005, A.G. Op. 05-0234.

## RESEARCH REFERENCES

**ALR.** Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other non-party or nonapplicant. 11 A.L.R.2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis. 98 A.L.R.2d 292.

**Am Jur.** Order — Ex parte — Granting leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 60.

Affidavit in support of motion for leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 55, 56.

Order — Denying leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 61.

**CJS.** 20 C.J.S., Costs §§ 90, 91, 99, 101 et seq.

## § 11-53-19. Court may dismiss action of poor persons.

The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue.

**SOURCES:** Codes, 1880, § 2370; 1892, § 871; 1906, § 948; *Hemingway's* 1917, § 657; 1930, § 664; 1942, § 1575.

**Cross References** — Indigent being examined as to his financial condition, and a court dismissing the action if the claim of indigency is false, see Miss R. Civ. P. 3.

## JUDICIAL DECISIONS

### 1. In general.

Evidence was sufficient to support a trial court's determination that a patient's estate's claim of poverty was true and, therefore, the action, which was on re-

mand for a new trial, was not subject to dismissal. *Blake v. Estate of Clein*, 37 So. 3d 622 (Miss. 2010).

Where an action is brought pursuant to § 11-53-17 and the court conducts a hear-



ing on the issue of poverty to determine whether the action should be dismissed pursuant to § 11-53-19, it is entirely reasonable and in the interest of judicial economy that the pleading also be examined and the affiant questioned to determine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11, Miss. R. Civ. P. *Blanks v. State*, 594 So. 2d 25 (Miss. 1992).

Evidence held insufficient to warrant holding plaintiff's pauper's affidavit was not true. *Carroll v. Louisville & N.R. Co.*, 154 Miss. 188, 122 So. 469 (1929).

If the court is satisfied that allegation of poverty is untruthful, dismissal must be based on testimony taken and preserved the same as other testimony. *Feazell v. Soltzfus*, 98 Miss. 886, 54 So. 444 (1911).

## RESEARCH REFERENCES

**Am Jur.** 24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit § 53.

Order — Vacating order granting leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 73.

**CJS.** 20 C.J.S., Costs §§ 99, 100.

### § 11-53-21. Judgment for costs against poor persons.

In cases commenced or continued on an affidavit of poverty, the officers of the court shall perform all the duties required in the prosecution of the suit, and the witnesses shall attend until released; but in the case of failure to prosecute his suit to effect, judgment shall be given against the plaintiff for costs, and execution may be issued as in other cases.

**SOURCES:** Codes, 1880, § 2371; 1892, § 872; 1906, § 949; Hemingway's 1917, § 658; 1930, § 665; 1942, § 1576.

**Cross References** — Rule governing the awarding of costs to litigants, see Miss. R. Civ. P. 54.

### § 11-53-23. Costs on dismissal for want of jurisdiction.

When a case shall be dismissed by any court for want of jurisdiction, judgment shall be rendered by such court for costs against the party who invoked the jurisdiction, as in other cases.

**SOURCES:** Codes, 1880, § 2372; 1892, § 873; 1906, § 950; Hemingway's 1917, § 659; 1930, § 666; 1942, § 1577.

**Cross References** — Rule with respect to payment of cost of previously dismissed action, see Miss. R. Civ. P. 41.

## RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs § 23.

**CJS.** 20 C.J.S., Costs §§ 33, 35.

**§ 11-53-25. Stale cases dismissed at cost of plaintiff.**

The clerk of any court shall move the court to dismiss any cause pending therein in which no step has been taken for the two terms preceding; and the court shall, unless good cause be shown to the contrary, dismiss the same at the costs of the plaintiff or complainant.

**SOURCES:** Codes, 1857, ch. 61, art. 58; 1871, § 575; 1880, § 2373; 1892, § 874; 1906, § 951; Hemingway's 1917, § 660; 1930, § 667; 1942, § 1578.

**Cross References** — Requirement of notice before the dismissal of any case in which no action has been taken during the preceding twelve months, see Miss. R. Civ. P. 41.

**JUDICIAL DECISIONS**

1. Construction and application, generally.
2. Presumptions.
3. Dismissal.
4. Reinstatement.
5. Miscellaneous.

**1. Construction and application, generally.**

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action (§ 15-1-69) would apply. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986).

This section [Code 1942, § 1578] manifests a legislative policy which renders improper the granting of leave to amend an inadequate complaint after fifteen years, though the action was never dismissed by the clerk or the court because never in the chancery clerk's files. *Osborne v. Vince*, 240 Miss. 807, 129 So. 2d 345 (1961).

While this section [Code 1942, § 1578] does not provide for notice to be given of the clerk's motion to dismiss, evidently because of the fact that the interested parties are presumed to be before the court in cases pending on the active docket and are cognizant of what action is

being taken or is proposed to be taken in their cases, and are, therefore, afforded opportunity to show "good cause" to the contrary, it was never contemplated by this section that the parties to a suit which has been passed to the files until the further order of the court should be required to remain in attendance from day to day and from term to term pending such further order in order to show cause why the case should not be finally disposed of in the proposed manner, if and when it is withdrawn from the file, whether the proceedings be civil or criminal. *Ross v. Milner*, 194 Miss. 497, 12 So. 2d 917 (1943).

This section [Code 1942, § 1578] is applicable only to cases not yet decided, and hence was inapplicable where judgment below had been reversed on appeal, although under court rule no mandate had been issued because of appellee's failure to pay costs. *Dubois v. Thomas*, 173 Miss. 697, 161 So. 868 (1935).

This section [Code 1942, § 1578] is mandatory. *Mississippi Cent. R.R. v. Brookhaven Lumber & Mfg. Co.*, 165 Miss. 820, 147 So. 814 (1933).

**2. Presumptions.**

Action not tried for more than three years after institution, presumed continued from term to term by consent. *McCain v. Wade*, 181 Miss. 664, 180 So. 748 (1938).

Order of dismissal in county court was presumed to be correct where there was nothing in record to show that it was absolutely void, since there is a general

presumption in favor of correctness of judgments and presumption would obtain that dismissal was had because case was stale, in which event no notice was required. *Baker v. Moore*, 176 Miss. 431, 169 So. 773 (1936).

### 3. Dismissal.

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action (§ 15-1-69) would apply. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986).

In an action by a savings and loan association against a former vice-president of the association and members of the board of directors for \$26 million dollars in damages based on alleged breach of fiduciary duty in the management of the association, the trial court erred in granting the defendants' motion to dismiss the action as stale where the case was complex, involving an enormous mass of documentary material, and required a tremendous amount of work and time to comply with discovery, where the attorney for the savings and loan association had been killed in an airplane crash following four years of discovery proceedings and the association had made diligent efforts to retain substitute counsel, and where the defendants had made no effort to show prejudice which may have been sustained over the period of time prior to the dismissal. *Liberty Sav. & Loan Ass'n v. Mitchell*, 398 So. 2d 208 (Miss. 1981).

Where the order sustaining the defendant's demurrer and granting the complainant 30 days in which to amend his bill was entered in 1964, and when no amendment was filed the solicitor for the complainant, and defendant at several calls of the docket requested the chancery clerk to move to dismiss the suit as a stale case in compliance with Code 1942, § 1578, but no motion was made by the

clerk and defendants did not file a motion to dismiss until 1967 when an attorney other than the attorney who had filed the original bill appeared and filed a motion asking for additional time in which to plead, the trial court did not err in refusing to dismiss the suit. *Helton v. Evans*, 208 So. 2d 778 (Miss. 1968).

Where the heirs of a grantor brought an action to set aside a deed on the ground of mental incapacity of grantor, and such action was passed to the files pending the determination of a will contest predicated on grantor's want of testamentary capacity, and more than two years after the adjudication of the will contest in complainants' favor, such suit was reinstated on the active docket by an heir of grantee and dismissed on motion, this section [Code 1942, § 1578] did not apply to permit dismissal of the action as a stale case where the heirs of grantor were not informed of the reinstatement of the action. *Ross v. Milner*, 194 Miss. 497, 12 So. 2d 917 (1943).

Where cause was dismissed as stale on clerk's motion, court properly refused, under facts shown, to set aside order of dismissal. *Mississippi Cent. R.R. v. Brookhaven Lumber & Mfg. Co.*, 165 Miss. 820, 147 So. 814 (1933).

### 4. Reinstatement.

Case which has been dismissed as stale cannot be reinstated after expiration of term of court within which dismissal is entered unless dismissal is defective, or involves fraud, mistake or accident. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986).

A case dismissed as stale by a trial court may be reinstated during the same term of court without notice to the adverse party. *Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott*, 191 So. 2d 399 (Miss. 1966).

### 5. Miscellaneous.

Circuit court properly refused to entertain petition to transfer case which had been dismissed in county court by order from which no appeal had been taken. *Baker v. Moore*, 176 Miss. 431, 169 So. 773 (1936).



ATTORNEY GENERAL OPINIONS

Under Section 11-53-25 a county should have two months following date of judgment before it would be required to pay

the accrued costs in justice court. Thornton, December 6, 1995, A.G. Op. #95-0775.

RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 22, 96.

**CJS.** 20 C.J.S., Costs § 33, 35.

§§ 11-53-27 through 11-53-29. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-53-27. [Codes, Hutchinson's 1848, ch. 61, art. 1 (74); 1857, ch. 61, art. 255; 1880, § 2375; 1892, § 875; 1906, § 952; Hemingway's 1917, § 661; 1930, § 668; 1942, § 1579]

§ 11-53-29. [Codes, 1892, § 876; 1906, § 953; Hemingway's 1917, § 662; 1930, § 669; 1942, § 1580]

**Editor's Note** — Former § 11-53-27 related to successful party to recover costs generally.

Former § 11-53-29 related to successful defendant recovers costs, though plaintiff recover against others.

§ 11-53-31. Successful party liable for certain costs.

All costs accrued at the instance of the successful defendant in a suit, which cannot be collected out of the other party, may be collected from such defendant; and after return of "no property" on execution against a plaintiff or complainant against whom costs were adjudged, execution may be issued against the successful defendant for all cost accrued at his instance and not paid or collected from the other party. A successful plaintiff or complainant shall be liable for all the costs of the case accrued at his instance which cannot be collected from the defendants; and after return of "no property" on execution against the defendant against whom costs were adjudged, execution may be issued against the successful plaintiff or complainant for all the costs of the case accrued at his instance not paid or collected from the defendant. An unsuccessful plaintiff or complainant shall be liable for all the costs of the case.

**SOURCES:** Codes, 1880, § 2381; 1892, § 877; 1906, § 954; Hemingway's 1917, § 663; 1930, § 670; 1942, § 1581.

**Cross References** — Rule covering the awarding of costs to litigants, see Miss. R. Civ. P. 54.

## JUDICIAL DECISIONS

**1. In general.**

The state employment security commission is not exempted from the payment of court costs incurred in connection with litigation in which it engages. *Mississippi Emp. Sec. Comm'n v. Wilks*, 251 Miss. 744, 171 So. 2d 157 (1965).

Where no property of plaintiff could be found, a successful defendant was liable for the jury-tax of \$3. *Gulf & S.I.R.R. v. Mitchell*, 112 Miss. 560, 73 So. 577 (1917).

Where by the fault of the defendant in not keeping accounts as he obligated himself to do, a large volume of testimony was necessarily taken touching a great number of items, the supreme court will adjudge defendant to pay two-thirds of the cost of his appeal, although it reverses the decree appealed from by him because of errors in respect to several of said items. *Rowan v. Lamb*, 83 Miss. 45, 35 So. 427 (1903).

## ATTORNEY GENERAL OPINIONS

Unsuccessful civil action brought in name of county would nevertheless, subject county to same liability as to court cost, i.e. constable fees, that any other civil plaintiff would be required to pay into court for said services. *Gann*, March 21, 1990, A.G. Op. #90-0184.

Under Section 11-53-31, a tax collector does have to prepay the sheriff's fee, therefore, if there is no property found upon which to execute, a tax collector will lose the money used to pay the sheriff's fee. *Hollimon*, July 12, 1996, A.G. Op. #96-0400.

## RESEARCH REFERENCES

**ALR.** Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 10, 89 et seq.

**CJS.** 20 C.J.S., Costs §§ 10 et seq., 53, 54.

## § 11-53-33. Costs not recovered in some cases — limited in others.

In actions of assault, assault and battery, libel and slander, if the plaintiff recover less than Ten Dollars (\$10.00), costs shall not be awarded to him. In all other actions sounding in damages, where the plaintiff sues for more than Ten Dollars (\$10.00) and recovers less than that sum, no more costs than the amount of damages recovered shall be awarded to him, unless the court be of the opinion that the plaintiff had reasonable cause to expect to recover more, and that the action was brought for no other purpose than to be compensated for the wrong done, and enter the same on its minutes. If more costs be awarded, the judgment may be amended on motion at any time.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 61, art. 2 (17); 1857, ch. 61, art. 256; 1880, § 2376; 1892, § 878; 1906, § 955; *Hemingway's* 1917, § 664; 1930, § 671; 1942, § 1582.

**Cross References** — Actionability of words generally, see § 95-1-1.

Punishment of one convicted of writing or publishing any libel, see § 97-3-55.

Truth as defense in criminal prosecution for libel, see § 97-3-57.

## JUDICIAL DECISIONS

### 1. In general.

This section [Code 1942, § 1582] governs in action ex delicto. It was enacted to

discourage frivolous and vexatious litigation. *Kansas City, M. & B.R. Co. v. Mabry*, 67 Miss. 131, 7 So. 224 (1890).

## RESEARCH REFERENCES

**ALR.** Validity, construction, and application of statute limiting damages recoverable for defamation. 13 A.L.R.2d 277.

Who is protected by statute restricting recovery unless retraction is demanded. 84 A.L.R.3d 1249.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Validity, Construction, and Application of State Vexatious Litigant Statutes. 45 A.L.R.6th 493.

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 3, 6, 15.

**CJS.** 20 C.J.S., Costs §§ 19 et seq.

### § 11-53-35. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 62, art. 56; 1871, § 1035; 1880, § 2374; 1892, § 879; 1906, § 956; Hemingway's 1917, § 665; 1930, § 672; 1942, § 1583]

**Editor's Note** — Former § 11-53-35 related to costs discretionary in chancery.

### § 11-53-37. Costs in class suits.

Where a party hereafter institutes a suit for the benefit of himself and all others similarly situated, and thereby there is in such suit recovered or preserved property or a fund for the common benefit, the chancery court may make an allowance to such party of the reasonable costs incurred, which costs shall include the necessary disbursements, and reasonable solicitor's fees, out of the property recovered or preserved for the common benefit.

**SOURCES:** Codes, 1942, § 1583.5; Laws, 1948, ch. 234.

## JUDICIAL DECISIONS

1. In general.

2. Class actions not available.

### 1. In general.

Section 11-53-37 does not apply to public service litigation. *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995), but see *USPCI of Miss., Inc. v. State ex rel. McGowan*, 688 So. 2d 783 (Miss. 1997).

An attorney's fee is properly allowed to attorneys for successful appellees in a proceeding involving the construction of a will. In *re Powell's Will*, 239 Miss. 10, 121 So. 2d 1 (1960).

### 2. Class actions not available.

Miss. Code Ann. § 11-53-37 explained how attorney's fees would be awarded in class actions in chancery if there was an equitable class action; if and when the Mississippi Supreme Court chose to adopt a class action rule, § 11-53-37 would become operable again, as it was decades ago. It served no function currently because there were no class actions under the Mississippi Rules of Civil Procedure, whether in circuit or chancery court; the chancery court erred in concluding otherwise. *USF&G Ins. Co. v. Walls*, — So. 2d



—, 2004 Miss. LEXIS 657 (Miss. June 10, 2004).

## RESEARCH REFERENCES

**ALR.** Attorneys' fees in class actions. 38 A.L.R.3d 1384.

Attorneys' fees; cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Award of attorneys' fees under § 204(b) of Civil Rights Act of 1964 (42 USCS § 2000a-3(b)) authorizing court to allow prevailing party, other than United States, reasonable attorney's fee as part of costs in action under public accommodations part of Act. 16 A.L.R. Fed. 621.

Award of attorneys' fees under § 706(k) of Civil Rights Act of 1964 (42 USCS § 2000e-5(k)) authorizing court to allow

prevailing party, other than Equal Employment Opportunity Commission or United States, reasonable attorney's fee as part of costs in action under equal employment opportunities part of Act. 16 A.L.R. Fed. 643.

Construction and application of "common fund" doctrine in allocating attorneys' fees among multiple attorneys whose efforts were unequal in benefiting multiple claimants. 42 A.L.R. Fed. 134.

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs § 31.

**Law Reviews.** Tort Reform by the Mississippi Supreme Court, 24 Miss. C. L. Rev. 427, Spring, 2005.

## § 11-53-39. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 49, art. 1 (111); 1857, ch. 60, art. 119; 1880, § 2377; 1892, § 880; 1906, § 957; Hemingway's 1917, § 666; 1930, § 673; 1942, § 1584]

**Editor's Note** — Former § 11-53-39 related to executors and administrators entitled to and liable for costs.

## § 11-53-41. Executors and administrators entitled to and liable for costs — when not individually liable.

When costs are adjudged against an executor or administrator in a suit at law or in equity, and he shall obtain the certificate of the court before which the suit was tried that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them.

**SOURCES:** Codes, 1857, ch. 60, art. 132; 1880, § 2378; 1892, § 881; 1906, § 958; Hemingway's 1917, § 667; 1930, § 674; 1942, § 1585.

## JUDICIAL DECISIONS

### 1. In general.

Where a verdict is rendered against an administrator in a suit brought by him, and he obtains a certificate from the courts, under this section [Code 1942, § 1585], exempting him personally from

the costs upon such certificate, that there was probable cause of bringing the suit, a judgment for costs should not be rendered against the sureties on a voluntary bond given by the plaintiff limiting their liability to the payment of such costs as might

be adjudged against the plaintiff involuntarily. *Nichols v. Gulf & S.I.R. Co.*, 83 Miss. 126, 36 So. 192 (1903).

The statute does not absolve an administrator from liability for costs incurred by him in the service of process for his witness fees, and the cost of a transcript on appeal, whether he be successful or not in

prosecuting or defending the suit. *Campbell v. Doyle*, 57 Miss. 292 (1879).

The administrator will not be allowed for costs in his accounts unless he obtains the certificate provided in the statute. *Williamson v. Childress*, 26 Miss. 328 (1853); *Effinger v. Richards*, 35 Miss. 540 (1858).

#### RESEARCH REFERENCES

**Am Jur.** 20 *Am. Jur.* 2d (Rev), Costs §§ 31-33.

**CJS.** 20 *C.J.S.*, Costs §§ 56, 60.

### § 11-53-43. Executors and administrators entitled to and liable for costs — in their administration.

Executors and administrators shall be personally liable for the fees which accrue in the administration, and the estates in their hands shall be chargeable with such fees in preference to all other demands. It shall be lawful for the clerk of the chancery court to make out executions for the fees that may become due the officers of court or the publisher of a newspaper at any time in the administration of an estate. Every such execution shall have annexed to it a copy of the bill of costs, specifying the particular items thereof, to be enforced as in other cases.

**SOURCES:** Codes, 1880, § 2379; 1892, § 882; 1906, § 959; Hemingway's 1917, § 668; 1930, § 675; 1942, § 1586.

#### RESEARCH REFERENCES

**Am Jur.** 20 *Am. Jur.* 2d (Rev), Costs §§ 31-33.

**CJS.** 20 *C.J.S.*, Costs §§ 56, 60.

### § 11-53-45. Next friend of infant liable for costs.

If in any case the plaintiff or complainant be an infant suing by next friend, such next friend shall be liable for costs.

**SOURCES:** Codes, 1880, § 2380; 1892, § 883; 1906, § 960; Hemingway's 1917, § 669; 1930, § 676; 1942, § 1587.

**Cross References** — Power of chancery court to appoint guardian ad litem to infant, see § 9-5-89.

Institution of proceedings by next friend of minor to remove disability of minority, see § 93-19-3.

## RESEARCH REFERENCES

**ALR.** Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

## § 11-53-47. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1880, § 2382; 1892, § 884; 1906, § 961; Hemingway's 1917, § 670; 1930, § 677; 1942, § 1588]

**Editor's Note** — Former § 11-53-47 related to costs as between defendants.

## § 11-53-49. Costs in cases of setoff.

When a setoff is pleaded or filed and established, the defendant shall recover of the plaintiff his costs expended in establishing it, although judgment be rendered in favor of the plaintiff for a balance due him.

**SOURCES:** Codes, 1880, § 2385; 1892, § 885; 1906, § 962; Hemingway's 1917, § 671; 1930, § 678; 1942, § 1589.

## JUDICIAL DECISIONS

## 1. In general.

Trial court does not abuse its discretion by entering order allowing plaintiff to recover full costs in action for recovery of damages caused by killing of one milch cow and wounding of three others, in which action defendant claimed and was

allowed \$50 damages on account of corn destroyed by plaintiff's cattle, since defendant was not entitled to set off in tort action unliquidated damages caused by separate tort on part of plaintiff. *Vines v. Perry*, 208 Miss. 869, 45 So. 2d 734 (1950).

## RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs § 25.

**CJS.** 20 C.J.S., Costs § 13.

## § 11-53-51. Costs in cases of appeal from justices of the peace.

In cases of appeal from a judgment of a justice of the peace, if the appeal be by the defendant, and judgment be rendered thereon for the plaintiff equal to or greater than that recovered by him before the justice of the peace, he shall recover of the defendant full costs; but if the judgment for plaintiff be less than that recovered by him before the justice of the peace, the court may, on motion of defendant, apportion the costs between the parties as may be proper, otherwise defendant shall be liable for all the costs. If the judgment on such appeal be rendered for the defendant, he shall recover of the plaintiff full costs. If the appeal be by plaintiff from a judgment rendered against him, and he recover judgment thereon, he shall recover of the defendant full costs; but if the defendant recover judgment thereon, he shall recover of plaintiff full costs. If



a party appeal from a judgment in his favor, and does not obtain judgment for more than he recovered before the justice of the peace, he shall not recover costs that accrued on appeal, but shall be liable for such costs. But in such cases the circuit court, may, when the circumstances justify it, tax the costs to meet the ends of justice. In all cases where the principal is made liable for costs, judgment shall be rendered therefor against him and the sureties on his appeal bond jointly.

**SOURCES:** Codes, 1871, § 1597; 1880, §§ 2354, 2384; 1892, § 886; 1906, § 963; Hemingway's 1917, § 672; 1930, § 679; 1942, § 1590.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Trial of case on appeal from justice of the peace court to circuit court, see § 11-51-91.

Duty of circuit court clerk to tax costs accruing on trial before justice of the peace of case appealed to circuit court, see § 11-53-71.

### JUDICIAL DECISIONS

#### 1. In general.

On appeal of a cause by a defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for costs, since the case will be tried anew, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff enjoys the privilege of seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case

or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647 (1942).

The statute arms the circuit court with authority as to the costs on appeals from justices' courts, under which any abuse by a defendant of the right to interpose a defense for the first time in the circuit court could be prevented from doing injury to the plaintiff. *D. Callahan & Co. v. Newell*, 61 Miss. 437 (1884).

### RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 849, 869 et seq.

#### § 11-53-53. Costs in cases of certiorari and appeals from certain inferior tribunals.

In all cases of certiorari upon the judgment of any inferior court or tribunal, and the cases of appeal from the judgment of a board or supervisors, of a court of unlawful entry and detainer, of any municipal board or court, the successful party shall be entitled to recover full costs; but the circuit court may, when the circumstances of the case justify it, tax the costs to meet the ends of justice.

**SOURCES:** Codes, 1880, § 2384; 1892, § 887; 1906, § 964; Hemingway's 1917, § 673; 1930, § 680; 1942, § 1591.

**Cross References** — Use of certiorari to review cases decided by justices of the peace in circuit court, see § 11-51-93.

Use of certiorari to review judgments of tribunals inferior to circuit court, see § 11-51-95.

Duty of circuit court clerk to tax costs accruing on trial before any inferior tribunal or court of case appealed to the circuit court, see § 11-53-71.

## JUDICIAL DECISIONS

### 1. In general.

Trial court did not abuse discretion in taxing costs of condemnation proceedings

against county, though recovery was less than damage allowed. *Yalobusha County v. Davis*, 148 Miss. 153, 114 So. 34 (1927).

## RESEARCH REFERENCES

**Am Jur.** 5 Am. Jur. 2d (Rev), Appellate Review §§ 849, 869 et seq.

### § 11-53-55. Cases not expressly embraced by statute or Rule.

If a case shall occur in any court not embraced expressly by statute, Mississippi Rules of Civil Procedure or Mississippi Supreme Court Rules, the court may make such order for the payment of costs by any of the parties as, in its discretion, may be proper.

**SOURCES:** Codes, 1880, § 2386; 1892, § 889; 1906, § 966; Hemingway's 1917, § 675; 1930, § 682; 1942, § 1593; Laws, 1993, ch. 452, § 2, eff from and after passage (approved March 22, 1993).

**Cross References** — Payment of costs of causes transferred from chancery court to circuit court, or vice versa, see § 11-1-41.

## JUDICIAL DECISIONS

### 1. In general.

Consolidated cases never lose their identity as separate and distinct cases for purposes of assessment of costs. The court has no authority to assess costs in one of the consolidated cases against one who was a party only in the other case. *Karenina ex rel. Vronsky v. Presley*, 526 So. 2d 518 (Miss. 1988).

On a motion to retax costs, costs of the appeal would be taxed one-half against each party where the appellant had obtained reversal of that portion of the judgment which awarded appellee punitive damages but that portion of the judgment awarding appellee actual damages had been affirmed. *Gulf Guar. Life Ins. Co. v. Kelley*, 392 So. 2d 518 (Miss. 1981).

Under the rule authorizing a court to exercise its discretion in the assessment of

costs in certain cases, the cost of appeal would be assessed one half to each party in the case where the status of the plaintiff was that of an unsuccessful appellant and a successful cross appellee although a successful but dissatisfied plaintiff below, while a defendant was a successful appellee and an unsuccessful cross appellant. *Pearce v. Ford Motor Co.*, 235 So. 2d 281 (Miss. 1970).

Where a claimant, appealing from the decision of the workmen's compensation commission to the circuit court, successfully contended that he was entitled to recover the 20 per cent penalty as provided for in Code 1942, § 6998-19 (f), but was unsuccessful as to his contention that the entire award should have been judged to be due and payable, as provided in Code 1942, § 6998-25, the court was authorized

under this section [Code 1942, § 1593] to apportion the cost between the parties. *T.C. Fuller Plywood Co. v. Moffett*, 231 Miss. 382, 95 So. 2d 475 (1957).

Where an award of appeal costs had been an authorized act of the supreme court clerk and the question of appeal costs was not brought to the attention of the court, a motion to correct a decree entered by changing award of costs so to assess the costs evenly between the parties, was not in effect a suggestion of error. *Shipman v. Lovelace*, 215 Miss. 141, 60 So. 2d 559 (1952).

Trial court did not abuse its discretion by its judgment reciting that in court's opinion plaintiff had reasonable ground to expect to recover more than \$200 from defendant and ordering that plaintiff recover full costs in action for recovery of \$225 actual damages and punitive damages for killing of milch cow and injuring three others, particularly where jury failed to award damage for injury to one cow in awarding plaintiff \$192. *Vines v. Perry*, 208 Miss. 869, 45 So. 2d 734 (1950).

On appeal of a cause by a defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for costs, since the case will be tried anew, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff enjoys the privilege of seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647 (1942).

The power to order payment of costs by either party under the section [Code 1942, § 1593] arises only where no provision has been made by law, "expressly or by fair implication," for the payment of costs. *Clarke v. Parker*, 63 Miss. 549 (1886).

The discretion given by the statute to the trial court in the matter of taxation of costs will not be interfered with. *Highland Ave. & B.R. Co. v. Robinson*, 125 Ala. 483, 28 So. 28 (Ala. 1900).

## RESEARCH REFERENCES

**ALR.** Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust. 9 A.L.R.2d 1132.

### § 11-53-57. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 33, art. 4 (2); 1857, ch. 8, art. 2; 1880, § 2387; 1892, § 890; 1906, § 967; Hemingway's 1917, § 676; 1930, § 683; 1942, § 1594]

**Editor's Note** — Former § 11-53-57 related to taxation of costs — what costs taxed.

### §§ 11-53-59 through 11-53-61. Repealed.

Repealed by Laws of 1977, ch. 408, § 2, eff from and after passage (approved March 29, 1977), and further providing that any funds previously collected under said section shall be paid to the circuit clerk of each county and utilized in accordance with the provisions of this section.

§ 11-53-59. [Codes, 1942, § 1594.5; Laws, 1962, chs. 298, 304; Laws, 1964, ch. 321; Laws, 1968, ch. 331, § 1; Laws, 1968, ch. 332, § 1; Laws, 1969 Ex Sess, ch. 21, § 1; Laws, 1971, ch. 420, § 1, eff from and after passage (approved March 23, 1971); Am 1972, ch. 442, § 1]



§ 11-53-61. [Codes, 1942, § 1594.7; Laws, 1970, ch. 338, § 1, eff from and after the first day of the next succeeding month after passage (approved March 6, 1970)]

**Editor's Note** — Former § 11-53-59 related to collection of library fee as costs in certain counties.

Former § 11-53-61 related to collection of library fees as costs in additional counties.

## § 11-53-63. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2383; 1892, § 891; 1906, § 968; Hemingway's 1917, § 677; 1930, § 684; 1942, § 1595]

**Editor's Note** — Former § 11-53-61 related to retaxation of costs.

## § 11-53-65. Bill of costs made and filed.

When a cause shall be determined, the clerk of the court, and the justice of the peace in cases had before him, shall tax the costs of the case and make out a bill thereof, specifying therein each section of the law, and each paragraph or subdivision of section, if any, by virtue of which each fee or item of costs therein is charged or taxed, and he shall file the same with the papers in the cause.

**SOURCES:** Codes, 1857, ch. 8, art. 3; 1880, § 2388; 1892, § 892; 1906, § 969; Hemingway's 1917, § 678; 1930, § 685; 1942, § 1596.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Duty of circuit court clerk to deliver to clerk of the board of supervisors certified list of allowances made by court, payable out of county treasury, see § 9-7-129.

Duty of justice of peace to give itemized receipt to any person paying fees or costs, see § 9-11-21.

Preparation by clerk of supreme court of fee-bill of fees adjudged against state, see § 25-7-7.

Duty of district attorney to pass on all accounts of public nature before they are allowed by circuit court, see § 25-31-15.

## JUDICIAL DECISIONS

### 1. In general.

Where the clerk's cost bill was not properly itemized, was apparently excessive for the reason that nearly 40 witness subpoenas were improperly copied into the record, and the court reporter's cost bill did not contain a certificate of a number of words transcribed, appellant was

granted leave to file a motion to retax costs. *Conn v. State*, 231 Miss. 835, 97 So. 2d 923 (1957).

Where a chancery clerk in preparing his certified statement of transcript fees stated the rate charged and the total sum for preparing the transcript, but failed to disclose the number of the words in the

transcript, the certificate was null and void. *Superior Oil Co. v. Foote*, 216 Miss. 728, 65 So. 2d 453 (1953).

Until this section [Code 1942, § 1596] is complied with, no taxation of costs has been made, as respects right to retaxation thereof. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607 (1937).

Compliance with statute (Code 1942, § 1597), providing that fees and costs shall not be payable until person chargeable has been presented with a bill containing the particulars of such fees signed by the clerk or officer is dependent upon a taxation of costs in accordance with section of statute requiring taxation of costs and preparation of a bill thereof, specifying

ing the section of law by virtue of which each fee is charged. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607 (1937).

Taxation of costs by clerk of supreme court based upon trial court's certificate which stated aggregate amount of fees for making transcript and for other services rather than itemizing the account to show amount of fee for transcript would be set aside except in so far as it taxed fees due clerk of supreme court, but with permission granted to clerk of trial court to file a proper certificate and without prejudice to appellant to move for retaxation of costs. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607 (1937).

### RESEARCH REFERENCES

**Am Jur.** 20 *Am. Jur. 2d (Rev), Costs* § 89.

**CJS.** 20 *C.J.S., Costs* §§ 163-165.

Taxation of costs, 7 *Am. Jur. Pl & Pr Forms (Rev), Costs, Forms* 91-109.

### § 11-53-67. Fees not payable until bill produced.

Fees and costs shall not be payable by any person until there be produced to the person chargeable with the same a bill, or account in writing, containing the particulars of such fees, signed by the clerk or officer, in which shall be intelligently expressed and specified each section of the law, and, if any, each paragraph or subdivision of section by virtue of which each fee is charged. If any fee shall be paid without the production of such bill, the party paying the same shall at all times be entitled to demand and have from the officer receiving the same a copy of such bill without charge.

**SOURCES:** *Codes*, *Hutchinson's* 1848, ch. 33, art. 4 (4); 1857, ch. 8, art. 3; 1880, § 2389; 1892, § 893; 1906, § 970; *Hemingway's* 1917, § 679; 1930, § 686; 1942, § 1597.

### JUDICIAL DECISIONS

#### 1. In general.

Where a chancery clerk in preparing his certified statement of transcript fees stated the rate charged and the total sum for preparing the transcript, but failed to disclose the number of the words in the transcript, the certificate was null and void. *Superior Oil Co. v. Foote*, 216 Miss. 728, 65 So. 2d 453 (1953).

This section [Code 1942, § 1597] is inapplicable to require sheriff's claim presented to county board of supervisors for services required of the sheriff by board of supervisors for which no fees were fixed and for executing decrees, judgments, orders of process of the supreme court, chancery courts, or board of supervisors, to contain detailed itemization of the partic-

ular instances of such services. Board of Supvrs. v. Jones, 199 Miss. 373, 24 So. 2d 844 (1946).

Compliance with this section [Code 1942, § 1597] is dependent upon a taxation of costs in accordance with Code 1942, § 1596. McDonald v. Spence, 179 Miss. 348, 176 So. 607 (1937).

Taxation of costs by clerk of supreme court based on trial court's certificate of

aggregate amount of fees for transcript and other services rather than itemized account showing fee for transcript, set aside, except as to fees due clerk of supreme court, with permission to clerk of trial court to file a proper certificate, and without prejudice to appellant's moving for retaxation of costs. McDonald v. Spence, 179 Miss. 348, 176 So. 607 (1937).

## RESEARCH REFERENCES

CJS. 20 C.J.S., Costs § 224.

### § 11-53-69. Costs not due until suit ended.

The costs accruing upon suits in any court shall not be due until the final determination thereof, and may then be collected by execution; but the judges shall have power to order and adjudge costs and give decrees and judgments thereon in the progress of suits, as heretofore practised in said courts.

**SOURCES:** Codes, 1857, ch. 8, art. 8; 1880, § 2392; 1892, § 894; 1906, § 971; Hemingway's 1917, § 680; 1930, § 687; 1942, § 1598.

**Cross References** — Duty of circuit court clerk to issue execution, after adjournment of every term, for all fines, penalties, and forfeitures assessed by court and remaining due and unpaid, see §§ 11-7-217, 99-19-65.

Liability of clerks, sheriffs, and other officers for neglect of duty in respect to executions for fines, penalties, and forfeitures, see §§ 11-7-221, 99-19-69.

Provision for additional costs to create court education and training fund, see §§ 37-26-1 et seq.

## JUDICIAL DECISIONS

### 1. In general.

No authority is conferred by this section [Code 1942, § 1598] to require a defendant to post security for costs. Martin v. McGraw, 249 Miss. 334, 161 So. 2d 784 (1964), motion denied, 249 Miss. 351, 163 So. 2d 231 (1964).

No authority for requiring a defendant to pay a filing fee as a condition for receiving a defensive pleading is conferred by this section [Code 1942, § 1598]. Martin v. McGraw, 249 Miss. 334, 161 So. 2d 784 (1964), motion denied, 249 Miss. 351, 163 So. 2d 231 (1964).

Where a law authorizes a party recovering costs to file the certificates of his

witnesses, the fees of whom he has paid, and have the same included in an execution for costs, this does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforceable by suit. Hall v. Moore, 70 Miss. 75, 11 So. 655 (1892).

One at whose instance an execution for costs is issued, having by agreement with the officers of the court control of the execution, stands, as the officers would, in the attitude of a public trustee and cannot use the process for oppression or speculation. Hall v. Moore, 70 Miss. 75, 11 So. 655 (1892).



# RESEARCH REFERENCES

CJS. 20 C.J.S., Costs § 224.

## § 11-53-71. Taxation of costs in cases from justices of the peace.

The clerk of the circuit court is required to tax in the bill of costs, after final judgment, all the costs that accrued on the trial before a justice of the peace, or before any other inferior tribunal or court, in all cases carried to the circuit court by appeal or by certiorari, and include the same in the execution issued for the costs accruing in the case in the circuit court.

**SOURCES:** Codes, 1880, § 2659; 1892, § 895; 1906, § 972; Hemingway's 1917, § 681; 1930, § 688; 1942, § 1599.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Appeals from judgments of justices rendered in cases of unlawful entry and detainer, see § 11-51-83.

Appeals from judgments of justices of the peace in civil cases, see § 11-51-85.

Trial of cases on appeal from justice of the peace court to circuit court, see § 11-51-91.

Imposition of costs in cases of appeal from judgments of justices of the peace, see § 11-53-51.

Imposition of costs in cases of certiorari and appeals from certain inferior tribunals, see § 11-53-53.

Appeals from judgments of certain inferior courts in criminal cases, see §§ 99-35-1 et seq.

# RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d (Rev), Costs §§ 87 et seq. **CJS.** 20 C.J.S., Costs §§ 156 et seq.

Taxation of costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 91-109.

## § 11-53-73. Execution for costs.

It shall be lawful for the clerks of the several courts, when suits or causes are determined and the fees not paid by the party from whom they are due, to make out executions, directed to the sheriff or other proper officer of the county where the party resides; and the sheriff or other officer shall execute and return such execution as in other cases.

**SOURCES:** Codes, Hutchinson's 1848, ch. 33, art. 4 (5); 1857, ch. 8, art. 5; 1880, § 2390; 1892, § 896; 1906, § 973; Hemingway's 1917, § 682; 1930, § 689; 1942, § 1600.

**Cross References** — Another section derived from same 1942 code section, see § 11-53-75.

Time within which executions on judgments and decrees shall be issued, see § 13-3-111.

Issuance and return of executions generally, see § 13-3-113.

## JUDICIAL DECISIONS

### 1. In general.

Sales under execution issued to satisfy costs taxed against surety on appeal bond is void, where execution was issued and

levy made in one county, and surety lived in another. *Griffin v. Hickman*, 92 Miss. 266, 46 So. 73 (1908).

## RESEARCH REFERENCES

**Am Jur.** 20 *Am. Jur. 2d (Rev)*, Costs §§ 87, 92, 93.

**CJS.** 20 *C.J.S.*, Costs §§ 233-236.

### § 11-53-75. Bill of costs appended to execution.

On all executions in which any costs are included, there shall be entered thereon or annexed a copy of the bill of costs, specifying the particular items thereof, in intelligible words and figures, and each section of the law, and, if any, each paragraph or subdivision of section by virtue of which each item therein is charged; and all such executions issuing without the copy of such bill of costs shall be illegal, and the sheriff or other officer shall not execute the same. The sheriff or other officer receiving the same shall add thereto, in like manner, his fees, including all additional fees and costs, and shall make out a fair copy of the same and deliver it, on demand, to the person from whom he receives the money or out of whose property he makes the same.

**SOURCES:** *Codes*, *Hutchinson's* 1848, ch. 33, art. 4 (5); 1857, ch. 8, art. 5, 6; 1880, §§ 2390, 2391; 1892, §§ 896, 897; 1906, §§ 973, 974; *Hemingway's* 1917, §§ 682, 683; 1930, §§ 689, 690; 1942, §§ 1600, 1601.

**Cross References** — Another section derived from same 1942 code section, see § 11-53-73.

## JUDICIAL DECISIONS

### 1. In general.

Execution for costs accruing in criminal case held quashable on motion, where execution contained no itemized bill for costs specifying sections of law by virtue of which items were charged. *Riley v. State*, 175 Miss. 831, 168 So. 475 (1936).

Execution sale of land without having bill of costs attached thereto is void, and may be quashed on motion. *Wilkinson v. Hutto*, 157 Miss. 358, 128 So. 93 (1930).

No costs can be collected under execution not having statement of costs at-

tached. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773 (1929).

Failure to annex to execution copy of bill of costs does not render execution void in so far as it commands collection of principal of judgment. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773 (1929).

Judgment against claimant of property levied on and sureties for costs accrued in justice court proceedings held erroneous, where copy of bill of costs was not annexed to execution. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773 (1929).

# RESEARCH REFERENCES

**ALR.** Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

**Am Jur.** 20 Am. Jur. 2d, Costs §§ 87, 89, 93.

**CJS.** 20 C.J.S., Costs §§ 163-165, 233-236.

## § 11-53-77. Combining orders and decrees to save costs.

It shall be the duty of the judges of the several courts to require the clerks to combine in one judgment or decree as many interlocutory or other orders as can be lawfully and conveniently done, with a view to prevent the increase of costs, and, on application of any party, to correct any incorrect bill of costs as charged and made out by a clerk.

**SOURCES:** Codes, 1857, ch. 8, art. 10; 1880, § 2393; 1892, § 898; 1906, § 975; Hemingway's 1917, § 684; 1930, § 691; 1942, § 1602.

## § 11-53-79. Table of fees to be posted conspicuously.

It shall be the duty of the clerks of the circuit and chancery courts, and of the sheriff, to post in a conspicuous place in his office, and each justice of the peace at his place of holding court, a copy of the bill of fees which he is entitled to receive, and on failure to do so he shall not be entitled to receive or collect any fee for any service rendered during the time of such failure.

**SOURCES:** Codes, 1857, ch. 8, art. 11; 1880, § 2394; 1892, § 899; 1906, § 976; Hemingway's 1917, § 685; 1930, § 692; 1942, § 1603.

**Editor's Note** — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Fees chargeable by chancery court clerks, see § 25-7-9.

Fees chargeable by circuit court clerks, see § 25-7-13.

Fees chargeable by sheriffs, see § 25-7-19.

Fees chargeable by justices of the peaces, see § 25-7-25.

## § 11-53-81. Recovery of attorney's fees in suit on open account.

When any person fails to pay an open account within thirty (30) days after receipt of written demand therefor correctly setting forth the amount owed and an itemized statement of the account in support thereof, that person shall be liable for reasonable attorney's fees to be set by the judge for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the plaintiff. Evidence of receipt of written demand by the spouse of the debtor when they are living together as husband and wife on behalf of the debtor may be introduced as evidence of written demand on the debtor. If that person sued on the open account shall prevail in the suit, he shall be entitled to reasonable attorney's fees to be set by the judge.



If delivery of written demand on the debtor is attempted, but not accomplished because circumstances made delivery of written demand impossible, a notation, on the envelope containing the written demand, made by the person attempting delivery stating the date of the attempted delivery, the reasons why delivery could not be accomplished along with the initials of the person attempting delivery and making said notation may be introduced as evidence of written demand on the debtor, and if the judge in his discretion finds that sufficient evidence of due diligence in delivery of written demand has been made, he may make a conclusion of written demand for purposes of justice and find that there has been written demand on the debtor.

**SOURCES:** Laws, 1980, ch 443, eff from and after July 1, 1980.

**Cross References** — Office confession of judgment on debt, see § 11-7-181.

When statute of limitation commences to run on open account, see §§ 15-1-21 and 15-1-31.

## JUDICIAL DECISIONS

1. In general.
2. "Prevailing plaintiff".
3. Counterclaims.
4. Difference between demand letter and complaint.

### 1. In general.

Miss. Code Ann. § 11-53-81 does not mandate that a demand letter and a complaint list the same amount; rather, just a correct amount is required. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So. 2d 974 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 341 (Miss. 2008).

Because a contractor ratified the course of conduct by paying on account for items purchased from a supply company on delivery tickets that were not signed by himself or his employees, the defense without merit under Miss. Code Ann. § 75-2-204(1); because the record contained overwhelming evidence of an obligation owed by the contractor to the supply company for goods delivered on signed and unsigned delivery tickets, entry of judgment notwithstanding the verdict in favor of the supply company was proper, but there was evidence to suggest that mistakes in the invoices were made, and a new trial on the issue of damages alone was ordered. *Natchez Elec. & Supply Co. v. Johnson*, 968 So. 2d 358 (Miss. 2007).

Attorney fees are not available under Miss. Code Ann. § 11-53-81 when the

claim is based on contract, and therefore in a case that originally sought to recover on an open account, there was no entitlement to attorney fees under § 11-53-81 because this issue was resolved in a pre-trial motion to dismiss and/or summary judgment; thereafter, the claims proceeded on contract. *H & E Equip. Servs., LLC v. Floyd*, 959 So. 2d 578 (Miss. Ct. App. 2007).

Court of appeals erred in reversing a jury's finding in favor of a contractor in an open account case filed by an electrical equipment supplier and granting a JNOV to the supplier; the contractor's defense was that the invoices were, inter alia, inaccurate and that overbilling was commonplace and the fact that the supplier had already credited the contractor \$19,025 due to billing errors and fired one of its employees because of the errors, carried weight with the jury. *Natchez Elec. & Supply Co. v. Johnson*, — So. 2d —, 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007), opinion withdrawn by, substituted opinion at, remanded by 968 So. 2d 358, 2007 Miss. LEXIS 512, 63 U.C.C. Rep. Serv. 2d (CBC) 930 (Miss. 2007).

In a dispute over the sale of certain tractors, the lower court ruled that it was an action on an open account, but despite some apparent past dealings between the parties, nothing in the record indicated that the transaction was predicated upon

defendant's credit or an advance agreement to allow purchases on credit. The action was more properly characterized as an action in contract and the trial court's ruling and the judgment regarding attorney's fees were in error; a new trial was necessary to determine the terms of the contract, whether the parties mutually assented to the terms of the contract, and whether there was a breach of the contract. *Mauldin Co. v. Lee Tractor Co.*, 920 So. 2d 513 (Miss. Ct. App. 2006).

Circuit court did not err in awarding attorney fees to plaintiff who prevailed in the action for an open account and established evidence of reasonable attorney fees. *Prime Rx, LLC v. McKendree, Inc.*, 917 So. 2d 791 (Miss. 2005).

There was nothing to warrant a departure from the rule that accounts established by medical providers for services provided to their patients were open accounts within the purview of Miss. Code Ann. § 11-53-81, and attorney fees were allowable; moreover, pursuant to the default judgments, *res judicata* was applicable with regard to the questions regarding the open account procedure because the debtors did not allege they were improperly served or that jurisdiction was improper in the justice court, and they did not dispute that the debt was actually owed. *Franklin Collection Serv. v. Stewart*, 863 So. 2d 925 (Miss. 2003).

An award of attorney's fees was appropriate under § 11-53-81 where the debtor did not satisfy its account in full with the creditor before the action on open account was heard on its merits by the trial court, the debtor did not pay the creditor the amount of accrued interest it owed despite notice from the creditor that it had not paid the full amount owed, and the creditor received a judgment against the debtor for the amount of its claim against the debtor that had yet to be satisfied. *Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977 (Miss. 1992).

Plaintiff is not entitled to attorneys' fees under § 11-53-81 where its claim against defendant is based on contract rather than open account. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Claimant under contractor's bond is not entitled to attorney's fees, notwithstand-

ing that claimant might be entitled to such fees under § 11-53-81 in action on open account against defaulting contractor, since claimant on contract surety bond is not entitled to recover attorney's fees unless statute or contract with surety so requires, and in instant case surety's bond does not require payment of attorney's fees and no such payment is required by § 85-7-185, which governs instant bond pertaining to contract between private parties. *Kimberly-Clark Corp. v. Alpha Bldg. Co.*, 591 F. Supp. 198 (N.D. Miss. 1984).

In an action by a creditor on an open account, the creditor was not a prevailing party within the meaning of § 11-53-81, and therefore could not recover attorney's fees under the statute, where it recovered no more than the debtor had unqualifiedly offered to pay without suit. Also, the debtor was not a prevailing party within the meaning of the statute even though it conceded prior to and during trial that it owed the sum actually recovered by the creditor where it made no efforts to either pay the sum, tender it into court, or make an offer of judgment under Rule 68, Miss. R. Civ. P. *Rainbow Rental & Fishing Tools, Inc. v. Delta Underground Storage, Inc.*, 542 So. 2d 258 (Miss. 1989).

Judgment must be rendered in favor of defendant and against plaintiff to constitute defendant as prevailing party entitled to award of attorney fees under § 11-53-81. *Hughes Equip. Co. v. Fife*, 482 So. 2d 1144 (Miss. 1986).

Attorney fees are not available under § 11-53-81 unless written demand is made upon debtor by means of demand letter 30 days prior to filing suit; notice and demand in form of complaint or lawsuit does not suffice. *Putt v. Ray Sewell Co.*, 481 So. 2d 785 (Miss. 1985).

Claim by subcontractor against prime contractor based upon work for which no agreement has been made in advance as to price does not qualify as open account upon which attorney fees and prejudgment interest might be based. *Stanton & Assocs. v. Bryant Constr. Co.*, 464 So. 2d 499 (Miss. 1985).

Attorney fees were not recoverable under § 11-53-81, where an account was paid in full before trial and no judgment

was ever rendered on the once-delinquent account. *Magnolia Farm Servs., Inc. v. Tunica Oil Co.*, 438 So. 2d 285 (Miss. 1983).

## 2. "Prevailing plaintiff".

Attorney was not entitled to the costs of collection under Miss. Code Ann. § 11-53-81 because the judgment was partially in favor of both parties, and the attorney was not entitled to attorney's fees for collecting the debt. *Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert*, 991 So. 2d 1209 (Miss. 2008).

Award of attorney fees was not proper because both parties partially prevailed in the case. Thus, neither party was a "prevailing plaintiff" within the meaning of Miss. Code Ann. § 11-53-81. *Natchez Elec. & Supply Co. v. Johnson*, 968 So. 2d 444 (Miss. Ct. App. 2006), reversed by 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

## 3. Counterclaims.

Where the defendant prevailed on the plaintiff's claims and where a judgment

was rendered in favor of the defendant on its counterclaim for a debt on an open account after a demand for payment was made prior to filing its counterclaim, the defendant was the prevailing party and attorney fees were properly awarded. *Par Indus. v. Target Container Co.*, 708 So. 2d 44 (Miss. 1998).

## 4. Difference between demand letter and complaint.

Creditor complied with Miss. Code Ann. § 11-53-81, even though a different amount was stated in a demand letter and a complaint; although a strict construction of § 11-53-81 was required, there was nothing mandating that the same amount be stated in both, so long as the correct amount was set forth. This was in conformity with case law from Louisiana relating to La. Rev. Stat. Ann. § 9:2781, which was considered persuasive authority. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So. 2d 974 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 341 (Miss. 2008).

# ATTORNEY GENERAL OPINIONS

Section 11-53-81 provides for reasonable attorneys fees to be awarded in the discretion of the judge. Also attorneys fees

may be provided for by contract. *Peterson*, October 11, 1996, A.G. Op. #96-0698.

# RESEARCH REFERENCES

**ALR.** Amount of attorneys' fees in matters involving commercial and general business activities. 58 A.L.R.3d 1327.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 USC § 2000e-5(k)). 140 A.L.R. Fed. 301.

**Am Jur.** 1 Am. Jur. 2d (Rev), Accounts and Accounting §§ 8-20.

Complaint for balance due on open account, 1 Am. Jur. Pl & Pr Forms (Rev), Accounts and Accounting, Forms 21, 23, 25, 26.

Demand for payment of account, 1 Am. Jur. Legal Forms 2d, Accounts and Accounting § 6:13.

**CJS.** 1 C.J.S., Accounts, Actions on §§ 2-41.

**Law Reviews.** 1983 Mississippi Supreme Court Review: Attorneys' fee in suit on open account. 54 Miss L. J. 103, March, 1984.

Dunn, Construction Contract Claims and Litigation — Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.



## CHAPTER 55

### Litigation Accountability Act of 1988

SEC.

- |           |                                                                                                                                                        |
|-----------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| 11-55-1.  | Title.                                                                                                                                                 |
| 11-55-3.  | Definitions.                                                                                                                                           |
| 11-55-5.  | Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings. |
| 11-55-7.  | Award of costs and attorney's fees; amount of award; factors to consider.                                                                              |
| 11-55-9.  | Limitations of chapter.                                                                                                                                |
| 11-55-11. | Application of chapter.                                                                                                                                |
| 11-55-13. | Severability.                                                                                                                                          |
| 11-55-15. | Actions to which chapter applies.                                                                                                                      |

#### § 11-55-1. Title.

This chapter may be cited as the "Litigation Accountability Act of 1988."

**SOURCES:** Laws, 1988, ch. 495, § 1, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

#### JUDICIAL DECISIONS

1. In general.
2. Paternity.

##### 1. In general.

Mississippi Supreme Court considered and ruled upon the issues of personal jurisdiction and sufficient service of process such that the Tennessee courts found that the Mississippi circuit court had subject matter jurisdiction to award appellee attorney's fees and expenses against the Tennessee attorney under Miss. Code Ann. § 11-55-1; the attorney's appeal was barred under res judicata and the enrollment of the Mississippi judgment against the attorney was affirmed and the Mississippi judgments afforded full faith and credit in Tennessee. *First State Bank v. Wyssbrod*, 124 S.W.3d 566 (Tenn. Ct. App. 2003).

Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 through 11-55-15 (2002), allows only a court, not an administrative board, to award attorneys' fees. *Miss. Emp. Sec. Comm'n v. Culbertson*, 832 So. 2d 519 (Miss. 2002).

State employer's failure to follow state personnel board rules regarding promo-

tions entitled employees to promotions and back pay; but only the reviewing court, not the Employee Appeals Board, had the authority to award the employees their attorneys' fees. *Miss. Emp. Sec. Comm'n v. Culbertson*, 832 So. 2d 519 (Miss. 2002).

Grandson's claim that his uncle should be required to return the proceeds of three certificates of deposit his grandmother had obtained in her name and the uncle's name, jointly, to the grandmother's estate, because of the uncle's undue influence over the grandmother, without offering any proof of a confidential relationship between the uncle and the grandmother, subjected the grandson, and his attorney, to the assessment of the uncle's attorney's fees and costs. *Foster v. Ross*, 804 So. 2d 1018 (Miss. 2002).

The adoption of Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which

provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

## 2. Paternity.

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litiga-

tion Accountability Act, Miss. Rev. Code § 11-55-1 et seq., because the father's claim for custody was not frivolous. He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. *Adcock v. Van Norman*, 918 So. 2d 747 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

## RESEARCH REFERENCES

**ALR.** Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

When statute of limitations begins to run upon action against attorney for legal malpractice — deliberate wrongful acts or omissions. 67 A.L.R.5th 587.

**Law Reviews.** Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

## § 11-55-3. Definitions.

The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) "Without substantial justification," when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court.

(b) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company or any other entity, including any governmental entity or unincorporated association of persons.

(c) "Action" means a civil action that contains one or more claims for relief, defense or an appeal of such civil action. For the purposes of this chapter only, an "action" also means any separate count, claim, defense or request for relief contained in any such civil action.

**SOURCES:** Laws, 1988, ch. 495, § 2, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## JUDICIAL DECISIONS

1. In general.
2. "Frivolous."

### 1. In general.

Evidence supported the chancellor's

findings that the claims concerning the dissemination of the daughter's medical records and custody claims were without substantial justification; therefore, the attorney was liable for sanctions under the

Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

Where a party in a divorce proceeding had substantial justification in presenting a motion for modification, the chancellor erred in imposing sanctions upon his attorney. Norton v. Norton, 742 So. 2d 126 (Miss. 1999).

A chancellor erred in assessing sanctions against a plaintiff and his attorney based upon a finding that they had brought their action for trespass to real property "without substantial justification" since it could not be said that they had "no hope of success," even though the action was effectively barred by a judgment in a separate action declaring the plaintiff to have no legally cognizable interest in the subject property, where the plaintiff and his attorney had "hope," which proved to be well-founded, that the Supreme Court would remove the bar by reversing the prior judgment, the plaintiff's claim was clearly not "groundless in fact or in law" as he would be entitled to prevail if the allegations in his complaint were proven, and there was no allegation that the action was filed for purposes of vexation. Smith v. Malouf, 597 So. 2d 1299 (Miss. 1992).

## 2. "Frivolous."

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. Knight v. Covington County, 27 So. 3d 1163 (Miss. Ct. App. Apr. 21, 2009), writ of certiorari dismissed by 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

Because a father was aware of a son's statute of limitation's defense and the father proceeded with his action on a promissory note even though he had no hope of success, a trial court did not abuse its discretion in determining that the suit was frivolous and without substantial justification under Miss. Code Ann. §§ 11-55-5(1) and 11-55-3(a). Accordingly, the trial

court could impose sanctions in the form of attorneys' fees and expenses against the father. Merideth v. Merideth, 987 So. 2d 477 (Miss. Ct. App. 2008).

Sanctions against plaintiffs were not warranted where, based on the background of the case and including its long history of transfers and the period of time allowed by the multi-district court for discovery, plaintiffs did not delay the litigation for the purpose of harassment; the grounds for the dismissal of claims were based on a recent clarification of the law in Mississippi regarding joinder pursuant to Miss. R. Civ. P. 20. Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove, 965 So. 2d 1041 (Miss. 2007).

Where a chancery court had already issued an order regarding the disposition of insurance funds, a subsequent lawsuit over the same issue involving the same parties was barred by the doctrine of collateral estoppel; since a subsequent claim arising from the same issue had no hope of success, sanctions were properly awarded. Richardson v. Audubon Ins. Co., 948 So. 2d 445 (Miss. Ct. App. 2006).

Appellate court affirmed a grant of summary judgment in favor of defendants as plaintiff had admitted it had no contract with a group of property owners to auction their property, but defendants' request for attorney fees under Miss. Code Ann. § 11-55-5(1) was denied as the court could not state that plaintiff's claim was substantially without justification as defined by Miss. Code Ann. § 11-55-3. John Mazingo Real Estate & Auction, Inc. v. Nat'l Auction Group, Inc., 925 So. 2d 141 (Miss. Ct. App. 2006).

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant to Miss. Rev. Code §§ 11-55-5(1) and 11-55-3(a). He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. Adcock v. Van Norman, 918 So. 2d 747 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).



## RESEARCH REFERENCES

**ALR.** Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution. 87 A.L.R.3d 554.

Civil liability of attorney for abuse of process. 97 A.L.R.3d 688.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

**§ 11-55-5. Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.**

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(2) No attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.

(4) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that such party's action, claim or defense or any part of it was without substantial justification.

**SOURCES:** Laws, 1988, ch. 495, § 3, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## JUDICIAL DECISIONS

1. In general.
2. Attorneys' fees awarded excessive.
3. Payment of attorneys' fees awarded.
5. Payment of attorneys' fees denied.
4. Attorneys' fees awarded not excessive.

**1. In general.**

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. *Prewitt v. City of Oxford*, 44 So. 3d 922 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 274 (Miss. June 3, 2010), writ of certiorari denied by 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224, 79 U.S.L.W. 3201 (U.S. 2010).

Violations under the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) had to be brought in motion form; thus, the Legislature did not create a separate cause of action by virtue of Miss. R. Civ. P. 11, and the doctor's claim against the attorney was properly dismissed; the attorney did not act in manner that was improper or would warrant sanctions. *Rose v. Tullos*, 994 So. 2d 734 (Miss. 2008).

Chancellor committed plain error and therefore abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record; there was nothing in the Litigation Accountability Act (Act) or Miss. R. Civ. P. 11 which supported awarding attorneys' fees and expenses in excess of those actually incurred as both the Act and the Rule allowed only for the recovery of "reason-

able" fees and costs; the punitive functions of both the Act and the Rule were served by simply awarding reasonable attorneys' fees and costs, not an amount in excess of them. In *re Spencer*, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Sanctions against plaintiffs were not warranted where, based on the background of the case and including its long history of transfers and the period of time allowed by the multi-district court for discovery, plaintiffs did not delay the litigation for the purpose of harassment; the grounds for the dismissal of claims were based on a recent clarification of the law in Mississippi regarding joinder pursuant to Miss. R. Civ. P. 20. *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove*, 965 So. 2d 1041 (Miss. 2007).

Trial court had the authority to award the employees attorney fees pursuant to the Litigation Accountability Act of 1988 after they established that the State personnel agency passed them over for promotions they would have received had the State personnel followed its manual of policies, procedures, and rules in awarding promotions and not engaged in favoritism or bias in filling its own employment openings. *Miss. Empl. Sec. Comm'n v. Culbertson*, — So. 2d —, 2002 Miss. LEXIS 48 (Miss. Feb. 21, 2002), opinion withdrawn by, substituted opinion at, remanded by 2002 Miss. LEXIS 428 (Miss. Dec. 12, 2002).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit that sought to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth its reasons for awarding sanctions. *Miss. Dep't of Human Servs. v. Shelby*, — So. 2d —, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), opinion withdrawn by, substituted opinion at 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Although third trial resulted in directed verdict for insured, there was no evidence

that insurer had prolonged the proceedings, as required to support insured's claim for attorney fees; insurer won both times that case was submitted to jury. *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171 (Miss. 1997).

In determining whether claim is frivolous for purposes of Litigation Accountability Act, warranting award of attorney fees, court looks to definition of "frivolous" found in *Miss. R. Civ. P. 11*. *Scruggs v. Saterfiel*, 693 So. 2d 924 (Miss. 1997).

In reviewing decision regarding the imposition of sanctions pursuant to Litigation Accountability Act, appellate court is limited to consideration of whether trial court abused its discretion. *Scruggs v. Saterfiel*, 693 So. 2d 924 (Miss. 1997).

Unsuccessful action in which child and aunt acting as child's guardian sought to obtain visitation with child's half brother, who was living with his father, was not frivolous for purposes of Litigation Accountability Act, and thus did not warrant attorney fee award; objectively speaking, it could not be said that motion, which concerned issue of first impression in state, was without hope of success. *Scruggs v. Saterfiel*, 693 So. 2d 924 (Miss. 1997).

In buyer's breach of contract action, in which contract itself did not provide for recovery of attorney fees, trial court was justified in refusing to require seller to pay buyer's attorney fees under Litigation Accountability Act; seller mounted articulate, cogent defense as to whether it was liable for cost of cover, and seller had already been required to pay buyer attorney fees incurred in bankruptcy proceeding in which seller sought to forestall instant litigation. *Terex Corp. v. Ingalls Shipbuilding, Inc.*, 671 So. 2d 1316 (Miss. 1996).

An award of attorney's fees and costs against a will contestant pursuant to Rule 11, *Miss. R. Civ. P.* and the Litigation Accountability Act would be reversed where there was a presumption of undue influence by the testator's daughter and suspicious circumstances surrounding the execution of the will, which justified the filing of the complaint and gave the contestant some "hope of success." *Pallatin v. Jones*, 638 So. 2d 493 (Miss. 1994).

The adoption of Rule 11, *Miss. R. Civ. Proc.*, which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

By stating that the court shall specifically set forth the reasons for awarding attorney's fees and costs and enumerating factors to be considered by the court when making such an award, § 11-55-7 augments Rule 11, *Miss. R. Civ. Proc.*, which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, and § 11-55-5, which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

A petitioner's action for a writ of mandamus compelling a county board of education to adopt a resolution requesting the board of supervisors to create single member districts was not without substantial justification, and therefore the trial court did not err in declining to award attorney's fees to the school board under the Litigation Accountability Act (§§ 11-55-1 et seq.), even though the petitioner did not make an effort to dismiss the action when he learned that his claim was moot though the board of education suggested that he do so, where there was no evidence that the action was prosecuted in bad faith or for an improper purpose, there were no issues of fact determinative of the validity of the claim in conflict at the time of the first hearing, and there was no prevailing party since the petitioner's claim became moot via action of the school board following the first hearing. *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731 (Miss. 1992).

A chancellor erred in assessing sanctions against a plaintiff and his attorney



based upon a finding that they had brought their action for trespass to real property “without substantial justification” since it could not be said that they had “no hope of success,” even though the action was effectively barred by a judgment in a separate action declaring the plaintiff to have no legally cognizable interest in the subject property, where the plaintiff and his attorney had “hope,” which proved to be well-founded, that the Supreme Court would remove the bar by reversing the prior judgment, the plaintiff’s claim was clearly not “groundless in fact or in law” as he would be entitled to prevail if the allegations in his complaint were proven, and there was no allegation that the action was filed for purposes of vexation. *Smith v. Malouf*, 597 So. 2d 1299 (Miss. 1992).

## **2. Attorneys’ fees awarded excessive.**

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the *Litigation Accountability Act*, Miss. Code Ann. §§ 11-55-1 et seq., or Miss. R. Civ. P. 11 which supported awarding attorneys’ fees and expenses in excess of those actually incurred. In *re Spencer*, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

## **3. Payment of attorneys’ fees awarded.**

Decision to impose sanctions under Miss. R. Civ. P. 45(f) and Miss. Code Ann. § 11-55-5(1), including an award of attorney’s fees, against creditors was consistent with the decision that the garnishment was unreasonable as a result of the considerable evidence that creditors knew or should have known prior to filing for garnishment of the good efforts debtors made with regard to making the payment at issue. *Deliman v. Anthony Clarke Thomas & Act Envtl., Inc.*, 16 So. 3d 721 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 415 (Miss. 2009).

Where plaintiff’s counsel commenced a personal injury suit against defendant railroad company one year and eight

months after plaintiff’s demise, the lawsuit amounted to a nullity; because the railroad company had a complete defense based upon the death of plaintiff some 20 months earlier, the lawsuit was frivolous, and an award of attorney fees was proper under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5. *Ill. Cent. R.R. Co. v. Broussard*, — So. 2d —, 2008 Miss. App. LEXIS 589 (Miss. Ct. App. Sept. 30, 2008), opinion withdrawn by, substituted opinion at 19 So. 3d 821, 2009 Miss. App. LEXIS 745 (Miss. Ct. App. 2009).

Because a father was aware of a son’s statute of limitation’s defense and the father proceeded with his action on a promissory note even though he had no hope of success, a trial court did not abuse its discretion in determining that the suit was frivolous and without substantial justification under Miss. Code Ann. §§ 11-55-5(1) and 11-55-3(a). Accordingly, the trial court could impose sanctions in the form of attorneys’ fees and expenses against the father. *Merideth v. Merideth*, 987 So. 2d 477 (Miss. Ct. App. 2008).

Evidence supported the chancellor’s findings that the claims concerning the dissemination of the daughter’s medical records and custody claims were without substantial justification; therefore, the attorney was liable for sanctions under the *Litigation Accountability Act*, Miss. Code Ann. §§ 11-55-1 et seq. In *re Spencer*, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

Award of attorneys’ fees based upon a quantum meruit claim in favor of the subcontractor was proper because the contractor delayed paying the subcontractor the remaining balance on its contract for no apparent reason. The contractor knew that the subcontractor was entitled to the money, but withheld the money and continued to do so; further, the contractor solicited and secured the subcontractor’s efforts to persuade the agency to release the retainage, inducing the subcontractor to believe that it would get its money when in fact the contractor had already assigned the entire retainage to its bank. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495 (Miss. 2007).

Where a chancery court had already issued an order regarding the disposition of insurance funds, a subsequent lawsuit over the same issue involving the same parties was barred by the doctrine of collateral estoppel; since a subsequent claim arising from the same issue had no hope of success, sanctions were properly awarded. *Richardson v. Audubon Ins. Co.*, 948 So. 2d 445 (Miss. Ct. App. 2006).

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 to 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. In re Estate of Ladner v. Ladner, 909 So. 2d 1051 (Miss. — 2004).

Attorney fees were properly awarded against a pro se litigant in an action by him against a judge, where the judge's attorney wrote to him advising that his cause of action lacked merit, advising him of the Litigation Accountability Act of 1988, requesting that he seek legal counsel, and stating that, if he pursued the complaint, an award of attorney's fees would be sought. *Wheeler v. Stewart*, 798 So. 2d 386 (Miss. 2001).

Sanctions were properly awarded to the defendant in an action for intentional infliction of emotional distress based on an allegation that the plaintiff's former wife set out on a course of conduct calculated to lead to the total destruction of the parent-child/grandparent-child relationship between the parties' child and her father's side of the family where the trial court found that the plaintiffs had no hope of success in the case. *Little v. Collier*, 759 So. 2d 454 (Miss. Ct. App. 2000).

The plaintiff's attorney was properly ordered to pay attorneys' fees to the defen-

dant since (1) he had every opportunity to research and insure that the claim had a hope of survival and chose to file the suit and to pursue it even after he learned of prior proceedings that showed no hope of success, and (2) even if he filed the suit with a hope of success, once he learned of those prior proceedings, he should have voluntarily dismissed the suit. *McBride v. Meridian Pub. Imp. Corp.*, 730 So. 2d 548 (Miss. 1998).

#### 5. Payment of attorneys' fees denied.

Doctor's motion for sanctions under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5 against a patient's attorney in a wrongful death action that alleged medical malpractice was properly denied as the attorney had a reasonable hope of success and had performed due diligence in determining the validity of the claim against the doctor. *Todd v. Clayton*, 53 So. 3d 827 (Miss. Ct. App. 2011).

Refusal to award attorney fees to the employer after the deceased employee's personal-injury suit was dismissed was proper under Miss. R. Civ. P. 11 and the Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 to 11-55-15, because, although the filing of a claim for a deceased person was frivolous since the claim had no hope of success, the decision to award sanctions was within the discretion of the trial court and the trial court was within its discretion to deny sanctions. The deceased employee's counsel filed the lawsuit and tried to follow up on it, and the employee was alive when it was originally filed; when counsel was unable to contact the employee, counsel pursued the lawsuit on the employee's behalf in order to avoid being barred by the statute of limitations. *Ill. Cent. R.R. v. Broussard*, 19 So. 3d 821 (Miss. Ct. App. 2009).

Appellate court could not find that the chancery court erred in concluding that sanctions under neither Miss. R. Civ. P. 11(b) nor the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) were warranted because while the chancellor had ordered the property owner to pay the county's fees for producing the records, it was unclear whether the property owner was to pay the bill within 20 days of the hearing or the final judgment. However, once the property owner paid the fees and



the county withdrew its motion, the issue became moot. *LaCroix v. Marshall County Bd. of Supervisors*, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. *Knight v. Covington County*, 27 So. 3d 1163 (Miss. Ct. App. Apr. 21, 2009), writ of certiorari dismissed by 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

In a will-contest action, even if the matter were properly before the appellate court, the girlfriend of the decedent's motion for sanctions and attorney fees under Miss. Code Ann. § 11-55-5(1) and Miss. R. Civ. P. 11(b) was waived since she filed no notice of appeal for her "counter-appeal" as required by Miss. R. App. P. 4(a). Moreover, once the chancellor held the matter in abeyance, the record did not reflect that the girlfriend raised the motion for sanctions again until her appellate brief and she did not file her notice of appeal until 28 days after entry of the final judgment; at any time in the interim, the girlfriend could have requested a ruling on her motion for sanctions, but she failed to do so. *Frazier v. Loew (In re Caspelich)*, 22 So. 3d 1199 (Miss. Ct. App. 2009).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, the services company was not entitled to recover attorney fees for the defense of a withdrawn counterclaim under Miss. R. Civ. P. 11(b) and Miss. Code Ann. § 11-55-5(1) because, even though the counterclaim was weak, there was no showing that it lacked any hope of success. *Cain v. Cain*, 967 So. 2d 654 (Miss. Ct. App. 2007).

Appellate court affirmed a grant of summary judgment in favor of defendants as plaintiff had admitted it had no contract with a group of property owners to auction their property, but defendants' request for attorney fees under Miss. Code Ann. § 11-55-5(1) was denied as the court could not state that plaintiff's claim was substan-

tially without justification. *John Mozingo Real Estate & Auction, Inc. v. Nat'l Auction Group, Inc.*, 925 So. 2d 141 (Miss. Ct. App. 2006).

To be awarded attorney's fees, the mother would have had to have been successful in her action against the father regarding child support, but she was not; there had been an extra-judicial modification to the child support agreement, but the father was compliant with the modified agreement. The failure to pay the daughter's medical expenses was the result of the mother not providing the father with proof of the expenses, and his willingness to pay those expenses was evident in the record where upon presentation of the bills, the father promptly paid them; thus, the mother was not entitled to an award of attorney's fees. *Bryant v. Bryant*, 924 So. 2d 627 (Miss. Ct. App. 2006).

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant to Miss. Rev. Code §§ 11-55-5(1) and 11-55-3(a). He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. *Adcock v. Van Norman*, 918 So. 2d 747 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

Trial court did not err in denying the doctors' motion for sanctions where nothing in the record supported their claim that they were entitled to fees and expenses because the patient fired her counsel shortly before trial and caused delay of the proceedings and great expense to them; the trial court did not find that the patient requested a continuance for an improper purpose or to delay the trial, but allowed the patient time to obtain new counsel and ordered that each party pay its own fees and expenses. *Hodges v. Lucas*, 904 So. 2d 1098 (Miss. Ct. App. 2004).

Award of attorney fees to the husband in a divorce action was improper where the chancellor never made a finding that the wife had fabricated the sexual abuse



charges involving their older son and had in some manner convinced the child to make the statements that he did; an award of some amount of fees incurred by the husband allocable to enforcing the visitation order might be supportable but a finding of contempt must first have been made. *Gregory v. Gregory*, 881 So. 2d 840 (Miss. Ct. App. 2003), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Though the Mississippi Life and Health Guaranty Association "stretched the limits" in various defenses it raised to defeat a trustee's claim for coverage for sums lost under an annuity contract with an insolvent insurer, the circuit court did not abuse its discretion by denying the trustee's request for attorney's fees. *Bank of Miss. v. Miss. Life & Health Ins. Guar.*

*Ass'n*, 850 So. 2d 127 (Miss. Ct. App. 2003).

#### 4. Attorneys' fees awarded not excessive.

Amount of attorneys' fees awarded in favor of the subcontractor were not excessive because the facts surrounding and concerning that portion of the subcontractor's motion for attorneys' fees relating to setting the amount of attorney's fees justified the assessment of the fees in an amount that the trial judge found to have been reasonable and fair and that satisfied the requirements of law. The trial judge presided over a two-week trial in which numerous witnesses testified and more than 100 exhibits were received into evidence. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495 (Miss. 2007).

### RESEARCH REFERENCES

**ALR.** Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond. 37 A.L.R.2d 525.

Malicious prosecution or similar tort action predicated upon disciplinary proceedings against an attorney. 52 A.L.R.2d 1217.

Use of criminal process to collect debt as abuse of process. 27 A.L.R.3d 1202.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court. 68 A.L.R.3d 314.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution. 87 A.L.R.3d 554.

Method employed in collecting debt due client as ground for disciplinary action against attorney. 93 A.L.R.3d 880.

Civil liability of attorney for abuse of process. 97 A.L.R.3d 688.

Liability of attorney, acting for client, for malicious prosecution. 46 A.L.R.4th 249.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 A.L.R.4th 843.

Attorney's liability under state law for opposing party's counsel fees. 56 A.L.R.4th 486.

Attorneys' fees: cost of services provided by paralegals or the like as compensable

element of award in state court. 73 A.L.R.4th 938.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

What circumstances justify award of damages and/or double costs against appellant's attorney under 28 USCS sec. 1912, or Rule 38 of the Federal Rules of Appellate Procedure. 50 A.L.R. Fed. 652.

Authority of United States District Court, under 28 USCS sec. 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim. 53 A.L.R. Fed. 651.

Award of damages or costs under 28 USCS sec. 1912 or Rule 38 of Federal Rules of Appellate Procedure, against appellant who brings frivolous appeal. 67 A.L.R. Fed. 319.

Attorney's liability under 42 USCS sec. 1983 for improperly instituting or pursuing legal procedure. 72 A.L.R. Fed. 724.

Inherent power of Federal District Court to impose monetary sanctions on counsel in absence of contempt of court. 77 A.L.R. Fed. 789.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833; 80 A.L.R. Fed. 302.

What conduct constitutes multiplying proceedings unreasonably and vexa-

tiously so as to warrant imposition of liability on counsel under 28 USCS sec. 1927 for excess costs, expenses, and attorney fees. 81 A.L.R. Fed. 36.

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment § 20 et seq.

16A Am. Jur. 2d, Constitutional Law § 617.

20 Am. Jur. 2d, Costs §§ 32, 33.

**CJS.** 20 C.J.S., Costs §§ 209-214.

72 C.J.S., Process §§ 136-140.

**Lawyers' Edition.** Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L. Ed. 2d 713.

**Law Reviews.** Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

## § 11-55-7. Award of costs and attorney's fees; amount of award; factors to consider.

In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorney's fees and costs and the amount to be assessed:

(a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;

(c) The availability of facts to assist in determining the validity of an action, claim or defense;

(d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

(e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;

(f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

(g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

(h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;

(i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

(j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

(k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

**SOURCES:** Laws, 1988, ch. 495, § 4, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## JUDICIAL DECISIONS

1. In general.
3. Attorneys' fees awarded excessive.
3. Jurisdiction.

### 1. In general.

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. *Prewitt v. City of Oxford*, 44 So. 3d 922 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 274 (Miss. June 3, 2010), writ of certiorari denied by 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224, 79 U.S.L.W. 3201 (U.S. 2010).

Chancellor was within her discretion in finding the grandparents' visitation claim, the claims concerning the dissemination of the daughter's medical records, and custody claims were without substantial justification; therefore, the chancellor properly found the attorney liable for sanctions under the Litigation Accountability Act. *In re Spencer*, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the parents were ordered to pay the county's attorney fees that were incurred in defending the action on appeal because the appeal was frivolous, as they had no hope of success against the county;

the parents were only able to construct a one-sentence argument against the county and the undisputed facts showed that the passengers were involved in criminal activity at the time of the death, namely fleeing from the police in a stolen vehicle. *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Trial court erred in awarding attorney fees to the father and against the state human service agency in its action to obtain child support for the mother as the court did not consider the factors for awarding attorney fees set forth in Miss. Code Ann. § 11-55-7, as it was required to do, but instead noted only that the father's motion for attorney fees as a sanction for the state human service agency's allegedly frivolous pleading was granted. *Mississippi Dep't of Human Servs. v. Shelby*, 802 So. 2d 89 (Miss. 2001).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit that sought to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth its reasons for awarding sanctions. *Miss. Dep't of Human Servs. v. Shelby*, — So. 2d —, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), opinion withdrawn by, substituted opinion at 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

The court properly awarded attorney fees and expenses under the act on the ground that the action was brought without substantial justification as there was no evidence that either the plaintiff or his attorney exercised sufficient effort to determine the validity of the claims before they were asserted. *Wyssbrod v. Wittjen*, 798 So. 2d 352 (Miss. 2001).

Where a chancery court gave no specific reasons for imposing sanctions, as required by the Litigation Accountability Act (§ 11-55-1 et seq.), the sanctions im-



posed must have been pursuant to Rule 11, Miss. R. Civ. P. *Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188 (Miss. 1995).

The adoption of Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

By stating that the court shall specifically set forth the reasons for awarding attorney's fees and costs and enumerating factors to be considered by the court when making such an award, § 11-55-7 augments Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, and § 11-55-5, which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

A petitioner's action for a writ of mandamus compelling a county board of education to adopt a resolution requesting the board of supervisors to create single member districts was not without substantial justification, and therefore the trial court did not err in declining to award attorney's fees to the school board under the Litigation Accountability Act (§§ 11-55-1

et seq.), even though the petitioner did not make an effort to dismiss the action when he learned that his claim was moot though the board of education suggested that he do so, where there was no evidence that the action was prosecuted in bad faith or for an improper purpose, there were no issues of fact determinative of the validity of the claim in conflict at the time of the first hearing, and there was no prevailing party since the petitioner's claim became moot via action of the school board following the first hearing. *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731 (Miss. 1992).

### 3. Attorneys' fees awarded excessive.

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 et seq., or Miss. R. Civ. P. 11 which supported awarding attorneys' fees and expenses in excess of those actually incurred. *In re Spencer*, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

### 3. Jurisdiction.

The court had jurisdiction to award attorney fees and expenses against both the plaintiff and his out-of-state counsel notwithstanding that counsel was no longer representing the plaintiff at the time of the award and his authority to practice law pro hac vice in the court had been rescinded, as he submitted to the jurisdiction of the court by appearing for the plaintiff and he was served with notice of the hearing on attorney fees and expenses. *Wyssbrod v. Wittjen*, 798 So. 2d 352 (Miss. 2001).

## RESEARCH REFERENCES

**ALR.** Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond. 37 A.L.R.2d 525.

Malicious prosecution or similar tort action predicated upon disciplinary proceedings against an attorney. 52 A.L.R.2d 1217.

Use of criminal process to collect debt as abuse of process. 27 A.L.R.3d 1202.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court. 68 A.L.R.3d 314.

Liability of attorney, acting for client, for malicious prosecution. 46 A.L.R.4th 249.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 A.L.R.4th 843.

Attorney's liability under state law for opposing party's counsel fees. 56 A.L.R.4th 486.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833.

What circumstances justify award of damages and/or double costs against appellant's attorney under 28 USCS sec. 1912, or Rule 38 of the Federal Rules of Appellate Procedure. 50 A.L.R. Fed. 652.

Authority of United States District Court, under 28 USCS sec. 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim. 53 A.L.R. Fed. 651.

Award of damages or costs under 28 USCS sec. 1912 or Rule 38 of Federal

Rules of Appellate Procedure, against appellant who brings frivolous appeal. 67 A.L.R. Fed. 319.

Attorney's liability under 42 USCS sec. 1983 for improperly instituting or pursuing legal procedure. 72 A.L.R. Fed. 724.

Inherent power of Federal District Court to impose monetary sanctions on counsel in absence of contempt of court. 77 A.L.R. Fed. 789.

What conduct constitutes multiplying proceedings unreasonably and vexatiously so as to warrant imposition of liability on counsel under 28 USCS sec. 1927 for excess costs, expenses, and attorney fees. 81 A.L.R. Fed. 36.

**Am Jur.** 6 Am. Jur. 2d (Rev), Attachment and Garnishment § 20 et seq.

16A Am. Jur. 2d, Constitutional Law § 617.

20 Am. Jur. 2d, Costs §§ 32, 33.

**CJS.** 20 C.J.S., Costs §§ 209-214.

72 C.J.S., Process §§ 136-140.

**Lawyers' Edition.** Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L. Ed. 2d 713.

**Law Reviews.** Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

## § 11-55-9. Limitations of chapter.

Nothing in this chapter shall be construed to prevent an attorney and his client from negotiating in private the actual fee which the client is to pay the client's attorney. Nothing in this chapter is intended to limit the authority of the court to approve written stipulations filed with the court or oral stipulations in open court agreeing to no award of attorney's fees or costs, or an award of attorney's fees or costs in a manner different than that provided in this chapter.

**SOURCES:** Laws, 1988, ch. 495, § 5, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## § 11-55-11. Application of chapter.

This chapter shall apply in all cases unless attorney's fees are otherwise specifically provided by statute or court rule, in which case the provision allowing the greater award shall prevail.

**SOURCES:** Laws, 1988, ch. 495, § 6, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## JUDICIAL DECISIONS

### 1. In general.

This section is not applicable in the context of a criminal case. *State v. Blenden*, 748 So. 2d 77 (Miss. 1999).

## RESEARCH REFERENCES

**Law Reviews.** Robertson, *Discovering* Procedure. 8 Miss. C. L. Rev. 111, Spring, Rule 11 of the Mississippi Rules of Civil 1988.

### § 11-55-13. Severability.

If any section, paragraph, sentence, phrase or any part of this chapter shall be held invalid or unconstitutional, such holding shall not affect any other section, paragraph, sentence, clause, phrase or part of this chapter which is not in and of itself invalid or unconstitutional. Moreover, if the application of this chapter, or of any portion of it, to any person or circumstance is held invalid, the invalidity shall not affect the application of this chapter to other persons or circumstances which can be given effect without the invalid provision or application.

**SOURCES:** Laws, 1988, ch. 495, § 7, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

### § 11-55-15. Actions to which chapter applies.

This chapter shall apply to any suit or claim or defense or appeal filed or perfected subsequent to July 1, 1988. It shall also apply to any suit or claim or defense or appeal which has been filed or perfected prior to July 1, 1988, and which is not dismissed within one hundred eighty (180) days after July 1, 1988.

**SOURCES:** Laws, 1988, ch. 495, § 8, eff from and after July 1, 1988.

**Cross References** — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

## RESEARCH REFERENCES

**Law Reviews.** Robertson, *Discovering* Procedure. 8 Miss. C. L. Rev. 111, Spring, Rule 11 of the Mississippi Rules of Civil 1988.



## CHAPTER 57

### Structured Settlements

SEC.	
11-57-1.	Short Title.
11-57-3.	Definitions.
11-57-5.	Disclosure statement.
11-57-7.	Transfers of structured settlement payment rights.
11-57-9.	Consequences of transfer.
11-57-11.	Application for transfer; notification; hearing.
11-57-13.	Transferee and payee responsibilities.
11-57-15.	Applicability.

#### § 11-57-1. Short Title.

This chapter shall be known and may be cited as the “Structured Settlement Protection Act.”

**SOURCES:** Laws, 2002, ch. 530, § 1, eff from and after July 1, 2002.

### RESEARCH REFERENCES

**ALR.** Construction and Application of  
State Structured Settlement Protection  
Acts.. 27 A.L.R. 6th 323.

#### § 11-57-3. Definitions.

The following words and phrases shall have the meanings ascribed herein, unless the context clearly indicates otherwise:

(a) “Annuity issuer” means an insurer that has issued a contract to fund periodic payments under a structured settlement.

(b) “Dependents” include a payee’s spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony.

(c) “Discounted present value” means the present value of future payments determined by discounting such payments to the present using the most recently published Applicable Federal Rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(d) “Gross advance amount” means the sum payable to the payee or for the payee’s account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.

(e) “Independent professional advice” means advice of an attorney, certified public accountant, actuary or other licensed professional adviser.

(f) “Interested parties” means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee’s death, the annuity issuer,

the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement.

(g) “Net advance amount” means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under Section 11-57-5(e).

(h) “Payee” means an individual who is receiving tax-free payments under a structured settlement and proposes to make a transfer of payment rights thereunder.

(i) “Periodic payments” includes both recurring payments and scheduled future lump-sum payments.

(j) “Qualified assignment agreement” means an agreement providing for a qualified assignment within the meaning of 26 USCS 130.

(k) “Responsible administrative authority” means, with respect to a structured settlement, any government authority vested by law with exclusive jurisdiction over the settled claim resolved by such structured settlement.

(l) “Settled claim” means the original tort claim or workers’ compensation claim resolved by a structured settlement.

(m) “Structured settlement” means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers’ compensation claim.

(n) “Structured settlement agreement” means the agreement, judgment, stipulation or release embodying the terms of a structured settlement.

(o) “Structured settlement obligor” means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.

(p) “Structured settlement payment rights” means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, where:

(i) The payee is domiciled in, or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is located in, this state;

(ii) The structured settlement agreement was approved by a court or responsible administrative authority in this state; or

(iii) The structured settlement agreement is expressly governed by the laws of this state.

(q) “Terms of the structured settlement” includes, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of any court or responsible administrative authority or other government authority that authorized or approved such structured settlement.

(r) “Transfer” means any sale, assignment, pledge, hypothecation or other alienation or encumbrance of structured settlement payment rights

made by a payee for consideration; provided that the term “transfer” does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.

(s) “Transfer agreement” means the agreement providing for a transfer of structured settlement payment rights.

(t) “Transfer expenses” means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorney’s fees, escrow fees, lien recordation fees, judgment and lien search fees, finder’s fees, commissions, and other payments to a broker or other intermediary; “transfer expenses” do not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.

(u) “Transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

**SOURCES: Laws, 2002, ch. 530, § 2, eff from and after July 1, 2002.**

### **§ 11-57-5. Disclosure statement.**

Not less than three (3) days before the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen (14) points, setting forth:

(a) The amounts and due dates of the structured settlement payments to be transferred;

(b) The aggregate amount of such payments;

(c) The discounted present value of the payments to be transferred, which shall be identified as the “calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities,” and the amount of the Applicable Federal Rate used in calculating such discounted present value;

(d) The gross advance amount;

(e) An itemized listing of all applicable transfer expenses, other than attorney’s fees and related disbursement payable in connection with the transferee’s application for approval of the transfer, and the transferee’s best estimate of the amount of any such fees and disbursements;

(f) The net advance amount;

(g) The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and



(h) A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.

**SOURCES:** Laws, 2002, ch. 530, § 3, eff from and after July 1, 2002.

### **§ 11-57-7. Transfers of structured settlement payment rights.**

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order or order of a responsible administrative authority based on express findings by such court or responsible administrative authority that:

(a) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;

(b) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing; and

(c) The transfer does not contravene any applicable statute or the order of any court or other government authority.

**SOURCES:** Laws, 2002, ch. 530, § 4, eff from and after July 1, 2002.

### **§ 11-57-9. Consequences of transfer.**

Following a transfer of structured settlement payment rights under this chapter:

(a) The structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;

(b) The transferee shall be liable to the structured settlement obligor and the annuity issuer:

(i) If the transfer contravenes the terms of the structured settlement, for any taxes incurred by such parties as a consequence of the transfer; and

(ii) For any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by such parties with the order of the court or responsible administrative authority or arising as a consequence of the transferee's failure to comply with this chapter;

(c) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two (2) or more transferees or assignees; and

(d) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

**SOURCES:** Laws, 2002, ch. 530, § 5, eff from and after July 1, 2002.

### **§ 11-57-11. Application for transfer; notification; hearing.**

(1) An application under this chapter for approval of a transfer of structured settlement payment rights shall be made by the transferee and may be brought in the county in which the payee resides, in the county in which the structured settlement obligor or the annuity issuer maintains its principal place of business, or in any court or before any responsible administrative authority which approved the structured settlement agreement.

(2) Not less than twenty (20) days prior to the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under Section 11-57-7, the transferee shall file with the court or responsible administrative authority and serve on all interested parties a notice of the proposed transfer and the application for its authorization, including with such notice:

- (a) A copy of the transferee's application;
- (b) A copy of the transfer agreement;
- (c) A copy of the disclosure statement required under Section 11-57-5;
- (d) A listing of each of the payee's dependents, together with each dependent's age;
- (e) Notification that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or responsible administrative authority or by participating in the hearing; and
- (f) Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed which shall be not less than fifteen (15) days after service of the transferee's notice in order to be considered by the court or responsible administrative authority.

**SOURCES:** Laws, 2002, ch. 530, § 6, eff from and after July 1, 2002.

### **§ 11-57-13. Transferee and payee responsibilities.**

(1) The provisions of this chapter may not be waived by any payee.

(2) Any transfer agreement entered into on or after July 1, 2002, by a payee who resides in this state shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

(3) No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for (a) periodically confirming the

payee's survival, and (b) giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.

(4) No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to be proposed transferee or any assignee based on any failure of such transfer to satisfy the conditions of this chapter.

(5) Nothing contained in this chapter shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into before July 1, 2002, is valid or invalid.

(6) Compliance with the requirements set forth in § 11-57-5 and fulfillment of the conditions set forth in § 11-57-7 shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear any responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

**SOURCES:** Laws, 2002, ch. 530, § 7, eff from and after July 1, 2002.

### **§ 11-57-15. Applicability.**

This chapter shall apply to any transfer of structured settlement payment rights under a transfer agreement entered into on or after August 1, 2002; provided, however, that nothing contained herein shall imply that any transfer under a transfer agreement reached before such date is either effective or ineffective.

**SOURCES:** Laws, 2002, ch. 530, § 8, eff from and after July 1, 2002.



## CHAPTER 59

### Uniform Interstate Depositions and Discovery Act

SEC.

- 11-59-1. Short title.
- 11-59-3. Definitions.
- 11-59-5. Issuance of subpoena.
- 11-59-7. Service of subpoena.
- 11-59-9. Deposition, production and inspection.
- 11-59-11. Application to court.
- 11-59-13. Uniformity of application and construction.
- 11-59-15. Application to pending actions.

#### § 11-59-1. Short title.

This chapter may be cited as the Uniform Interstate Depositions and Discovery Act.

**SOURCES:** Laws, 2011, ch. 347, § 1, eff from and after July 1, 2011.

**Comparable Laws from other States** — California: Cal Code Civ Proc §§ 2029.100 et seq.

Colorado: C.R.S. §§ 13-90.5-101 et seq.

Delaware: 10 Del. C. § 4311

District of Columbia: D.C. Code §§ 13-441 et seq.

Indiana: Burns Ind. Code Ann. §§ 34-44.5-1-1 et seq.

Kansas: K.S.A. § 60-228a.

Kentucky: KRS § 421.360

Maryland: Md. Courts and Judicial Proceedings Code Ann. §§ 9-407 et seq.

South Carolina: S.C. Code Ann. §§ 15-47-100 et seq.

Tennessee: Tenn. Code Ann. §§ 24-9-201 et seq.

Utah: Utah Code Ann. §§ 78B-17-101 et seq.

Virgin Islands: 5 V.I.C. §§ 4922 et seq.

Virginia: Va. Code Ann. §§ 8.01-412.8 et seq.

#### § 11-59-3. Definitions.

In this chapter:

- (1) “Foreign jurisdiction” means a state other than this state.
- (2) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.
- (3) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (4) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.
- (5) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to:

- (A) Attend and give testimony at a deposition;
- (B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or
- (C) Permit inspection of premises under the control of the person.

**SOURCES:** Laws, 2011, ch. 347, § 2, eff from and after July 1, 2011.

### **§ 11-59-5. Issuance of subpoena.**

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this chapter does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

- (A) Incorporate the terms used in the foreign subpoena; and
- (B) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

**SOURCES:** Laws, 2011, ch. 347, § 3, eff from and after July 1, 2011.

### **§ 11-59-7. Service of subpoena.**

A subpoena issued by a clerk of court under Section 11-59-5 must be served in compliance with Rule 45 of the Rules of Civil Procedure.

**SOURCES:** Laws, 2011, ch. 347, § 4, eff from and after July 1, 2011.

### **§ 11-59-9. Deposition, production and inspection.**

Rule 45 of the Mississippi Rules of Civil Procedure and Rule 2.01 of the Uniform Rules of Circuit and County Court Practice apply to subpoenas issued under Section 11-59-5.

**SOURCES:** Laws, 2011, ch. 347, § 5, eff from and after July 1, 2011.

### **§ 11-59-11. Application to court.**

An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under Section 11-59-5 must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.

**SOURCES:** Laws, 2011, ch. 347, § 6, eff from and after July 1, 2011.

**§ 11-59-13. Uniformity of application and construction.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SOURCES:** Laws, 2011, ch. 347, § 7, eff from and after July 1, 2011.

**§ 11-59-15. Application to pending actions.**

This chapter applies to requests for discovery in cases pending on July 1, 2011.

**SOURCES:** Laws, 2011, ch. 347, § 8, eff from and after July 1, 2011.





# TITLE 13

## EVIDENCE, PROCESS AND JURIES

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### CHAPTER 1

#### Evidence

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13-1-81.	Presumptions attending certificates, attestation, etc.
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13-1-119.	Repealed.
13-1-121.	Injury to livestock in transit as prima facie evidence of carrier's want of skill.
13-1-123.	Injury to persons or property from operation of motor vehicle as making out prima facie case.

13-1-124 through 13-1-129. Repealed.

13-1-131. Land-office certificates.

13-1-133 through 13-1-147. Repealed.

13-1-149. Courts to take notice of law of United States, other states, territories and foreign countries.

13-1-151. Reproduction of business records; disposal of originals.

13-1-153. Repealed.

13-1-155. Destruction or other disposal of exhibits following final determination of civil actions.

## § 13-1-1. Provisions of chapter applicable to all courts.

All provisions contained in this chapter, unless restricted by their nature or by express provision to particular courts, shall apply to and govern all courts.

**SOURCES:** Codes, 1892, § 1810; 1906, § 1987; Hemingway's 1917, § 1647; 1930, § 1526; 1942, § 1687.

**Cross References** — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Applicability of the rules of evidence, see Miss. R. Evid. 101.

## JUDICIAL DECISIONS

### 1. Waiver.

If suit is filed on either medical malpractice grounds or other grounds placing plaintiff's condition in issue, scope of waiver of medical privilege is limited to

medical information which is relevant to injury placed in issue by plaintiff. Scott ex rel. Scott v. Flynt, 704 So. 2d 998 (Miss. 1996), reh'g denied, 703 So. 2d 864 (Miss. 1997).

## RESEARCH REFERENCES

**ALR.** Power of court sitting as trier of fact to dismiss at close of plaintiff's evidence, notwithstanding plaintiff has made out prima facie case. 55 A.L.R.3d 272.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or ex-

cited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act. 38 A.L.R.4th 1237.

Habit or routine practice evidence under Uniform Evidence Rule 406. 64 A.L.R.4th 567.

## § 13-1-3. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 190; 1871, § 756; 1880, § 1599; 1892, § 1738; 1906, § 1915; Hemingway's 1917, § 1575; 1930, § 1527; 1942, § 1688]

**Editor's Note** — Former § 13-1-3 provided that a person was competent to give evidence in any suit even if he or she had an interest in the result thereof.



## RESEARCH REFERENCES

**Law Reviews.** McCormick, *The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103*, 67 Miss L J 547, Winter, 1997.

## § 13-1-5. Competency of husband and wife.

Husbands and wives may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children. But in all other instances where either of them is a party litigant the other shall not be competent as a witness and shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without the consent of both.

**SOURCES:** Codes, 1857, ch. 61, art. 193; 1871, §§ 759, 760; 1880, § 1601; 1892, § 1739; 1906, § 1916; Hemingway's 1917, § 1576; 1930, § 1528; 1942, § 1689; Laws, 1928, ch. 35; Laws, 1954, ch. 236; Laws, 1978, ch. 395, § 1, eff from and after July 1, 1978.

**Cross References** — Husband-wife privilege, see § 43-19-43.

Testimony by spouses in proceedings for protection from domestic abuse, see § 93-21-19.

Husband-wife privilege, see Miss. R. Evid. 504.

General rule of competency, see Miss. R. Evid. 601.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application generally.
3. Competency of spouse as witness in general.
4. Witness for other spouse.
5. Witness against other spouse.
6. Controversies between spouses.
7. —Criminal prosecutions.
8. Communications between spouses.
9. Divorce, effect of.
10. Consent or waiver.
11. Failure of spouse to testify.
12. Evidence.

## 1. Validity.

Statutory provision that, where either husband or wife is party litigant, the other shall not be competent as a witness without consent of both, held not to deny due

process by depriving opposing party of material evidence, since statute prescribes mere rule of evidence and does not affect substantial rights of parties. *Whitney Nat'l Bank v. Stirling*, 177 Miss. 325, 170 So. 692 (1936).

## 2. Construction and application generally.

Law enforcement officers' use of defendant's wife as confidential informant did not violate statute concerning spousal competency or evidence rule concerning spousal privilege. *Dowbak v. State*, 666 So. 2d 1377 (Miss. 1996).

Since the privilege protected by § 13-1-5 extends only to communications which are intended to be confidential, the presence of another person, even a family member, is deemed to mean that the com-

munication was not intended to be confidential. *Fanning v. State*, 497 So. 2d 70 (Miss. 1986).

This provision does not operate to exclude testimony of a third person as to declarations of the wife of the accused which are part of the *res gestae*. *Eubanks v. State*, 242 Miss. 372, 135 So. 2d 183 (1961).

Statutory provisions that all persons, whether interested parties to suit, or not, make competent witnesses (Code 1942, § 1688), that either party to suit shall have right to force adversary to testify (Code 1942, § 1710), that examination of interested witnesses may be had in open court (Code 1942, § 1711), and the provisions of this section [Code 1942, § 1689], must be construed together, and so as to except this section from operation of other statutes. *Whitney Nat'l Bank v. Stirling*, 177 Miss. 325, 170 So. 692 (1936).

### 3. Competency of spouse as witness in general.

The prosecution cannot call the defendant's wife to the stand to testify, thereby forcing the defendant to assert, before the jury, his right to have her testimony excluded. *Simpson v. State*, 497 So. 2d 424 (Miss. 1986).

Where judgment creditor obtained judgment plus interest and attorney fees against husband, and subsequently served writ of garnishment upon wife, wife could properly assert marital privilege under § 13-1-5. *Fidelity Nat'l Bank v. Center Mgt., Inc.*, 585 F. Supp. 1406 (S.D. Miss. 1984).

In a prosecution for murder or manslaughter, the deceased is in no sense a party to the suit, and the wife of deceased was competent to testify as to what occurred at the scene of the killing, and as to statements made by others, or statements made in the presence of others, bearing on the material issues in controversy. *McBride v. State*, 188 Miss. 620, 196 So. 633 (1940).

In suit against husband and wife and their grantee to set aside, as fraudulent, conveyance of homestead owned by wife and to enforce judgment against husband and wife, neither husband nor wife could be called as an adverse witness, though homestead was owned by wife, since hus-

band had interest in homestead, and any material evidence that either would give would affect interest of both. *Whitney Nat'l Bank v. Stirling*, 177 Miss. 325, 170 So. 692 (1936).

### 4. Witness for other spouse.

Husband of beneficiary under will was competent attesting witness to will. *Gore v. Dace*, 157 Miss. 221, 127 So. 901 (1930).

The widow is a competent witness on behalf of the estate of her deceased husband to prove a conversation between her husband in his lifetime and the opposing party. *Stuhlmuller v. Ewing*, 39 Miss. 447 (1860).

### 5. Witness against other spouse.

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. *Hood v. State*, 17 So. 3d 548 (Miss. 2009).

Defendant's marriage to his first wife ended in May 2002 when, upon the first wife's petition, the Florida court declared that defendant died on August 13, 1998, in the Gulf of Mexico; as such, she was his ex-wife at the time of the trial and, therefore, competent to testify against him, and the information to which she testified was not privileged communication, so Miss. Code Ann. § 13-1-5 did not apply to exclude her testimony. *Butt v. State*, 986 So. 2d 981 (Miss. Ct. App. 2007).

Although testimony by third party as to substance of party's conversation with criminal defendant's spouse is prohibited, testimony as to fact that conversation with spouse took place is not. *Davis v. State*, 472 So. 2d 428 (Miss. 1985).

In a prosecution for child abuse, the trial court properly allowed defendant's wife to testify against him, and to be cross-examined by the district attorney as an adverse witness, since § 13-1-5 provides no spousal immunity in a prosecution for child abuse. *Shelton v. State*, 445 So. 2d 844 (Miss. 1984).

In a prosecution for aggravated assault by a wife against her husband, there was no error in compelling the husband to testify against his wife, even though this

was against his wishes, where the husband was introduced as a witness by the State of Mississippi, not by his spouse, and the charge did not concern a criminal act against a child, notwithstanding § 13-1-5. *Stubbs v. State*, 441 So. 2d 1386 (Miss. 1983).

In a prosecution for manslaughter by culpable negligence the court improperly admitted statements made by defendant's wife to an officer outside the defendant's presence, where such testimony was hearsay and violated the confidential communication privilege between husband and wife. *Bayse v. State*, 420 So. 2d 1050 (Miss. 1982).

In a prosecution for murder, it was error to permit the state to cross-examine the defendant about the presence of his wife at the scene of the crime where the defense had successfully objected to the testimony of the wife when she had been called to the stand by the state. *Owens v. State*, 405 So. 2d 692 (Miss. 1981).

In the prosecution of the defendant for the murder of his wife's father, the trial court properly permitted the wife to testify against the defendant where the nearly simultaneous assault upon the wife by her husband and his threat to kill her "next" on the occasion that he shot and killed her father was such a controversy between them as to make her a competent witness when she was willing to testify. *Maiben v. State*, 405 So. 2d 87 (Miss. 1981).

In a manslaughter prosecution based upon a death arising from child abuse, the child's mother could not be compelled to testify against her husband. *Tapp v. State*, 347 So. 2d 974 (Miss. 1977).

A wife is a competent witness in the prosecution of her husband for crimes involving personal violence against their child. *Merritt v. State*, 339 So. 2d 1366, 93 A.L.R.3d 1005 (Miss. 1976).

Peace officer's testimony as to statements against accused husband's interest made in his presence by accused's wife was inadmissible, both as hearsay and as a violation of this section [Code 1942, § 1689]. *Caldwell v. State*, 194 So. 2d 878 (Miss. 1967).

In a criminal trial the defendant's wife could not testify against him without the

consent of both. *Wallace v. State*, 254 Miss. 944, 183 So. 2d 525 (1966).

Under this section [Code 1942, § 1689] a wife is a competent witness before the grand jury investigating a charge that her husband had incestuous relations with their minor daughter, and an indictment returned against the husband is not void. *Graham v. State*, 250 Miss. 816, 168 So. 2d 496 (1964).

Where prosecutor erroneously called defendant's estranged wife to the witness stand causing defendant to object in presence of the jury to her competency as witness against him, defendant was not entitled to reversal since he made no motion for a mistrial at time of trial. *Blackwell v. State*, 44 So. 2d 409 (Miss. 1950).

In criminal prosecution against husband for unlawful possession of intoxicating liquor, it is improper for prosecution to call defendant's wife and offer her as witness against him. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Wife is incompetent as witness against husband in prosecution for unlawful possession of intoxicating liquor unless both she and her husband consent, and when case is close it is prejudicial error for prosecution to ask defendant and court to require answer as to whether defendant objected to wife's testifying for state, particularly where statement of court impliedly left it entirely to the husband to consent or object. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Common-law husband is not competent witness against his common-law wife in criminal prosecution against her for forgery. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

Denial by court of motion for preliminary hearing on question of competency of state's witness to testify in forgery prosecution against accused claiming to be common-law wife of witness is prejudicial error. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

Introduction in prosecution for bigamy of defendant's first wife who was sworn but withdrawn before testifying, was harmless error, where guilt of accused was fully established by other evidence. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).



Husband not competent against wife suing third person. *Spencer v. O'Bryant*, 140 Miss. 474, 106 So. 6 (1925).

State may not introduce wife to prove former marriage in prosecution of husband for bigamy. *McQueen v. State*, 139 Miss. 457, 104 So. 168 (1925).

At common law one spouse could not be introduced to establish crime against other, except offenses committed by one against other. *McQueen v. State*, 139 Miss. 457, 104 So. 168 (1925).

Bill for discovery attempting to make husband and wife testify against one another, not maintainable. *Strauss v. Hutson*, 104 Miss. 637, 61 So. 594 (1913).

Wife not competent witness against accused prosecuted for burglary. *Finklea v. State*, 94 Miss. 777, 48 So. 1 (1909).

Witness before grand jury could not decline to identify woman returning stolen property because she was wife of the thief, on the theory that since she could not be compelled to testify against her husband, the witness could not be compelled to testify. *Rogers v. State*, 88 Miss. 38, 40 So. 744 (1906).

The wife is not a competent witness for a third person in a suit in chancery against the husband, who is joined as defendant, even though he be not a necessary party. *Leach v. Shelby*, 58 Miss. 681 (1881).

A wife is not a competent witness against her husband who is on trial for crime. *Byrd v. State*, 57 Miss. 243, 34 Am. R. 440 (1879).

## 6. Controversies between spouses.

A husband's assaults on his present wife, which formed the basis of a law suit by his former wife seeking custody of the parties' minor child, constituted a "controversy" between the husband and his current wife under § 13-5-1, and, thus, although the present wife could not be compelled to testify against her husband, she would, if willing, be competent to testify as to his acts of violence against her. *McCuskey v. Jones*, 441 So. 2d 1372 (Miss. 1983).

## 7. —Criminal prosecutions.

Wife was incompetent as witness against husband to establish rape committed on her prior to marriage; wife is

competent witness to acts of violence committed on her by husband only as to offenses during time marriage relation exists. *Doss v. State*, 156 Miss. 522, 126 So. 197 (1930).

Prosecution of husband for vagrancy by wife is controversy between husband and wife. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

The wife is a competent witness against her husband if the crime be an assault and battery committed on her person. *Turner v. State*, 60 Miss. 351, 45 Am. R. 412 (1882).

## 8. Communications between spouses.

Letter from wife to victim was privileged and should not have been admitted over wife's objection, notwithstanding husband's waiver of privilege, in prosecution of son for assault with intent to murder his father. *Martin v. State*, 203 Miss. 187, 33 So. 2d 825, 2 A.L.R.2d 640 (1948).

Husband or wife cannot testify against other after divorce as to privileged communications. *Hesdorffer v. Hiller*, 111 Miss. 16, 71 So. 166, Am. Ann. Cas. 1918E,191 (1916).

Wife competent to relate conduct and declarations of husband in presence of others, but not to her alone. *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737, Am. Ann. Cas. 1916A,1051 (1913), error overruled, 104 Miss. 823, 62 So. 432 (1913).

## 9. Divorce, effect of.

In a prosecution for murder, a wife could testify against her husband regarding a statement made by him to her, in the presence of five other people where the parties had been divorced after the homicide but before the trial. *Holden v. State*, 399 So. 2d 1343 (Miss. 1981).

The husband or wife may testify against each other after divorce, if the testimony does not relate to privileged communications. *Hesdorffer v. Hiller*, 111 Miss. 16, 71 So. 166, Am. Ann. Cas. 1918E,191 (1916).

Divorced husband cannot testify against wife as to confidential communication between them. *Hesdorffer v. Hiller*, 111 Miss. 16, 71 So. 166, Am. Ann. Cas. 1918E,191 (1916).

## 10. Consent or waiver.

There is no merit to objection to testimony on ground of inter-spousal immu-

nity where spouse testified voluntarily. *Jordan v. State*, 513 So. 2d 574 (Miss. 1987).

The competency of a wife to testify against her husband in a criminal prosecution may be waived, and either the husband or the wife may testify in any proceeding, civil or criminal, where both consent thereto. *Brewer v. State*, 233 So. 2d 779 (Miss. 1970).

In a workmen's compensation proceeding wherein both alleged widows of employee claimed compensation, one of the claimants who did not object to testimony of a witness who was her undivorced husband in effect consented that such witness could testify and she could not thereafter be heard to say that her undivorced husband was not a competent witness under this section [Code 1942, § 1689]. *United Timber & Lumber Co. v. Alleged Dependents of Hill*, 226 Miss. 540, 84 So. 2d 921 (1956).

Where defendant, in a prosecution for neglecting to provide for his children, attempted to explain why he was separated from wife and consented to wife stating her side of the matter, error if any in permitting wife to testify held not reversible. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

In larceny prosecution against husband for taking money belonging to the wife, permitting wife to testify was not reversible error, where objection to her competency was not made before reception of testimony. *Huff v. State*, 176 Miss. 443, 169 So. 839 (1936).

### 11. Failure of spouse to testify.

In a murder prosecution, the state is not entitled to an instruction regarding the defendant's failure to call his wife to the stand. *Simpson v. State*, 497 So. 2d 424 (Miss. 1986).

At trial of murder charge to which defendant's sole defense was self-defense, remarks by prosecutor, in closing argument, that the only reason defendant married his wife because he wanted to marry the only eyewitness to the murder he had committed, constituted an impermissible comment upon defendant's failure to call his wife to testify, and the trial court's refusal to sustain objections to such re-

marks was reversible error. *Simpson v. State*, 497 So. 2d 424 (Miss. 1986).

General rule that an unfavorable inference may be indulged against a party who fails to produce material and necessary testimony which is within his power to control did not apply in a case where the material witness in question was wife of the party, and remark made by appellee's counsel during summation with reference to the failure of the appellant to call his wife to testify required reversal. *Daniels v. Beeson*, 312 So. 2d 441 (Miss. 1975).

Assignment of error that state was permitted to ask accused's wife if she had testified at the preliminary trial and to make comment on such failure, without basis in record, will not be considered on appeal. *Higgins v. State*, 120 Miss. 823, 83 So. 245 (1919).

Prosecuting attorney's comment on failure of accused to call wife as witness, error. *Smith v. State*, 112 Miss. 802, 73 So. 793 (1917), overruled on other grounds, 155 Miss. 348, 124 So. 432 (1929).

Asking accused on cross-examination if wife would testify and if he would object to her testimony, improper but not reversible error. *Carter v. State*, 99 Miss. 435, 54 So. 734 (1911).

Error to refuse instruction to disregard comments of district attorney on failure of husband to call wife as witness. *Johnson v. State*, 94 Miss. 91, 47 So. 897 (1909).

The failure of the husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel. *Johnson v. State*, 63 Miss. 313 (1885); *Cole v. State*, 75 Miss. 142, 21 So. 706 (1897).

### 12. Evidence.

The court did not err when it admitted a pistol and jewelry into evidence, notwithstanding that those items were obtained by virtue of information obtained from the defendant's wife; this section, insofar as it relates to a criminal prosecution, limits itself to the proper conduct of the trial itself and does not purport to regulate or restrict the conduct of police officers in an ongoing criminal investigation. *Clunan v. State*, 736 So. 2d 1078 (Miss. Ct. App. 1999).

Statement defendant's wife made while in custody was inadmissible in light of



explicit prohibition against spousal testimony. *Williams v. State*, 667 So. 2d 15 (Miss. 1996).

There was no violation of the statute concerning spousal competency, § 13-1-5, or the evidence rule concerning the husband-wife privilege, Rule 504, Miss. R. Ev., where a defendant's wife told the police where to locate certain items which were subsequently used as physical evidence in the prosecution of the defendant for capital murder committed during the commission of a robbery, since the location of the items did not fall within any protected class of communication, and no out-of-court statements or trial testimony of the wife was admitted against the defendant. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

Although the intended victim of an attempted murder could testify that he was informed of the intended crime, it was reversible error to permit him to testify, over objection, to telephone conversations initiated by the defendant's wife wherein she related to him the major details of the plot by her husband and others to take his life. *Ford v. State*, 218 So. 2d 731 (Miss. 1969).

Admission of statement made by defendant's wife to witness in prosecution for murder that "he has killed Marvin and fixing to kill —," was not prejudicial error where defendant admitted the killing. *Harris v. State*, 209 Miss. 141, 46 So. 2d 91 (1950).

Although wife's letter to the prosecuting witness in a case of assault with intent to murder was privileged in the absence of a waiver by both husband and wife, the defendant could not set up its admission

as error where its contents were not prejudicial to the defendant. *Martin v. State*, 203 Miss. 187, 33 So. 2d 825, 2 A.L.R.2d 640 (1948).

No statement made by husband either as a witness or otherwise can be used against the wife in any litigation to which she is a party, unless the husband was acting as the authorized agent of the wife. *Gunter v. Reeves*, 198 Miss. 31, 21 So. 2d 468 (1945).

Rule that no statement made by husband can be used against the wife in a litigation to which she is a party is inapplicable so far as statement or admission is to explain the conduct of a third person. *Gunter v. Reeves*, 198 Miss. 31, 21 So. 2d 468 (1945).

Testimony of a third person in a murder prosecution as to statement made by defendant's wife to the defendant was incompetent and prejudicial to the defendant, since the wife herself was incompetent to testify against her husband under this section [Code 1942, § 1689]. *Smith v. State*, 193 Miss. 474, 10 So. 2d 352 (1942).

Where wife testified against husband in larceny prosecution without objection, court's denial of defendant's motion made, at conclusion of State's evidence, on ground that evidence was not sufficient to make out offense, held not reversible error, since court was not required to separate objectionable evidence from evidence which was free from objection. *Huff v. State*, 176 Miss. 443, 169 So. 839 (1936).

Evidence of charges made by wife against husband accusing him of crime not admissible as she could not testify that she made the accusation. *Pearson v. State*, 97 Miss. 841, 53 So. 689 (1910).

## RESEARCH REFERENCES

**ALR.** Right of one against whom testimony is offered to invoke privilege of communication between others. 2 A.L.R.2d 645.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them. 4 A.L.R.2d 835.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse. 10 A.L.R.2d 1389.

Crimes against spouse within exception permitting testimony by one spouse



against other in criminal prosecution. 11 A.L.R.2d 646.

Calling or offering accused's spouse as witness for prosecution as prejudicial. 76 A.L.R.2d 920.

Spouse as competent witness for or against co-offender with other spouse. 90 A.L.R.2d 648.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent. 18 A.L.R.3d 824.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 36 A.L.R.3d 820.

Competency of one spouse to testify against other in prosecution for offense against child of both or either. 93 A.L.R.3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce. 98 A.L.R.3d 1285.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person. 3 A.L.R.4th 1104.

Communication between unmarried couple living together as privileged. 4 A.L.R.4th 422.

Testimonial privilege for confidential communications between relatives other than husband and wife — state cases. 6 A.L.R.4th 544.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony. 13 A.L.R.4th 1305.

Propriety and prejudicial effect of prosecutor's argument commenting on failure of defendant's spouse to testify. 26 A.L.R.4th 9.

Presence of child at communication between husband and wife as destroying

confidentiality of otherwise privileged communication between them. 39 A.L.R.4th 480.

Insured-insurer communications as privileged. 55 A.L.R.4th 336.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications. 62 A.L.R.4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution — modern state cases. 74 A.L.R.4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 A.L.R.4th 277.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases. 79 A.L.R.4th 694.

Marital privilege under Rule 501 of Federal Rules of Evidence. 46 A.L.R. Fed. 735.

Situations in which federal courts are governed by state law of privilege under Rule 501 of the Federal Rules of Evidence. 48 A.L.R. Fed. 259.

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1986, prohibiting interception of communications (18 USCS § 2511(1)), to interceptions by spouse, or spouse's agent, of conversations of other spouse. 139 A.L.R. Fed. 517.

**Am Jur.** 81 Am. Jur. 2d (Rev), Witnesses §§ 230, 248 et seq.

**CJS.** 98 C.J.S., Witnesses §§ 227 et seq.

**Law Reviews.** McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss L J 547, Winter, 1997.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 13:5, 17:1-17:3.

## §§ 13-1-7 through 13-1-9. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-1-7. [Codes, 1857, ch. 61, art. 190; 1871, § 758; 1880, § 1602; 1892, § 1740; 1906, § 1917; Hemingway's 1917, § 1577; 1930, § 1529; 1942, § 1690; Laws, 1896, p. 107]

§ 13-1-9. [Codes, 1880, § 1603; 1892, § 1741; 1906, § 1918; Hemingway's 1917, § 1578; 1930, § 1530; 1942, § 1691; Laws, 1882, p. 109]

**Editor's Note** — Former § 13-1-7 concerned the competency of a claimant against the estate of a decedent or a person non compos mentis.

Former § 13-1-9 related to competency of an accused.

### § 13-1-11. Conviction, except for perjury or subornation of perjury, as no disqualification.

A conviction of a person for any offense, except perjury or subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same.

**SOURCES:** Codes, Hutchinson's 1848, ch. 64, art. 12, title 8 (18); 1857, ch. 61, art. 191; 1871, § 779; 1880, § 1600; 1892, § 1743; 1906, § 1920; Hemingway's 1917, § 1580; 1930, § 1531; 1942, § 1692.

**Cross References** — What constitutes perjury, see § 97-9-59.

Commitment by court of party reasonably believed to have committed perjury before court, see § 99-3-29.

Requisites of an indictment for perjury, see § 99-7-39.

Requisites of an indictment for subornation of perjury, see § 99-7-41.

Impeachment of witness by evidence of conviction of crime, see Miss. R. Evid. 609.

## JUDICIAL DECISIONS

### 1. In general.

Criminal statute and rule of evidence rendering convicted perjurer incompetent to testify in criminal proceeding violated provision of state constitution entitling defendant to compulsory process, as evidentiary rule gave district attorney discretion as to whether to render particular witness incompetent by prosecuting him for perjury or preserve his competence by declining to prosecute known perjury. *Fuselier v. State*, 702 So. 2d 388 (Miss. 1997).

A state's witness was not incompetent to testify at a capital murder trial on the basis that he was a conceded perjurer where he had not been convicted of perjury. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

In ruling on the admissibility of a prior conviction for impeachment purposes, a trial judge must make a determination that the probative value outweighs the prejudicial effect of the evidence on the

record, and should articulate the reasons for his findings. As a framework for articulating the court's determination on the record, the judge should consider the impeachment value of the crime, the point in time of the conviction and the witness's subsequent history, the similarity of the past crime and the charged crime, the importance of the defendant's testimony, and the centrality of the credibility issue. *Johnson v. State*, 525 So. 2d 809 (Miss. 1988).

Under law preceding adoption of new Mississippi Rules of Evidence as of January 1, 1986, driving under influence of alcohol was misdemeanor of sufficient gravity that conviction thereof could be used to impeach witness. *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

Defendant charged with armed robbery is denied fair trial by introduction of detail surrounding prior conviction and evidence of other crimes not resulting in convictions; error may be raised on appeal not-

withstanding defendant's failure to object at time of trial where development of inadmissible detail is lengthy and repetitious. *Gallion v. State*, 469 So. 2d 1247 (Miss. 1985).

In a prosecution for burglary and theft, the prosecutor was properly allowed to specify each crime that defendant had been convicted of prior to trial, since any felony may be used to impeach the testimony of a witness under § 13-1-11. *Johnson v. State*, 452 So. 2d 850 (Miss. 1984), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Under § 13-1-11, defendant's prior convictions were properly introduced to impeach him. *Burns v. State*, 438 So. 2d 1347 (Miss. 1983).

In a prosecution for the sale of marijuana, the trial court committed reversible error in limiting the impeachment of the state's undercover informant to questions about the latter's reputation for truth and veracity and excluding any cross-examination on the informant's prior convictions. *Valentine v. State*, 396 So. 2d 15 (Miss. 1981).

The trial court in an armed robbery prosecution erred in refusing to allow defense counsel to question an accomplice-prosecution witness concerning convictions of misdemeanors, since a witness' credibility may be impeached by evidence of misdemeanors as well as infamous crimes; the trial court also erred in refusing to permit defense counsel to cross-examine another witness concerning the nature of the felonies of which he had previously been convicted. *Sanders v. State*, 352 So. 2d 822 (Miss. 1977).

Although the defendant admitted on direct examination that he had been previously convicted of a crime this did not foreclose the prosecution from cross-examining him on this point. *Wells v. State*, 288 So. 2d 860 (Miss. 1974).

The jury in a robbery case may take into consideration admitted convictions of defendants testifying as witnesses of fighting, disorderly conduct, assault and battery, larceny, vagrancy, resisting arrest, and breaking jail. *Parrish v. State*, 237 Miss. 37, 112 So. 2d 548 (1959).

In a prosecution for the sale of intoxicating liquors, since defendant's admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to defendant's credibility as a witness, and the loss or impairment of credibility affected both defendant's character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe from the evidence, beyond a reasonable doubt, that the defendant made the particular sale of liquor, and that they were not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. *Hassell v. State*, 229 Miss. 824, 92 So. 2d 194 (1957).

At common law a person convicted of most felonies was disqualified as a witness, but the statute removes this disqualification and conviction now may be used to impeach his credibility and that is a question for the jury. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

Conviction of perjury, though creating a general disqualification to testify at common law and in Mississippi, goes only to the convict's credit in the federal court, at least when the conviction was under the federal statute punishing perjury. *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359 (5th Cir. 1945).

Evidence of conviction for offense except perjury and subornation of perjury is admissible to impeach the credibility of witness. *Brister v. Dunaway*, 149 Miss. 5, 115 So. 36 (1927).

Accused testifying in his own behalf may be impeached on cross-examination by proof of prior convictions of crimes or misdemeanors. *Williams v. State*, 87 Miss. 373, 39 So. 1006 (1906).

Under the statute a convicted principal may testify against his accessory. *Keithler v. State*, 18 Miss. (10 S. & M.) 192 (1848).



## RESEARCH REFERENCES

**ALR.** Conviction in another jurisdiction as disqualifying witness. 2 A.L.R.2d 579.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment. 67 A.L.R.3d 761.

Propriety, on impeaching credibility of witness in criminal case by showing former conviction, of questions relating to nature and extent of punishment. 67 A.L.R.3d 775.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case. 97 A.L.R.3d 1150.

Conviction by courts-martial as proper subject of cross-examination for impeachment purposes. 7 A.L.R.4th 468.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime. 9 A.L.R.4th 897.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment of sentence thereon. 28 A.L.R.4th 647.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 A.L.R.4th 948.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding — post-Luce cases. 80 A.L.R.4th 1028.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial. 37 A.L.R.5th 319.

Review on appeal, where accused does not testify, of trial court's preliminary ruling that evidence of prior convictions will be admissible under Rule 609 of the Federal Rules of Evidence if accused does testify. 54 A.L.R. Fed. 694.

**Am Jur.** 81 Am. Jur. 2d (Rev), Witnesses §§ 195, 196.

3 Am. Jur. Proof of Facts, Character and Reputation, Proof No. 1 (general reputation in community or in place of employment, business, or profession).

3 Am. Jur. Proof of Facts, Conviction of Crime, Proof No. 1 (cross-examination concerning previous conviction).

3 Am. Jur. Proof of Facts, Conviction of Crime, Proof No. 2 (introduction of record after denial of previous conviction).

36 Am. Jur. Proof of Facts 2d 747, Impeachment of Witness by Prior Criminal Conviction.

**CJS.** 98 C.J.S., Witnesses §§ 196, 198-200.

**Law Reviews.** McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 13:1, 13:3.

## § 13-1-13. Witness may be examined touching interest or convictions.

Any witness may be examined touching his interest in the cause or his conviction of any crime, and his answers may be contradicted, and his interest or his conviction of a crime established by other evidence. A witness shall not be excused from answering any material and relevant question, unless the answer would expose him to criminal prosecution or penalty.

**SOURCES:** Codes, 1857, ch. 61, art. 208; 1871, § 778; 1880, § 1607; 1892, § 1746; 1906, § 1923; Hemingway's 1917, § 1583; 1930, § 1532; 1942, § 1693.

**Cross References** — Relevancy of evidence generally, see Miss. R. Evid. 401-412.

Admissibility of evidence of religious beliefs or opinions of witness with respect to issue of credibility, see Miss. R. Evid. 610.

Taking testimony, see Miss. R. Civ. P. 43.

## JUDICIAL DECISIONS

1. Examination and cross-examination in general.
2. Interest in cause.
3. Conviction of crime.
4. Contradiction and impeachment of witness.
5. Evidence.
6. Instructions.
7. Punishment for contempt.
8. Judgment.

**1. Examination and cross-examination in general.**

A trial court did not err in refusing to permit cross-examination of a witness concerning her use of marijuana and involvement in a robbery since specific instances of conduct may be used to attack the credibility of a witness on cross-examination only if probative of truthfulness or untruthfulness, and neither robbery nor marijuana use were probative of the witness' character for truthfulness or untruthfulness. *Johnston v. State*, 618 So. 2d 90 (Miss. 1993).

At a hearing on a former wife's petition to hold her former husband in contempt for failure to pay child support, the wife could not invoke her right against self-incrimination to shield herself from questions on cross-examination as to whether she maintained that the husband had an account at a particular bank, where the wife had voluntarily taken the stand on direct examination and unequivocally identified the signature on the bank account as the husband's. A party may not testify as to material facts in proceedings which he or she initiated, and later invoke the privilege against self-incrimination on those same matters. Thus, when the wife voluntarily took the stand and testified to material matters on direct examination, she also waived her right against self-incrimination. *Wallace v. Jones*, 572 So. 2d 371 (Miss. 1990).

Although a judge has wide discretionary control over the extent of cross-examination, the arbitrary curtailment upon a proper subject of cross-examination may be grounds for reversal. Thus, denial of a defendant's right to a broad and extensive cross-examination of a prosecution wit-

ness substantially affected the defendant's rights where the prosecution's evidence was largely circumstantial, with the exception of that witness. *Sayles v. State*, 552 So. 2d 1383 (Miss. 1989).

A defendant should have been permitted to cross-examine a prosecution witness as to an alleged affair between the defendant and the witness' wife, even though the affair took place approximately 2 to 5 years prior to the trial; it was still likely that the witness could or would have a grudge against the defendant, and this question should have been determined by the jury. *Sayles v. State*, 552 So. 2d 1383 (Miss. 1989).

Bias of mother, who had not testified at trial, was not allowed to be established, although bias, motive, or interest are always material and may be proven by extrinsic evidence, because fact that mother, standing alone, had extreme bias and motive to lie was too remote to impeach credibility of children. *Cantrell v. State*, 507 So. 2d 325 (Miss. 1987).

When witness voluntarily took the stand in a perjury trial and testified on behalf of the defendant therein as to the truthfulness of witness' brother's statements concerning a murder, to which witness had pled guilty and had been sentenced, witness waived his Fifth Amendment right and was subject to cross-examination on all relevant and material matters. *Hentz v. State*, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

Requiring witness, who had already pled guilty to the murder, to answer questions concerning that murder did not expose witness to prosecution for the murder and did not infringe upon his Fifth Amendment rights, where the witness' petition for writ of habeas corpus or, in the alternative, petition to withdraw his guilty plea, came months after the term of court expired wherein he had pled and sentence had been entered. *Hentz v. State*, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

In prosecution for false pretenses by delivery of a bad check, it was not error for



the state to cross-examine a witness who had once been married to defendant and to whom defendant had been furnishing child support. *Parker v. State*, 484 So. 2d 1033 (Miss. 1986).

Code 1942 § 2120 [Code 1972 § 13-1-13] does not permit the cross examination of an official charged with embezzlement as to censures by a grand jury. *Interior Contractors v. Western Waterproofing Co.*, 233 So. 2d 829 (Miss. 1970).

Where the accused had taken the stand as a witness in a prosecution for unlawful possession of a slot machine, he could not complain of being asked whether he had ever sold intoxicating liquor at his place of business wherein the slot machine was found. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

Where the accused took the stand in prosecution for assault and battery and testified as a witness he necessarily placed his veracity at issue and this justified the state in attacking this veracity. *Ables v. State*, 223 Miss. 770, 79 So. 2d 241 (1955).

It is only by virtue of this section [Code 1942, § 1693] that defendant's conviction of former offenses could be inquired into on his cross-examination, and the statute must be strictly construed in favor of defendant. *Berry v. State*, 212 Miss. 164, 54 So. 2d 222 (1951).

No witness is exempt from right of fair cross-examination. *Mississippi Ice & Utils. Co. v. Pearce*, 161 Miss. 252, 134 So. 164 (1931).

## 2. Interest in cause.

Letters written by defendant to relatives and page from manuscript of book about defendant's life, which expressed defendant's hostile views toward blacks and civil rights leaders and proclaimed his involvement in the Ku Klux Klan, were relevant to establish defendant's motive for killing black leader of civil rights organization, and more probative on such issue than prejudicial, especially as there was no evidence that defendant had ever met victim. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Testimony of federal agency informant who infiltrated Ku Klux Klan that defen-

dant, a Klan member, discussed "selective killings" as a "partial solution to the right wing's problem," and then said that "he would never ask anyone to do anything that he hadn't already done himself," was relevant to show that defendant had violent tendencies towards his perceived political and social enemies, and therefore, testimony was admissible in prosecution for murder of black leader of civil rights organization. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Impeachment of former police officer through use of officer's grand jury testimony was not error in murder prosecution; grand jury testimony was transcribed from tape recording, the transcript was provided to the defense, and the tape recording was offered to the defense. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Trial court improperly limited defendant's right to testify and to cross-examine and impeach certain witnesses; trial court did not allow defendant to cross-examine co-indictee concerning his interest and bias in case by showing threats co-indictee made against defendant's other witnesses; defendant also was prevented from questioning co-indictee regarding possible promises of leniency from prosecution in return for his testimony against defendant; trial court also improperly denied defendant opportunity to present witness to impeach co-indictee's denial of threats against potential witnesses for defendant, on basis that proper predicate had not been laid for impeachment, where co-indictee had been asked if he threatened witness and he denied it; moreover, trial court sustained objections during co-indictee's questioning which for all practical purposes prevented laying of full and proper predicate. *Hill v. State*, 512 So. 2d 883 (Miss. 1987).

Counsel is not precluded from seeking in good faith on cross-examination to elicit interest, bias, or prejudice of witness because his answer may reveal that liability insurance company is interested. *Mississippi Ice & Utils. Co. v. Pearce*, 161 Miss. 252, 134 So. 164 (1931).



### 3. Conviction of crime.

In a prosecution for sexual battery, the trial court should have granted the defendant's motion in limine to preclude admission, for impeachment use pursuant to Rule 609, Miss. R. Ev., of his prior conviction of touching a child for lustful purposes, even though a social worker testified that a general characteristic of pedophiles is an inability to be truthful, since admission of the prior conviction would have been manifestly prejudicial and mere reference to the conviction during the trial would have prejudiced the jury irreparably. *Hopkins v. State*, 639 So. 2d 1247 (Miss. 1993).

A prior arson conviction might be admissible for impeachment purposes as a crime involving dishonesty or false statement in situations, for example, where the defendant burned a building as part of a scheme to defraud an insurance company. However, where an arson conviction was admitted for impeachment purposes and the prosecution failed to offer prima facie evidence that the arson involved fraud, dishonesty, false statement or other elements suggesting a propensity for lying, the case would be reversed and remanded for a new trial on all issues. *McInnis v. State*, 527 So. 2d 84 (Miss. 1988).

The decision whether to give an advance ruling on the admissibility of prior convictions for impeachment purposes is discretionary with the trial judge. *McInnis v. State*, 527 So. 2d 84 (Miss. 1988).

In ruling on the admissibility of a prior conviction for impeachment purposes, a trial judge must make a determination that the probative value outweighs the prejudicial effect of the evidence on the record, and should articulate the reasons for his findings. As a framework for articulating the court's determination on the record, the judge should consider the impeachment value of the crime, the point in time of the conviction and the witness's subsequent history, the similarity of the past crime and the charged crime, the importance of the defendant's testimony, and the centrality of the credibility issue. *Johnson v. State*, 525 So. 2d 809 (Miss. 1988).

Prosecutor's question concerning prior conviction, asking whether that crime had

involved breaking "in on a little 12-year old girl," was improper because, while accused who has taken stand on his own behalf may be questioned regarding previous convictions, defendant may not be asked to divulge any details of convictions including whether or not he served time for conviction; asking of question did not constitute reversible error, because upon defense objection, jury was instructed to ignore question and this admonition came before defendant could answer. *Williams v. State*, 512 So. 2d 666 (Miss. 1987).

Police officer who arrests suspect may testify as subsequent trial that arrest was made pursuant to outstanding arrest warrant, where no mention is made of charges upon which warrant is based. *Brown v. State*, 483 So. 2d 328 (Miss. 1986).

Criminal defendant is entitled to cross-examine witnesses upon whom state relies heavily regarding pending criminal charges against witnesses, notwithstanding lack of evidence of bargain between state and witnesses. *Hall v. State*, 476 So. 2d 26 (Miss. 1985).

Defendant charged with armed robbery is denied fair trial by introduction of detail surrounding prior conviction and evidence of other crimes not resulting in convictions; error may be raised on appeal notwithstanding defendant's failure to object at time of trial where development of inadmissible detail is lengthy and repetitious. *Gallion v. State*, 469 So. 2d 1247 (Miss. 1985).

Prosecutor may not impeach witness by showing that witness' relatives or acquaintances have prior convictions. *Acevedo v. State*, 467 So. 2d 220 (Miss. 1985).

In a prosecution for burglary, defendant was not entitled to a mistrial based on the prosecution's failure to prove, by extrinsic evidence the prior convictions of a witness that the prosecution had attempted to introduce to impeach the witness, where the witness either denied or claimed not to remember a number of the incidents referred to, the witness was questioned about 12 specific prior criminal convictions for impeachment purposes, the prosecution recited dates and crimes, no objection to the method of impeachment was made by the defendant, and where defen-

dant's attorney questioned the witness and then rested. *Cummings v. State*, 465 So. 2d 993 (Miss. 1985).

When prosecution questions, for impeachment purposes, defense witness about specific prior criminal convictions, reciting dates and crimes, and no objection to method of impeachment is made, defendant may not obtain mistrial on basis of assertion that state has failed to prove prior convictions by extrinsic evidence. *Cummings v. State*, 465 So. 2d 993 (Miss. 1985).

Limitation in § 99-19-101 on use in sentencing phase of capital case of prior convictions for purpose of establishing aggravating circumstances in no way alters established rule of evidence (§ 13-1-13) under which defendant who testifies may have credibility impeached by prior convictions, whether misdemeanors or felonies. *Mhoon v. State*, 464 So. 2d 77 (Miss. 1985).

Where a witness does not deny a previous conviction but states that he cannot recall the conviction, evidence of the prior conviction may be introduced under § 13-1-13. *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982).

Where the defendant took the stand in his own defense, the district attorney had a right to cross-examine him as to his previous criminal convictions. *Thornton v. State*, 313 So. 2d 16 (Miss. 1975).

Evidence of a previous conviction, based on a plea of nolo contendere, is not admissible in another case. *Dependents of Veasley v. Attala Co.*, 312 So. 2d 7 (Miss. 1975).

Trial court erred in refusing to allow the defense counsel to ask a prosecution witness if he had ever been convicted of a crime or misdemeanor, and such error was not harmless as the credibility of the witness was the real issue for the jury to determine in the case. *Baker v. State*, 307 So. 2d 545 (Miss. 1975), but see *Bevill v. State*, 556 So. 2d 699 (Miss. 1990).

Although the defendant admitted on direct examination that he had been previously convicted of a crime this did not foreclose the prosecution from cross-examining him on this point. *Wells v. State*, 288 So. 2d 860 (Miss. 1974).

It is proper to impeach a witness by showing previous conviction of crimes.

*Clanton v. State*, 279 So. 2d 599 (Miss. 1973).

Nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word "conviction" as used in Code 1942, § 1693. *Murphree v. Hudnall*, 278 So. 2d 427 (Miss. 1973).

Examination of defendant as to other crimes must be limited to convictions and even then the details of the crime cannot be inquired into. *Allison v. State*, 274 So. 2d 678 (Miss. 1973).

Even if defendant's reputation for peace and violence was properly put in issue when defense counsel in effect inquired into the reputation of the defendant, nevertheless the district attorney went too far a field in attempting to contradict the testimony as to the good reputation of the defendant for peace and violence and to bring out details of crimes for which defendant had not even been indicted, such as 4 other assaults, an incident in which defendant allegedly killed a man, and an incident in which he also killed a baby with a stray shot. *Allison v. State*, 274 So. 2d 678 (Miss. 1973).

In view of the provision in Code 1942, § 8280 to the effect that a person convicted of a traffic offense cannot have his credibility impeached for convictions of such offenses as speeding, driving without proper driver's license and the like, a person convicted of such offenses cannot be examined with respect thereto under earlier § 1693. *Jones v. State*, 268 So. 2d 348 (Miss. 1972).

The right to cross-examine a defendant with reference to his former convictions in order to impeach or discredit his testimony is limited to the fact that the defendant was convicted and does not include the right to go into the details of the former crime, nor into the punishment given as a result of the conviction. *Murray v. State*, 266 So. 2d 139 (Miss. 1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1534, 36 L. Ed. 2d 196 (1973), reh'g denied, 411 U.S. 959, 93 S. Ct. 1929, 36 L. Ed. 2d 419 (1973).

Where, after the defendant had admitted one previous conviction, and the prosecutor had inferred that the defendant had been absent without official leave and had been convicted of crimes in three



different states, the prosecutor responded to the defense statement that if the prosecution had any evidence of other convictions they should produce it in the proper manner, replied before the jury, "I will be glad to produce it," without thereafter producing a scintilla of evidence of other convictions, prejudicial error was committed. *Johns v. State*, 255 So. 2d 322 (Miss. 1971).

Under this section [Code 1942, § 1693] the state may show that the defendant had been convicted of criminal offenses for the purpose of discrediting him as a witness, provided that the details of the same are not given. *Benedetti v. State*, 249 So. 2d 671 (Miss. 1971).

In a prosecution of a justice of the peace for embezzlement, the district attorney's cross-examination of the defendant as to the number of times he had been criticized by the grand jury constituted reversible error, since, while the section [Code 1942, § 1693] permits a cross-examination of a defendant as to convictions, it never permits cross-examination as to indictments and certainly not as to censures by the grand jury, which are hearsay in nature and can only be enlisted for the purpose of degrading and prejudicing the defendant in the eyes of the jury. *Interior Contractors v. Western Waterproofing Co.*, 233 So. 2d 829 (Miss. 1970).

While the district attorney is not permitted to question a defendant about details of prior convictions, where a defendant in response to a question as to prior convictions, testified that he had been convicted of traffic violations and burglary, and that he had been sentenced to the penitentiary and had been released on parole, the district attorney was authorized, by this section [Code 1942, § 1693], to cross-examine the defendant about former offenses not mentioned on direct testimony, which questioning did not extend to details of convictions. *Mangrum v. State*, 232 So. 2d 703 (Miss. 1970).

Exclusion of certificates of conviction of adverse witnesses is not error where they admit having been convicted. *Matthews v. State*, 243 Miss. 568, 139 So. 2d 386 (1962).

A witness may be questioned only as to conviction, and not as to whether he has

been indicted. *Statham v. Blaine*, 234 Miss. 649, 107 So. 2d 93 (1958), motion granted, 234 Miss. 669, 108 So. 2d 213 (1959).

Where the accused took the stand as a witness in a prosecution for second degree arson, he thereby subjected himself to cross-examination, and made competent his own testimony, or any other admissible evidence, tending to establish his former conviction of crimes. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

Questions to accused concerning his prior convictions were proper under this section [Code 1942, § 1693]. *Jones v. State*, 228 Miss. 458, 88 So. 2d 91 (1956).

Error of the lower court in permitting the district attorney in prosecution for murder, over objection, to cross-examine the accused in regard to convictions while in the military service and in regard to the type of discharge he received from the military service, was harmless inasmuch as the accused freely and voluntarily confessed to a state of facts making out a clear case of murder and no question was raised in the record as to the confession not being entirely free and voluntary. *McNair v. State*, 223 Miss. 83, 77 So. 2d 306 (1955).

In an action by a passenger against an owner of a taxicab for personal injuries, questions as to indictments pending against the passenger would have been improper. *Garraga v. Yellow Cab Co.*, 222 Miss. 739, 77 So. 2d 276 (1955).

In an action by a passenger against owner of a taxicab for injuries sustained where passenger fell out of a moving cab, it was proper cross-examination to ask passenger of convictions for violations of internal revenue laws. *Garraga v. Yellow Cab Co.*, 222 Miss. 739, 77 So. 2d 276 (1955).

At common law a person convicted of most felonies was disqualified as a witness, but the statute removes this disqualification and conviction now may be used to impeach his credibility. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

In prosecution for murder where the defendant made no objection to prosecu-



tor's cross-examination of five defense witnesses concerning prior conviction, except as to one question asked the defendant, and that objection was properly sustained and where appellant made no motion for a mistrial, even if there was an error in cross-examination the accused failed to preserve that point on appeal. *Wetzel v. State*, 225 Miss. 450, 76 So. 2d 188 (1954), appeal dismissed, cert. denied, 350 U.S. 870, 76 S. Ct. 121, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 920, 76 S. Ct. 200, 100 L. Ed. 805 (1955).

Examination of a witness touching his conviction of a crime may extend to misdemeanors as well as to infamous crimes and the record of conviction of a misdemeanor is admissible to impeach the veracity of a witness. *Breland v. State*, 221 Miss. 371, 73 So. 2d 267 (1954).

In a prosecution for unlawful sale of intoxicating liquors, where the accused denied that he was ever convicted of a crime, it was an error to allow admission in evidence of a justice of peace court docket which showed only that the accused was charged with a crime. *Breland v. State*, 221 Miss. 371, 73 So. 2d 267 (1954).

This section [Code 1942, § 1693] permits a witness to be examined only concerning his conviction of a crime and not concerning its details. *Smith v. State*, 217 Miss. 123, 63 So. 2d 557 (1953).

In prosecution for assault and battery with intent to kill, defendant's prior conviction of drunkenness was competent evidence against him when both sides, without objection, entered upon proof of fact whether he was drunk or drinking on night of crime, and defendant took stand as witness, as his prior conviction of crime was competent as bearing upon weight of his testimony and his credibility as witness. *Phillips v. State*, 43 So. 2d 208 (Miss. 1949).

It is competent for state to question defendant in criminal prosecution in regard to previous convictions of crime when accused has taken witness stand in his own behalf. *Scarborough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).

In criminal prosecution, it is not competent for state, in presenting its case in chief, to prove that defendant has been

convicted or is guilty of other crimes wholly disconnected with, and having no direct bearing on, case under investigation. *Scarborough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).

Where the defendant on trial for burglary, in answer to a question on direct examination, stated that he had previously been convicted of wilful trespass, it was prejudicial error for the prosecuting attorney to make further inquiries for the purpose of showing that the conviction had followed withdrawal of a plea of guilty to a greater offense, wholly disconnected with the charge on which defendant was being tried. *White v. State*, 201 Miss. 556, 29 So. 2d 650 (1947).

Under this section [Code 1942, § 1693], if the defendant, in a murder prosecution, offers himself as a witness, then proof of the fact that he has been previously convicted of a crime, but not the extent of the punishment imposed, would be competent to affect his credibility as a witness. *Hartfield v. State*, 186 Miss. 75, 189 So. 530 (1939), overruled in part by *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982), superseded by statute as state in *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

Admission, on cross-examination, by party jointly indicted with defendant that, in addition to crime for which he and defendant were being tried, there were indictments pending against him for other offenses, held reversible error where he had not been convicted of those offenses. *Graham v. State*, 179 So. 340 (Miss. 1938).

Where defendant on cross-examination admitted previous conviction of grand larceny, fact that jurors were informed by further cross-examination that defendant had served penitentiary term held not to warrant reversal. *Roney v. State*, 167 Miss. 532, 142 So. 475 (1932).

Statute authorizing examination of witness regarding conviction does not permit details of crime to be shown. *Walker v. State*, 151 Miss. 862, 119 So. 796 (1929).

Witness may be cross-examined as to any and all convictions of crime affecting credibility. *Brown v. State*, 96 Miss. 534, 51 So. 273 (1910).

Proper to ask one accused of assault with intent to murder if he had been convicted of crime, but not, if he had been

confined in penitentiary for cutting white man's throat. *Dodds v. State*, 45 So. 863 (Miss. 1908).

Error to ask witness if he had ever been charged with committing an offense; statute allows only question as to conviction. *Starling v. State*, 89 Miss. 328, 42 So. 798 (1906); *McClelland v. State*, 98 Miss. 735, 54 So. 251 (1910).

The examination of witnesses may extend to misdemeanors as well as to infamous crimes. *Lewis v. State*, 85 Miss. 35, 37 So. 497 (1904).

#### 4. Contradiction and impeachment of witness.

Defendant was properly precluded from giving impeachment testimony about taped conversations in which state witness allegedly said that district attorney's office was threatening to revoke probation if he did not testify, where defendant did not tell counsel about conversations until after witness had been excused, thus preventing the laying of proper predicate for impeachment testimony, where defendant made no objection to release of witness, and where defense counsel did not reveal existence of tape pursuant to discovery requirements when trial commenced the next day, but waited until defendant's testimony to try to elicit that information. (Per Smith, Justice, with three Justices concurring). *Harris v. State*, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

A trial judge properly excluded evidence of a state witness' refusal to talk to defense counsel prior to trial as irrelevant. The witness' refusal to talk to the attorney was not indicative of a lack of veracity and was not relevant to credibility. *Sayles v. State*, 552 So. 2d 1383 (Miss. 1989).

The manufacture, possession or transportation of untaxed liquor is a crime involving dishonesty or false statement under Rule 609(a)(2), Miss. R. Ev., which permits impeachment of a witness' testimony by evidence of conviction of such a crime. *Johnson v. State*, 529 So. 2d 577 (Miss. 1988).

Trial court improperly limited defendant's right to testify and to cross-examine and impeach certain witnesses; trial court did not allow defendant to cross-examine co-indictee concerning his inter-

est and bias in case by showing threats co-indictee made against defendant's other witnesses; defendant also was prevented from questioning co-indictee regarding possible promises of leniency from prosecution in return for his testimony against defendant; trial court also improperly denied defendant opportunity to present witness to impeach co-indictee's denial of threats against potential witnesses for defendant, on basis that proper predicate had not been laid for impeachment, where co-indictee had been asked if he threatened witness and he denied it; moreover, trial court sustained objections during co-indictee's questioning which for all practical purposes prevented laying of full and proper predicate. *Hill v. State*, 512 So. 2d 883 (Miss. 1987).

Where defendant did not testify at the guilt stage of his murder trial, evidence that defendant was on parole was not admissible for the purpose of impeaching his testimony under this section. *Gray v. State*, 351 So. 2d 1342 (Miss. 1977).

Plea of guilty being tantamount to a conviction for purposes of this statute, the credibility as a witness of defendant in a burglary prosecution could properly be impeached by evidence of his prior plea of guilty in an out of state prosecution for forgery, even though sentence had not been imposed and final judgment had not been entered on that plea. *Bridges v. State*, 336 So. 2d 1309 (Miss. 1976).

In seeking to impeach a prosecution witness, defense counsel could not question the witness as to mere charges of the commission of offenses, especially where such charges were pending and the witness's testimony might incriminate him. Further, the witness could not be asked nor proof made of the details of an alleged crime said to have been committed by the witness sought to be impeached. *Haralson v. State*, 314 So. 2d 722 (Miss. 1975).

If a defendant denies a former conviction he may be contradicted by the record of such conviction and such evidence goes only to the credibility of the witness. *Berry v. State*, 212 Miss. 164, 54 So. 2d 222 (1951).

Where witness is sought to be impeached on ground of conviction, details of crime are not admissible, and he cannot



be examined as to such details; only fact of conviction is admissible; in seeking to impeach credibility of accused it was error to ask if he had not been convicted of beating wife and child and to contradict denial. *Powers v. State*, 156 Miss. 316, 126 So. 12 (1930).

Permitting state in murder prosecution to cross-examine husband of deceased as to statements relative to getting divorce and to contradict such testimony in rebuttal held proper. *Hardy v. State*, 143 Miss. 352, 108 So. 727 (1926).

Person jointly indicted with accused, not on trial but testifying for accused, may be impeached by contradictory statement made by him as to commission of offense. *Pickett v. State*, 139 Miss. 529, 104 So. 358 (1925).

## 5. Evidence.

Defendant could present evidence that police officers were biased and prejudiced against him during his direct testimony in armed robbery prosecution, and was not required to show bias during cross-examination of the officers. *McLemore v. State*, 669 So. 2d 19 (Miss. 1996).

Before evidence may be received under the other bad acts exception to the primary relevancy rule, the proponent must articulate precisely the evidential hypothesis by which the consequential act may be inferred from the proffered evidence. *Houston v. State*, 531 So. 2d 598 (Miss. 1988).

The certified abstract of a court record showing a defendant's prior conviction was competent evidence of such conviction and was not rendered incompetent by the fact that the abstract included the punishment inflicted for the prior offense. *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982).

In a robbery prosecution against a daughter, who had testified that she had grabbed her mother's metal box containing money and a pistol and fled to prevent the mother from obtaining the pistol, evidence that on several occasions the mother had shot at members of the accused's family should have been permitted to go to the jury as tending to show the bias and prejudice of the mother, who was a prosecuting witness, even though it was

not part of the *res gestae*. *Hardin v. State*, 232 Miss. 470, 99 So. 2d 600 (1958).

Cross examination by district attorney in robbery prosecution of defendant's witness as to number of times sheriff raided his place and concerning his sales of whisky was incompetent but not reversible error. *Ivey v. State*, 206 Miss. 734, 40 So. 2d 609 (1949).

Conviction of crime admissible to impeach veracity of witness only after he has denied conviction. *Alabama & V. Ry. Co. v. Thornhill*, 106 Miss. 387, 63 So. 674 (1913).

It is proper under this section [Code 1942, § 1693] to ask a witness on cross-examination if he had not confessed to having been a convict in the penitentiary, and his answer may be contradicted. The record of such conviction is only necessary where the object is to show conviction, but if the witness is asked for the purpose of discrediting him the question is competent without the production of the record. *Jackson v. State*, 75 Miss. 145, 21 So. 707 (1897).

The record of a conviction of a misdemeanor is admissible. *Helm v. State*, 67 Miss. 562, 7 So. 487 (1890).

## 6. Instructions.

Instruction that interest of witness might be considered not error, though defendant's wife was his only witness. *Jones v. State*, 130 Miss. 703, 94 So. 851 (1923).

## 7. Punishment for contempt.

While undue delay in imposition of punishment for contempt will not be tolerated, withholding imposition of punishment on witness found guilty of direct criminal contempt until the day following the conclusion of the trial did not constitute undue delay. *Hentz v. State*, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

## 8. Judgment.

A judgment which simply stated that witness had been found in contempt 27 times for refusing to answer questions, and had been punished for 6 acts, but did not specify the 6 acts, was not sufficiently clear and explicit to warrant Supreme



Court to affirm, annul, reverse, or modify it. *Hentz v. State*, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

While contempt proceeding is summary and the judge may act upon that which he personally knows is direct contempt, the judgment of conviction should contain ma-

terial facts constituting the contempt, and, in rendering the judgment and making up the record, the causes for contempt should be separately stated so as to constitute *res judicata*. *Hentz v. State*, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

## RESEARCH REFERENCES

**ALR.** Testifying in civil proceeding as waiver of privilege against self-incrimination. 72 A.L.R.2d 830.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. 9 A.L.R.3d 990.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 A.L.R.3d 1413.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 A.L.R.3d 1203.

Propriety, on impeaching credibility of witness in civil case by showing former conviction, of questions relating to nature and extent of punishment. 67 A.L.R.3d 761.

Propriety, on impeaching credibility of witness in criminal case by showing former conviction, of questions relating to nature and extent of punishment. 67 A.L.R.3d 775.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense. 67 A.L.R.3d 824.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge — modern state cases. 24 A.L.R.4th 333.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases. 58 A.L.R.4th 1229.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse — modern cases. 80 A.L.R.4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment rela-

tionship to party — modern cases. 80 A.L.R.4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution — modern cases. 80 A.L.R.4th 547.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding — post-Luce cases. 80 A.L.R.4th 1028.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases. 81 A.L.R.4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases. 81 A.L.R.4th 939.

Permissibility of testimony by telephone in state trial. 85 A.L.R.4th 476.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial. 37 A.L.R.5th 319.

Requirement that court advise accused of, and make inquiry with respect to, waiver of right to testify. 72 A.L.R.5th 403.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party. 48 A.L.R. Fed. 390.

**Am Jur.** 81 Am. Jur. 2d (Rev), Witnesses §§ 770 et seq., 828 et seq.

3 Am. Jur. Proof of Facts, Conviction of Crime, Proof No. 1 (cross-examination concerning previous conviction).

3 Am. Jur. Proof of Facts, Conviction of Crime, Proof No. 2 (introduction of record after denial of previous conviction).

36 Am. Jur. Proof of Facts 2d 747, Impeachment of Witness by Prior Criminal Conviction.

6 Am. Jur. Trials, Cross-Examination of Defendant, §§ 17 et seq.

6 Am. Jur. Trials, Cross-Examination of Plaintiff and Plaintiff's Witnesses, §§ 26 et seq.

**CJS.** 31A C.J.S., Evidence §§ 657-665; 98 C.J.S., Witnesses §§ 249, 252 et seq.; 98 C.J.S., Witnesses §§ 732, 745 et seq.

**Law Reviews.** 1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss. L. J. 149, March 1983.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 10:3, 12:1, 12:4, 12:5, 13:1, 13:3, 13:8, 15:2, 15:11.

## § 13-1-15. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 1604; 1892, § 1742; 1906, § 1919; Hemingway's 1917, § 1579; 1930, § 1533; 1942, § 1694]

**Editor's Note** — Former § 13-1-15 provided that a person shall not be incompetent as a witness because of his religious belief or want of it.

## § 13-1-16. Repealed.

Repealed by Laws of 1984, ch. 414, § 9, eff from and after July 1, 1984.

§ 13-1-16. [En Laws, 1972, ch. 338, § 1]

**Editor's Note** — Section 13-1-16 provided for the appointment of interpreters for deaf parties and witnesses and for the payment of fees. Sections 13-1-301 et seq. now make provisions for such appointments.

## § 13-1-17. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 60, art. 1 (112); 1857, ch. 61, art. 206; 1871, § 776; 1880, § 1605; 1892, § 1744; 1906, § 1921; Hemingway's 1917, § 1581; 1930, § 1534; 1942, § 1695]

**Editor's Note** — Former § 13-1-17 provided for the affirmation of witnesses.

## § 13-1-19. Witness to be committed for refusal to testify.

If any person subpoenaed as a witness in any case or matter, shall refuse to be sworn or affirmed, or to give evidence, he shall be committed to prison by the court, justice, master, commissioner, referee, or other person authorized to take his testimony, there to remain without bail until he shall be sworn or affirmed or shall give his evidence.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1 (108); 1857, ch. 61, art. 207; 1871, § 777; 1880, § 1606; 1892, § 1745; 1906, § 1922; Hemingway's 1917, § 1582; 1930, § 1535; 1942, § 1696.

## RESEARCH REFERENCES

**ALR.** Refusal to answer questions before state grand jury as direct contempt of court. 69 A.L.R.3d 501.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify. 20 A.L.R.4th 245.

Right of independent expert to refuse to testify as to expert opinion. 50 A.L.R.4th 680.

**CJS.** 98 C.J.S., Witnesses §§ 98-101, 106-118.

## § 13-1-21. Communications privileged; exception.

(1) All communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such party shall not be required to disclose the same in any legal proceeding except at the instance of the patient or, in case of the death of the patient, at the instance of his personal representative or legal heirs in case there be no personal representative, or except, if the validity of the will of the decedent is in question, at the instance of the personal representative or any of the legal heirs or any contestant or proponent of the will.

(2) Waiver of the medical privilege of patients regarding the release of medical information to health care personnel, the State Board of Health or local health departments, made to comply with Sections 41-3-15, 41-23-1 and 41-23-2 and related rules, shall be implied. The medical privilege likewise shall be waived to allow any physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to report to the State Department of Health necessary information regarding any person afflicted with any communicable disease or infected with the causative agent thereof who neglects or refuses to comply with accepted protective measures to prevent the transmission of the communicable disease.

(3) Willful violations of the provisions of this section shall constitute a misdemeanor and shall be punishable as provided for by law. Any physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist, or chiropractor shall be civilly liable for damages for any willful or reckless and wanton acts or omissions constituting such violations.

(4) In any action commenced or claim made after July 1, 1983, against a physician, hospital, hospital employee, osteopath, dentist, nurse, pharmacist, podiatrist, optometrist or chiropractor for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the medical privilege and any medical information relevant to the allegation upon which the cause of action or claim is based shall be disclosed upon the request of the defendant, or his or her counsel.

(5) In any disciplinary action commencing on or after July 1, 1987, against a medical physician, an osteopathic physician or a podiatrist pursuant to the provisions of Sections 73-25-1 through 73-25-39, 73-25-51 through 73-25-67, 73-25-81 through 73-25-95 and 73-27-1 through 73-27-19, waiver of the



medical privilege of a patient to the extent of any information other than that which would identify the patient shall be implied.

**SOURCES:** Codes, 1906, § 3695; Hemingway's 1917, § 6380; 1930, § 1536; 1942, § 1697; Laws, 1944, ch. 315; Laws, 1968, ch. 441, § 4; Laws, 1976, ch. 347; Laws, 1979, ch. 408; Laws, 1982, ch. 407; Laws, 1983, ch. 327; Laws, 1987, ch. 500, § 2; Laws, 1988, ch. 557, § 3, eff from and after July 1, 1988.

**Cross References** — Hospital records not generally constituting public records, see § 41-9-67.

Confidentiality and inspection of hospital records of civilly committed patients, see § 41-21-97.

What constitutes the practice of medicine, see § 73-25-33.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Additional provisions relative to privileged communications, see Miss. R. Evid. 501-505.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application generally.
3. Persons subject to privilege.
4. —Chiropractor.
5. —Dentist.
6. —Nurse.
7. Persons who may assert privilege.
8. Matters subject to privilege.
9. —X-rays.
10. —Hospital and other records.
11. Waiver.
12. —Waiver by contract.
13. —Persons who may waive.
14. Failure to call physician as subject of inference.

### 1. Validity.

This section is constitutional. *French Drug Co. v. Jones*, 367 So. 2d 431, 3 A.L.R.4th 259 (Miss. 1978).

Privileged communication statute is mere rule of evidence, and so not unconstitutional, though preventing proof by defendant on main issue. *Yazoo & Miss. Valley Ry. v. Decker*, 150 Miss. 621, 116 So. 287 (1928).

### 2. Construction and application generally.

Only privilege established by the clear and unambiguous language of Miss. Code Ann. § 13-1-21 is for communications made to a physician by a patient under his or her charge or by one seeking profes-

sional advice; thus, if a court is to be faithful to the statute, it must limit what is privileged thereunder to communications made to a physician by a patient. *Franklin Collection Serv. v. Kyle*, 955 So. 2d 284 (Miss. 2007).

In a collection agency's suit brought on an open account against a patient, the patient did not have a counterclaim for breach of a physician-patient privilege when the collection agency attached certain information to its complaint because Miss. Code Ann. § 13-1-21 was too narrow to apply, and there was no privilege for this type of information under the broader Miss. R. Evid. 503. *Franklin Collection Serv. v. Kyle*, — So. 2d —, 2007 Miss. LEXIS 11 (Miss. Jan. 11, 2007), substituted opinion at, opinion withdrawn by 955 So. 2d 284, 2007 Miss. LEXIS 234 (Miss. 2007).

Although the urinalysis evidence came under the Miss. Code Ann. § 3-1-21(1) physician-patient privilege, defendant could not rely on the privilege to exclude the incriminating evidence of cocaine in defendant's system where the procedure allegedly failed to comply with Miss. Code Ann. § 63-11-19. *Jones v. State*, 858 So. 2d 139 (Miss. 2003).

Defendant's conviction for vehicular homicide was affirmed where the appellate court found that a hospital employee's analysis of his urine that showed defen-

dant had cocaine in his system at the time of the fatal accident was properly admitted; to ensure the proper administration of justice, the analysis of defendant's urine specimen was removed from the protection of the physician-patient privilege. *Jones v. State*, — So. 2d —, 2002 Miss. App. LEXIS 185 (Miss. Ct. App. Apr. 9, 2002), opinion withdrawn by, substituted opinion at 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002).

Where newborn was accidentally taken by hospital staff to the wrong mother to be breast fed, the unidentified patient responsible for breast feeding newborn was a fact witness to the alleged negligence of the hospital; therefore, her identity had to be revealed and her medical records may be inspected by the judge in camera to determine whether the health of the newborn was at risk. *Baptist Mem. Hosp.-Union County v. Johnson*, 754 So. 2d 1165 (Miss. 2000).

Under no circumstances should a court order require plaintiff in medical malpractice or other action to release medical information unconditionally. *Scott ex rel. Scott v. Flynt*, 704 So. 2d 998 (Miss. 1996), reh'g denied, 703 So. 2d 864 (Miss. 1997).

In cases involving personal injuries, where a plaintiff has, during pretrial discovery, expressly refused to waive the medical privilege provided for under § 13-1-21, the defendant is not entitled to an instruction stating that the fact that the treating physicians were not called as witnesses by the plaintiff would justify an inference that their testimony would have been unfavorable, whether or not defendant subpoenaed them. *Jackson v. Brumfield*, 458 So. 2d 736 (Miss. 1984).

In a prosecution for manslaughter by culpable negligence resulting from an automobile collision, defendant was properly precluded from arguing that the prosecution had failed to prove the results of a blood test for alcohol, since the State in rebuttal could not reply to the defendant's argument by discussing material protected by § 13-1-21, the physician-patient privilege, which defendant had exercised. *Alford v. State*, 433 So. 2d 940 (Miss. 1983).

The testimony of two doctors as to their court-ordered examinations did not vio-

late the physician-patient privilege statute which declared as privileged only those communications made to a physician by a patient under his charge or by one seeking professional advice. *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971).

The purpose of the physician-patient privilege is to protect the patient by encouraging full and confidential disclosure to his physician of all information, however embarrassing, which might aid the physician in diagnosis and treatment. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

In Mississippi the physician-patient privilege arises only when the patient consults the physician in his professional capacity and generally for the purpose of treatment, and it would not apply to a physician appointed by a state court. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

To be privileged, physician-patient communications must be in a professional context and generally must be with the purpose of treatment. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

Under state law, the examining doctor's testimony is not subject to medical privilege, and by federal standards Rule 35 overrides any conflicting state-created rule, procedural, or substantive, which would bar the testimony of an examining physician appointed by order of federal court. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

The physician-patient privilege is substantive for diversity purposes, requiring the application of state substantive law in diversity cases. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

Code 1942, § 6998-08 does not prohibit the invocation of the patient-physician communication privilege in proceedings before the Mississippi workmen's compensation commission. *Cooper's, Inc. v. Long*, 224 So. 2d 866 (Miss. 1969).

Under this section [Code 1942, § 1697], a decedent's physician is properly permitted to testify for the proponent of his will. *Grant v. Norwood*, 248 Miss. 740, 161 So. 2d 189 (1964).

Error in permitting a physician to testify to a privileged communication held



harmless, in view of the patient's testimony as to what the doctor prescribed. *Pullin v. Nabors*, 240 Miss. 864, 128 So. 2d 117 (1961).

A doctor may not be required to testify as to matters learned in treating a patient, where the patient's widow objects. *Donaldson v. Life & Cas. Ins. Co.*, 239 Miss. 635, 124 So. 2d 701 (1960).

The privileged communications statute is no prohibition against the offering of a physician as a witness since the patient may or may not waive the statute. *Gulf, M. & O.R.R. v. Smith*, 210 Miss. 768, 50 So. 2d 898 (1951).

The purpose of the privileged communication statute is to protect confidential matters growing out of the relation of physician and his assistants and patient. *Life & Cas. Ins. Co. v. Walters*, 180 Miss. 384, 177 So. 47 (1937).

The privileged communication statute and statute permitting introduction in evidence of vital statistics records must be construed together. *Life & Cas. Ins. Co. v. Walters*, 180 Miss. 384, 177 So. 47 (1937).

Statute declaring as privileged communications made to physician by patient or one seeking professional advice must be limited to its language and clear purpose, and should not be extended by construction. *Gulf, M. & N.R. Co. v. Willis*, 171 Miss. 739, 158 So. 551 (1935).

Privileged communication statute is mere rule of evidence. *Yazoo & Miss. Valley Ry. v. Decker*, 150 Miss. 621, 116 So. 287 (1928).

State privileged communication statute held mere rule of evidence, applicable in action under Federal Employer's Liability Act. *New Orleans & N.E.R. Co. v. Jackson*, 145 Miss. 702, 110 So. 586 (1926).

Physician cannot disclose patient's communication except at patient's instance. *Hunter v. Hunter*, 127 Miss. 683, 90 So. 440 (1922).

### 3. Persons subject to privilege.

Evidence rule creating psychotherapist-patient privilege defines "psychotherapist" not only by those persons who are licensed, but also by subjective impressions of patient. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice

concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Patient-psychotherapist relationship and privilege existed between defendant and witness, even though witness was not licensed psychologist, where defendant believed that witness was psychiatrist or psychologist and that anything he told witness was confidential. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

In a proceeding by a wife seeking a divorce from her husband on the basis of excessive drug use, the physician-patient privilege of § 13-1-21 did not extend to pharmacist-client communications, and thus, testimony of the husband's pharmacist was properly introduced. *Ladner v. Ladner*, 436 So. 2d 1366 (Miss. 1983).

In personal injury action, physician who was partner of physician who treated plaintiff held incompetent to testify concerning plaintiff's condition. *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932).

### 4. —Chiropractor.

Chiropractors are not within privilege of physicians. *S.H. Kress & Co. v. Sharp*, 156 Miss. 693, 126 So. 650, 68 A.L.R. 167 (1930).

### 5. —Dentist.

Offer of proof of what was expected to be proved by dentist held insufficient to justify reversal of judgment for patient suing railroad for injuries on ground that dentist's testimony was not privileged, where record did not disclose that dentist's testimony would have contradicted that given by patient or would have mitigated damages awarded by jury. *Gulf, M. & N.R. Co. v. Willis*, 171 Miss. 739, 158 So. 551 (1935).

Dentist is not a "physician" within statute declaring as privileged all communications made to a physician by a patient or by one seeking professional advice. *Gulf, M. & N.R. Co. v. Willis*, 171 Miss. 739, 158 So. 551 (1935).

### 6. —Nurse.

In action on life policy excluding liability if insured was pregnant at date of



policy and death resulted from such pregnancy, student nurse in hospital who prepared room for insured's confinement, and who remained through the confinement, could testify regarding matters observed without violating the privileged communication statute. *Life & Cas. Ins. Co. v. Walters*, 180 Miss. 384, 177 So. 47 (1937).

Nurse employed by physician who treated plaintiff for injury would be competent as witness as to all matters learned when not assisting physician. *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932).

Nurse who was employee of physician who treated plaintiff for injury to leg held incompetent as witness. *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932).

Statute, making communications to physician privileged, held not to exclude testimony of nurses employed in hospitals and present when communications were made. *Goodman v. Lang*, 158 Miss. 204, 130 So. 50 (1930), error overruled, 130 So. 311 (Miss. 1930).

### 7. Persons who may assert privilege.

Testimony of a physician that the defendant informed him that he had a girl "in trouble" and asked whether the doctor could give her something to bring about menstruation, was not privileged, where the doctor specifically declined to have anything to do with the matter and never saw or had any communication with the prosecutrix, the relation of physician and patient never existing between any of the persons involved. *Smith v. State*, 188 Miss. 339, 194 So. 922 (1940).

The privilege conferred by the statute regarding communications between physician and patient is for the benefit of the patient alone, so that the testimony of a physician offered by the state in a criminal case to show that the wound suffered by a bystander was caused by the pistol of the accused, even if it was error to admit such testimony over the objection of such bystander, could not be complained of by the accused. *Vance v. State*, 182 Miss. 840, 183 So. 280 (1938).

### 8. Matters subject to privilege.

Where an employer noticed that a return to work date on a medical leave form

appeared to have been altered and asked the employee's health care provider to provide another copy of the form, which revealed the employee's alteration, the health care provider did not violate the physician-patient privilege under Miss. Code Ann. § 13-1-21 because the privilege only applied to information provided by a patient to his or her doctor, and the employee's return to work date did not qualify as such information. *Thornton v. Statcare, PLLC*, 988 So. 2d 387 (Miss. Ct. App. 2008).

A physician's knowledge of a patient's deafness, obtained while treating him, is privileged. *New Orleans & N.E.R. Co. v. Shows*, 240 Miss. 604, 128 So. 2d 381 (1961).

In matter involving merely conventional relation of physician and patient, as distinguished from matter in which it is necessary for physician to examine into case and apply his skill and knowledge to form an opinion, or to make preliminary preparation for purpose of qualifying himself to give expert testimony, physician is ordinarily subject to testify under subpoena as any other witness. *Johns-Mansville Prods. Corp. v. Cather*, 208 Miss. 268, 44 So. 2d 405 (1950).

This section [Code 1942, § 1697] has no application to a situation where one claiming disability benefits under a life insurance policy voluntarily presented himself to a physician employed by the insurance company solely for the purpose of an examination, and not for professional advice or treatment, so as to enable such physician to report the facts he might find to the insurance company; and under such circumstances, the privilege not only did not arise but was also waived. *Metropolitan Life Ins. Co. v. Evans*, 183 Miss. 859, 184 So. 426 (1938).

Where defendant, charged with assault and battery with intent to kill, testified that she acted in self-defense, having been assaulted by another who beat defendant over head, inflicting wounds treated by physician, physician's testimony that he had not treated a wound on defendant's head held admissible. *Sproles v. State*, 176 Miss. 810, 170 So. 293 (1936).

In murder prosecution, admitting testimony of physician, who attended de-

ceased, with reference to nature and effects of wound found upon body of deceased, held not reversible error. *Mad-dox v. State*, 173 Miss. 799, 163 So. 449 (1935).

In action for death, communications made by decedent to his physician about a year before his death held privileged. *Illinois Cent. R.R. v. Humphries*, 170 Miss. 840, 155 So. 421 (1934).

Physician who treated plaintiff for former injury to leg held incompetent as witness, where such physician could not segregate knowledge acquired as physician from that learned from contact and association. *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932).

Nurse employed by physician who treated plaintiff for injury would be competent as witness as to all matters learned when not assisting physician. *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932).

Where physician investigates by direction of court or prosecuting attorney to ascertain condition of person for purposes of trial, statutory privilege does not arise. *Norwood v. State*, 158 Miss. 550, 130 So. 733 (1930).

Where person is examined by physician at instance or with approval of officers for purpose of law enforcement, and person examined knows, or facts reasonably give knowledge, that examination is for such purpose and no wrongful means are used, statute relating to privilege is not available. *Norwood v. State*, 158 Miss. 550, 130 So. 733 (1930).

Testimony of physician treating insured as to nature and character of disease is inadmissible. *Provident Life & Accident Ins. Co. v. Jemison*, 153 Miss. 53, 120 So. 180 (1929), error overruled, 153 Miss. 60, 120 So. 836 (1929).

What physician knows about patient by physical examination held privileged communication. *Yazoo & Miss. Valley Ry. v. Decker*, 150 Miss. 621, 116 So. 287 (1928).

Testimony of physician treating insured, together with hospital records, held properly excluded in beneficiary's action on policy after insured's death. *Metropolitan Life Ins. Co. v. McSwain*, 149 Miss. 455, 115 So. 555 (1928).

In trial of unlawful killing admitting testimony of physician, who attended deceased, with reference to condition of his wound, held not reversible error. *Davenport v. State*, 143 Miss. 121, 108 So. 433, 45 A.L.R. 1348 (1926).

Physician cannot disclose deceased patient's communication. *Watkins v. Watkins*, 142 Miss. 210, 106 So. 753 (1926).

Physician not competent to testify as to the facts and information received by him in professional capacity; physician competent to testify as to knowledge concerning mental condition derived from social or business relation; trial judge may determine competency of physician's knowledge derived partly from his relation as physician and partly from social and business relations. *Dabbs v. Richardson*, 137 Miss. 789, 102 So. 769 (1925).

Physician held not precluded from giving non-expert testimony as to facts and circumstances affecting testamentary capacity of patient, based on conversation derived from business and social relations. *Estes v. McGehee*, 133 Miss. 174, 97 So. 530 (1923).

In action against railway company for wrongful death, erroneous to permit defendant to prove by decedent's physician that injuries sustained were not cause of death. *Hamel v. Southern R. Co.*, 113 Miss. 344, 74 So. 276 (1917).

Word "communication" includes matters ascertained by railroad surgeon in examination of persons injured in wreck; communications need not be in words. *Yazoo & Miss. V.R.R. v. Messina*, 109 Miss. 143, 67 So. 963 (1915), rev'd, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709 (1916).

## 9. —X-rays.

Privileged communication statute held not to prevent physical and X-ray examination of parts of plaintiff's body which were alleged to have been injured and which were voluntarily exhibited to jury for inspection and examination. *Dixie Greyhound Lines v. Matthews*, 177 Miss. 103, 170 So. 686, 108 A.L.R. 134 (1936).

## 10. —Hospital and other records.

Without the results of defendant's urine specimen and test, which specimen was taken and which test was performed by a hospital according to its policy, the State



would have been unable to prove that defendant was under the influence of cocaine when defendant collided with the victim's automobile; thus, to ensure the proper administration of justice, the medical records regarding the analysis of defendant's urine specimen had to be removed from the protection of the physician-patient privilege under Miss. Code Ann. § 13-1-21(1) and Miss. R. Evid. 503(b) and the trial court did not err in admitting this evidence. *Jones v. State*, 881 So. 2d 209 (Miss. Ct. App. 2002).

In light of the highly personal nature of a patient's medical and hospital records and of the problems that could result from their improper release, a hospital properly refused to reproduce and release voluminous patient records when it received only a form request and offer to pay for "reasonable access"; a reasonable response would be to allow access if representatives of the requesting facility appeared personally at the hospital, checked the records, and indicated those for which they would be willing to pay for copies. *Young v. Madison Gen. Hosp.*, 337 So. 2d 931 (Miss. 1976).

The privileged communications statute does not preclude testimony from and concerning a patient's hospital records, by doctors who had never seen or examined the patient. *Reynolds v. West*, 237 Miss. 613, 115 So. 2d 742 (1959).

In action on life policy excluding liability if insured was pregnant at date of policy and death resulted from such pregnancy, certified copies of vital statistics, records, consisting of insured's attending physician's reports to the department of vital statistics showing required facts with reference to death of the insured and birth of child, were admissible, since, by adoption of statute permitting introduction of records of vital statistics, legislature intended to except from operation of the privileged communications statute the vital statistics records. *Life & Cas. Ins. Co. v. Walters*, 180 Miss. 384, 177 So. 47 (1937).

In homicide prosecution, exclusion of expert testimony of insane hospital physicians as to nature and character of mental disease with which deceased was afflicted held error, where knowledge of matters

testified to was acquired by perusal of hospital records and not by a personal examination or by communications from deceased. *Motley v. State*, 174 Miss. 568, 165 So. 296 (1936).

In homicide prosecution exclusion as privileged, of testimony of insane hospital physicians as to knowledge of deceased's insanity acquired from perusal of hospital records, held error, where statute required that records of examinations of patients be kept. *Motley v. State*, 174 Miss. 568, 165 So. 296 (1936).

Testimony of physician treating insured, together with hospital records, held properly excluded in beneficiary's action on policy after insured's death. *Metropolitan Life Ins. Co. v. McSwain*, 149 Miss. 455, 115 So. 555 (1928).

### 11. Waiver.

For purposes of determining scope of a waiver of medical privilege, relevancy of particular medical information to condition which plaintiff has placed in issue by filing medical malpractice or other type of action is to be determined at judicial relevancy hearing if that determination cannot be worked out on amicable terms between opposing counsel. *Scott ex rel. Scott v. Flynt*, 704 So. 2d 998 (Miss. 1996), reh'g denied, 703 So. 2d 864 (Miss. 1997).

In a personal injury action arising from a motor vehicle accident, the plaintiff, by filing suit and submitting evidence on his injuries, waived the physician-patient privilege only to the extent of those injuries and expenses for treatment. Thus, information given to the plaintiff's treating physician concerning the cause of the accident was privileged. Additionally, the plaintiff did not waive the privilege by answering questions on cross-examination and denying that he had made certain statements regarding the cause of the accident to the treating physician. The testimony of a plaintiff on cross-examination as to communications made to his or her physician is not voluntary so as to constitute a waiver of the physician-patient privilege. *Sessums ex rel. Sessums v. McFall*, 551 So. 2d 178 (Miss. 1989).

Where a patient has been treated or examined by different physicians at different times for the same ailment, and the patient permits one of his physicians to



testify about his physical condition, he does not waive the right to assert his statutory privilege of confidential communication as to the other attending physicians. *Hill v. Stewart*, 209 So. 2d 809 (Miss. 1968), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

Although the testimony of one of the physicians who had treated the decedent during his terminal illness was introduced in evidence in a malpractice action, the depositions of other physicians who examined and diagnosed decedent's illness and treated him according to their learning cannot be taken or introduced into evidence without the intentional or express waiver by the heirs of the deceased. *Hill v. Stewart*, 209 So. 2d 809 (Miss. 1968), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

The waiver of the physician-patient privilege as to one of a party's physicians does not operate as a waiver of the privilege as to any other physicians. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

When a party to a law suit takes the stand and voluntarily testifies as to his injuries, their treatment by a physician, and what he and his physician said about them, he waives his privilege. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

Where a patient voluntarily goes into detail regarding the nature of her injuries and either testifies as to what a particular physician did or said while in attendance, or relates what she communicated to the physician, the privilege is waived and the adverse party may examine the physician. *Dennis v. Prisock*, 254 Miss. 574, 181 So. 2d 125 (1965).

Plaintiff patient waives his rights to claim privileged communications under the provisions of this section [Code 1942, § 1697] when plaintiff makes effort to induce defendant to produce his doctor or to have defendant's doctor testify concerning injuries received by plaintiff in defendant's employ, but defendant is not required to accept or act upon such waiver. *Johns-Mansville Prods. Corp. v. Cather*, 208 Miss. 268, 44 So. 2d 405 (1950).

To effectively constitute a waiver of a physician's testimony, the consent must

make reasonably and readily available both the physician's testimony and physical presence; this is not done by consent at trial time when the physician is known to be out of town. *Gatlin v. Allen*, 203 Miss. 135, 33 So. 2d 304 (1948).

Where plaintiff's expressed willingness, on examination in action for personal injury, for any of the doctors who examined her to testify, constituted a waiver of her privilege under this section [Code 1942, § 1697], and such offer was made before the taking of testimony in the case had reached the halfway mark, and there was no showing that a specific physician, who had treated her, was not reasonably available and that his attendance could not have been procured without unreasonable delay or discomfiture to the court, an instruction that if said doctor was available as a witness in her behalf and she failed to introduce him as such witness, the presumption would be that his testimony would have been adverse to the plaintiff, was erroneous. *Clary v. Breyer*, 194 Miss. 612, 13 So. 2d 633 (1943).

This section [Code 1942, § 1697] has no application to a situation where one claiming disability benefits under a life insurance policy voluntarily presented himself to a physician employed by the insurance company solely for the purpose of an examination, and not for professional advice or treatment, so as to enable such physician to report the facts he might find to the insurance company; and under such circumstances, the privilege not only did not arise but was also waived. *Metropolitan Life Ins. Co. v. Evans*, 183 Miss. 859, 184 So. 426 (1938).

Privileged communication statute held not to prevent physical and X-ray examination of parts of plaintiff's body which were alleged to have been injured and which were voluntarily exhibited to jury for inspection and examination. *Dixie Greyhound Lines v. Matthews*, 177 Miss. 103, 170 So. 686, 108 A.L.R. 134 (1936).

Plaintiff's testifying on cross-examination that he was willing for physician to testify did not constitute waiver of right to claim privilege. *Coca Cola Bottling Works v. Simpson*, 158 Miss. 390, 130 So. 479, 72 A.L.R. 143 (1930).

Testimony of plaintiff on cross-examination regarding communications made to

physician is not "voluntary" in sense constituting waiver of privilege. *Coca Cola Bottling Works v. Simpson*, 158 Miss. 390, 130 So. 479, 72 A.L.R. 143 (1930).

Testimony of physician attending patient not admissible unless consented to by patient; privilege not waived by placing other physicians on the witness stand. *Davis v. Elzey*, 126 Miss. 789, 88 So. 630 (1921), suggestion of error sustained, 126 Miss. 789, 89 So. 666 (1921).

Privilege respecting testimony of physician not waived by calling other physicians; testimony should not be received in absence of jury. *United States Fid. & Guar. Co. v. Hood*, 124 Miss. 548, 87 So. 115, 15 A.L.R. 605 (1921).

Error in permitting privileged testimony by physician in behalf of defendant not cured by plaintiff introducing another physician to rebut such testimony. *Hamel v. Southern R. Co.*, 113 Miss. 344, 74 So. 276 (1917).

## 12. —Waiver by contract.

Blood alcohol test administered as part of medical treatment is admissible in civil action where driver from whom blood is taken has made contractual waiver of physician-patient privilege. *Edwards v. Ellis*, 478 So. 2d 282 (Miss. 1985).

Under Mississippi law, the physician-patient privilege can be waived by a contractual provision contained in an application for life insurance. *Leach v. Millers Life Ins. Co.*, 400 F.2d 179 (5th Cir. 1968).

The benefits of the privileged communication statute may be waived by contract before trial. *Fornea v. Goodyear Yellow Pine Co.*, 181 Miss. 50, 178 So. 914 (1938).

Testimony of physician who treated employee immediately after accident held admissible, over employee's objection, where employee had executed contract waiving benefits of privileged communications statute. *Fornea v. Goodyear Yellow Pine Co.*, 181 Miss. 50, 178 So. 914 (1938).

In action on life policy, testimony of physicians who had treated insured held admissible to prove that insured's physical condition was impaired at time he secured reinstatement of policy in view of clause in policy waiving any provisions of law making such testimony inadmissible. *New York Life Ins. Co. v. Burris*, 174 Miss. 658, 165 So. 116 (1936).

Patient may waive privilege; provision in insurance policy waiving privilege renders physician's testimony competent as to health. *Sovereign Camp, Woodmen of the World v. Farmer*, 116 Miss. 626, 77 So. 655 (1918).

## 13. —Persons who may waive.

The doctor-patient privilege applies in criminal proceedings, but the privilege may be waived. Accordingly, in a prosecution for manslaughter by culpable negligence, defendant waived the privilege when he called his physician to the stand as his own witness and the result of a blood alcohol test administered by the physician was elicited from the doctor on cross-examination without objection from defendant. *Ashley v. State*, 423 So. 2d 1311 (Miss. 1982).

Where the order appointing a temporary administratrix left part of the assets in the hands of an executor, either the temporary administratrix or the executor could waive the statutory privilege, thereby permitting the physician of the testatrix to give his opinion as to her competency on the date on which a purported will was executed. *Mattox v. McGough*, 222 So. 2d 673 (Miss. 1969).

Physician's privilege against testifying as to facts learned in employment may be waived in criminal case; consent of grandmother in loco parentis held waiver under statute so as to make admissible physician's testimony as to condition of 12-year-old rape victim. *Jenkins v. State*, 146 Miss. 339, 111 So. 433 (1927).

Statutory prohibition against disclosure by physician of communications of patient survives patient's death and cannot be waived by his heirs, executor, or administrator. *McCaw v. Turner*, 126 Miss. 260, 88 So. 705 (1921).

## 14. Failure to call physician as subject of inference.

In an action for injuries to plaintiff when automobile in which she was riding was struck from rear, where plaintiff pleaded privilege, the refusal to permit counsel for defendant to examine doctor who treated plaintiff, for the purpose of showing that a doctor was available as a witness, was not an error in view of the instructions that defendant could not



compel a doctor to testify, and jury was warranted in inferring that the testimony of the doctor would be unfavorable to the plaintiff if he had been permitted to testify. *Gulf Ref. Co. v. Myrick*, 220 Miss. 429, 71 So. 2d 217 (1954).

An instruction would not be proper which stated that failure of the plaintiff to call his physician raised a presumption that the doctor's testimony would be harmful to the plaintiff's case. *Gatlin v. Allen*, 203 Miss. 135, 33 So. 2d 304 (1948).

Where plaintiff's expressed willingness, on examination in action for personal injury, for any of the doctors who examined her to testify, constituted a waiver of her privilege under this section [Code 1942, § 1697], and such offer was made before the taking of testimony in the case had reached the halfway mark, and there was no showing that a specific physician, who had treated her, was not reasonably available and that his attendance could not have been procured without unreasonable delay or discomfiture to the court, an instruction that if said doctor was available as a witness in her behalf and she failed to introduce him as such witness, the presumption would be that his testimony would have been adverse to the

plaintiff, was erroneous. *Clary v. Breyer*, 194 Miss. 612, 13 So. 2d 633 (1943).

An instruction that the plaintiff's failure to produce as a witness one of three physicians who had attended him would justify the jury in inferring that the testimony of such physicians would have been unfavorable to the plaintiff, was proper. *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577, 131 A.L.R. 684 (1940).

Instruction that plaintiff's failure to use physician, who attended him after injuries sued for, as witness may create presumption that such physician's testimony would be unfavorable to plaintiff, held not erroneous as abolishing protection of privilege communications statute. *Robinson v. Haydel*, 177 Miss. 233, 171 So. 7 (1936).

Instruction that jury should not draw unfavorable inferences against defendant because he did not introduce plaintiff's physician as witness held reversible error as authorizing jury to draw unfavorable inference to plaintiff. *Hobson v. McLeod*, 165 Miss. 853, 147 So. 778 (1933).

Jury had no right to draw any inference against plaintiff because he failed to offer his physician as witness. *Hobson v. McLeod*, 165 Miss. 853, 147 So. 778 (1933).

## ATTORNEY GENERAL OPINIONS

Medical information contained in "run reports" from City EMS units which contain name of person treated, address of response, physical data, summary of any medical treatment or other action taken in response to run and other pertinent information, is confidential; other information in reports is public. *Lawrence* Oct. 6, 1993, A.G. Op. #93-0592.

Generally, most medical records in a mental commitment file in the office of the Chancery Clerk will fall under one or more of the exemptions to the Public Re-

cords Act; exempt records should not be released or kept open to the public absent a court order or authorized consent. *McGee*, Dec. 2, 2002, A.G. Op. #02-0543.

Whether county emergency medical service records, including health conditions of persons injured in an accident, constituted exempt "hospital records" under Section 41-9-68 or were otherwise privileged under Section 13-1-21 is a factual question. *Lamar*, Dec. 16, 2005, A.G. Op. 05-0595.

## RESEARCH REFERENCES

**ALR.** Right of one against whom testimony is offered to invoke privilege of communication between others. 2 A.L.R.2d 645.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him. 24 A.L.R.2d 895.



Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician. 25 A.L.R.2d 1429.

Privileged nature of hospital record relating to intoxication or sobriety of patient. 38 A.L.R.2d 778.

Privilege of communication by or to nurse or attendant. 47 A.L.R.2d 742.

Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 A.L.R.2d 521.

Pleading or raising defense of privilege in defamation action. 51 A.L.R.2d 552.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question. 64 A.L.R.2d 1056.

Who may waive privilege of confidential communication to physician by person since deceased. 97 A.L.R.2d 393.

Testimony as to communications or observations as to mental condition of patient treated for other condition. 100 A.L.R.2d 648.

Waiver of privilege as regards one physician as a waiver as to other physicians. 5 A.L.R.3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient. 7 A.L.R.3d 1458.

Physician's tort liability, apart from defamation, for unauthorized disclosure of confidential information about patient. 20 A.L.R.3d 1109.

Admissibility of physician's testimony as to patient's statements or declarations, other than *res gestae*, during medical examination. 37 A.L.R.3d 778.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient. 44 A.L.R.3d 24.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff. 74 A.L.R.3d 1055.

Physician-patient privilege as applied to physician's testimony concerning wound required to be reported to public authority. 85 A.L.R.3d 1196.

Physician-patient privilege as extending to patient's medical or hospital records. 10 A.L.R.4th 552.

What constitutes physician-patient relationship for malpractice purposes. 17 A.L.R.4th 132.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 A.L.R.4th 395.

Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 A.L.R.4th 649.

Physician's tort liability for unauthorized disclosure of confidential information about patient. 48 A.L.R.4th 668.

Insured-insurer communications as privileged. 55 A.L.R.4th 336.

Waiver of evidentiary privilege by inadvertent disclosure — state law. 51 A.L.R.5th 603.

Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege. 47 A.L.R.6th 255.

Situations in which federal courts are governed by state law of privilege under Rule 501 of the Federal Rules of Evidence. 48 A.L.R. Fed. 259.

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 416 et seq, 449.

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons and Other Healers, Form 353 (complaint, petition, or declaration, plaintiff improperly diagnosed as suffering from dangerous communicable disease, plaintiff quarantined in hospital until condition correctly diagnosed).

17 Am. Jur. Proof of Facts, Privileged Communications between Physician and Patient, § 17 (proof that physician-patient relation existed between accused and examining physician).

17 Am. Jur. Proof of Facts, Privileged Communications between Physician and Patient, § 18 (proof that no physician-patient relation existed between accused and examining physician).

17 Am. Jur. Proof of Facts, Privileged Communications between Physician and Patient, § 19 (use of nonprivileged information to establish physical condition of patient in civil action).

45 Am. Jur. Proof of Facts 2d 595, Protected Communication Between Physician And Patient.

46 Am. Jur. Proof of Facts 2d 373, Existence of Physician and Patient Relationship.

2 Am. Jur. Trials, Selecting and Preparing Expert Witnesses, § 57.

32 Am. Jur. Trials 105, Unauthorized Disclosure of Confidential Patient Information.

**CJS.** 98 C.J.S., Witnesses §§ 411 et seq., 468, 469, 472, 477, 485 et seq.

**Law Reviews.** 1982 Mississippi Supreme Court Review: Torts. 53 Miss. L. J. 167, March 1983.

Whitfield, Mississippi medical privilege: blessing or curse? 12 Miss. C. L. Rev. 461, Spring, 1992.

McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 17:1, 17:11, 19:10.

### § 13-1-21.1. Medical privilege considered waived by and between defendants in medical malpractice suits involving multiple defendants.

In any medical malpractice action with multiple defendants, the medical privilege shall be considered waived by and between all defendants.

**SOURCES:** Laws, 2004, 1st Ex Sess, ch. 1, § 17, eff from and after Jan. 1, 2007.

**Editor's Note —** Laws of 2004, 1st Extraordinary Session, ch. 1, § 20 provides:

“SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004.”

### § 13-1-22. Confidentiality of priest-penitent communications.

(1) As used in this section:

(a) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious denomination.

(b) A communication is “confidential” if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(4) A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

**SOURCES:** Laws, 1976, ch. 453, eff from and after July 1, 1976.

**Editor's Note —** The preamble to Chapter 453 of the Laws of 1976 provides as follows:

"Whereas, the emotional, mental and spiritual health of many of our citizens depends upon the free and confidential access to their clergymen or spiritual advisers; Now, therefore,

"Be it enacted by the Legislature of the State of Mississippi:"

**Cross References** — Additional provisions relative to priest-penitent privilege, see Miss. R. Evid. 505.

## RESEARCH REFERENCES

**ALR.** Right of one against whom testimony is offered to invoke privilege of communications between others. 2 A.L.R.2d 645.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends. 22 A.L.R.2d 1152.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers. 49 A.L.R.3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends. 71 A.L.R.3d 794.

Insured-insurer communications as privileged. 55 A.L.R.4th 336.

Waiver of evidentiary privilege by inadvertent disclosure — state law. 51 A.L.R.5th 603.

Situations in which federal courts are governed by state law of privilege under Rule 501 of the Federal Rules of Evidence. 48 A.L.R. Fed. 259.

Communications to clergyman as privileged in federal proceedings. 118 A.L.R. Fed. 449.

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 493, 494, 501, 502, 504.

**CJS.** 98 C.J.S., Witnesses § 440-442.

**Law Reviews.** McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 17:1, 17:13.

## § 13-1-22.1. Certain communications made to certified peer support member by emergency responder to be privileged; definitions; exception to privilege; penalties.

(1) As used in this section, unless the context clearly indicates otherwise:

(a) "Certified peer support member" means a law enforcement officer, fireman or emergency medical technician of an emergency service agency or entity who has received training in critical incident stress management and who is certified as a peer support member by the State Board of Health or the Department of Public Safety to provide emotional and moral support to an emergency responder who needs those services as a result of job-related stress or an incident in which the emergency responder was involved while acting in his official capacity.

(b) "Peer support event" means any debriefing, defusing or counseling session conducted by a certified peer support member that involves the emotional or moral support of an emergency responder who needs those services as a result of job-related stress or an incident in which the emergency responder was involved while acting in his official capacity.

(2) A certified peer support member shall not be compelled, without the consent of the emergency responder making the communication, to testify or in any way disclose the contents of any communication made to the certified peer support member by the emergency responder while engaged in a peer support



event. This privilege only applies when the communication was made to the certified peer support member during the course of an actual peer support event.

(3) The privilege shall not apply if:

(a) The certified peer support member was an initial emergency service responder, a witness or a party to the incident that prompted the providing of the peer support event to the emergency responder;

(b) A communication reveals the intended commission of a crime or harmful act and such disclosure is determined to be necessary by the certified peer support member to protect any person from a clear, imminent risk of serious mental or physical harm or injury, or to forestall a serious threat to the public safety; or

(c) A crime has been committed and divulged.

(4) Any certified peer support member who reveals the contents of a privileged communication, or any person who threatens, intimidates, or in any way attempts to compel a certified peer support member to disclose the contents of a privileged communication, shall be guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

**SOURCES:** Laws, 2006, ch. 440, § 2, eff from and after July 1, 2006.

### § 13-1-23. Presumption of death.

Any person who shall remain beyond the sea, or absent himself from this state, or conceal himself in this state, for seven years successively without being heard of, shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time. Any property or estate recovered in any such case shall be restored to the person evicted or deprived thereof, if, in a subsequent action, it shall be proved that the person so presumed to be dead is living.

**SOURCES:** Codes, 1857, ch. 61, art. 252; 1871, § 882; 1880, § 1648; 1892, § 1737; 1906, § 1914; Hemingway's 1917, § 1574; 1930, § 1537; 1942, § 1698.

**Cross References** — Provisions of Uniform Simultaneous Death Law, see §§ 91-3-1 through 91-3-15.

Crime of bigamy not extending to person whose spouse has been absent for seven years, see § 97-29-15.

Presumptions in civil actions and proceedings generally, see Miss. R. Evid. 301.

### JUDICIAL DECISIONS

1. In general.
2. Evidence giving rise to presumption.
3. Application of presumption in marital situations.
4. Rebuttal of presumption.

#### 1. In general.

If detrimental reliance upon decree pursuant to § 13-1-23 can be shown, party presumed to be dead will not be allowed at some later date to be restored to property

which was conveyed in reliance upon statute. *Martin v. Phillips*, 514 So. 2d 338 (Miss. 1987).

Burden of proof is upon party attempting to prove death at any particular time within 7 years; no presumption as to time of death. *New York Life Ins. Co. v. Brame*, 112 Miss. 828, 73 So. 806 (1917); *Clement v. Knights of Maccabees of World*, 113 Miss. 392, 74 So. 287 (1917).

## 2. Evidence giving rise to presumption.

*Clement v. Knights of Maccabees of World*, 113 Miss. 392, 74 So. 287 (1917).

A grant of letters of administration on an estate is prima facie evidence of the death of a person upon whose estate the administration is granted. *Cock v. Abernathy*, 77 Miss. 872, 28 So. 18 (1900).

This section [Code 1942, § 1698] does not justify the presumption of the death of three infant devisees, who at the time of their departure from their last-known residence in this state, about eleven years before the trial, were of very tender years, the eldest being only seven years old, and who disappeared along with their mother and stepfather, the last named being at the time under apprehension of a criminal prosecution. The presumption of death not arising in such case because of the number and youth of such devisees, their subjection to the will of others and their incapacity to absent themselves from and conceal themselves within the state, the burden of proving their death is on him who asserts it, and is not met by the testimony of one or two witnesses who casually learned that such devisees once lived in a certain town in the state, such witnesses having only slight opportunity of knowing the facts. *Manley v. Patterson*, 73 Miss. 417, 19 So. 236, 55 Am. St. R. 543 (1896).

The uncontradicted testimony of the mother that the last she ever heard of her son was that ten years before he sailed on board a vessel for a foreign port, and that about five days afterwards there was a storm at sea, and that neither the ship nor anyone on board has ever been heard of since, and that she is satisfied her son is dead, fully establishes the presumption of death authorized by the statute. *Learned v. Corley*, 43 Miss. 687 (1870), overruled

on other grounds, *Cole v. Johnson*, 53 Miss. 94 (1876).

## 3. Application of presumption in marital situations.

Where a woman, more than twenty years after her husband had left her and gone to Arkansas, and, after having been informed by his sister that a letter from a postmaster in Arkansas stated that her husband had been drowned, remarried, without any divorce having been granted, and it was thereafter discovered that her first husband was still living and had also remarried, the woman's second marriage was invalid, and the heirs of her second husband were entitled, as against her, to the proceeds of an insurance association policy, a bylaw of which association provided that beneficiaries must be related by blood or by marriage, or must be persons upon whom the insured was wholly dependent for a living, notwithstanding she was designated in such policy as beneficiary. *Frank v. Frank*, 193 Miss. 605, 10 So. 2d 839, 144 A.L.R. 744 (1942).

Where woman's undivorced husband lived openly within state after his release from penitentiary and kept in touch with near relatives living in county in which he had formerly resided, such woman's subsequent marriage while husband lived held invalid, since inquiry would have disclosed that he was then alive, notwithstanding rumors that he was dead. *Watson v. Watson*, 177 Miss. 767, 171 So. 701 (1937).

The presumption of the death of a husband or wife authorized by the statute will be applied in favor of the validity of a marriage contracted by the abandoned party after the expiration of the seven years. *Spears v. Burton*, 31 Miss. 547 (1856); *Gibson v. State*, 38 Miss. 313 (1860).

## 4. Rebuttal of presumption.

The presumption of one's death arising from seven years' absence without being heard from disappears when proof is made that he was alive within that time. *Hill v. United Timber & Lumber Co.*, 68 So. 2d 420 (Miss. 1953).

This section [Code 1942, § 1698] embodies a rule at common law, and under it the presumption of death of a husband

arising from seven years of absence without being heard from disappears when proof was made that he was alive within that time. *Frank v. Frank*, 193 Miss. 605, 10 So. 2d 839, 144 A.L.R. 744 (1942).

Statutory presumption of death ends when it is shown that person whose death is in question is, in fact, alive. *Watson v. Watson*, 177 Miss. 767, 171 So. 701 (1937);

*Johnson v. Lee*, 212 Miss. 603, 55 So. 2d 140 (1951).

That person was fugitive from justice held insufficient to rebut statutory presumption of death from absence for 7 years. *Parker v. New York Life Ins. Co.*, 142 Miss. 517, 107 So. 198, 44 A.L.R. 1487 (1926).

### RESEARCH REFERENCES

**Am Jur.** 1 Am. Jur. 2d (Rev), Absentees §§ 1 et seq.; 22A Am. Jur. 2d, Death §§ 428-430 et seq.

Affidavit of absence, 1 Am. Jur. Legal Forms 2d, Absentees § 2:11.

1 Am. Jur. Proof of Facts, Absence, Proof No. 1.

**CJS.** 25A C.J.S., Death §§ 8-14.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 19:7, 19:19.

## § 13-1-25. Presumptions as to status of military and naval personnel or federal civilian employees.

(1) A written finding of presumed death, made by any officer or employee of the United States authorized to make such finding, pursuant to federal law (5 USC §§ 5561-5568; 37 USC §§ 551-558), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this state as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance.

(2) An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the laws referred to in subsection (1) of this section or by any other law of the United States to make same, shall be received in any court, office or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, as the case may be.

(3) For the purposes of subsections (1) and (2) of this section any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said subsections shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify.

**SOURCES:** Codes, 1942, § 1698-01; Laws, 1946, ch. 353 §§ 1-3.



**Cross References** — Presumptions in civil actions and proceedings generally, see Miss. R. Evid 301.

## RESEARCH REFERENCES

**Am Jur.** 22A Am. Jur. 2d, Death §§ 437 et seq.

### §§ 13-1-27 through 13-1-75. Repealed.

Repealed by Laws of 1975, ch. 501, § 22, eff from and after January 1, 1976.

§ 13-1-27. [Codes, Hutchinson's 1848, ch. 60, art. 1 (113, 114); 1857, ch. 61, art. 209, ch. 62, art. 88; 1871, §§ 788, 1079; 1880, §§ 1608, 1940; 1892, §§ 1747, 1759; 1906, §§ 1924, 1936; Hemingway's 1917, §§ 1584, 1596; 1930, § 1538; 1942, § 1699; Laws, 1948, ch. 231]

§ 13-1-29. [Codes, Hutchinson's 1848, ch. 50, art. 2 (13); 1857, ch. 58, art. 17; 1871, § 1314; 1880, § 2203; 1892, § 1748; 1906, § 1925; Hemingway's 1917, § 1585; 1930, § 1552; 1942, § 1713]

§ 13-1-31. [Codes, 1857, ch. 61, art. 210; 1871, § 790; 1880, § 1609; 1892, § 1749; 1906, § 1926; Hemingway's 1917, § 1586; 1930, § 1539; 1942, § 1700]

§ 13-1-33. [Codes, 1892, § 1750; 1906, § 1927; Hemingway's 1917, § 1587; 1930, § 1540; 1942, § 1701; Laws, 1958, ch. 255]

§ 13-1-35. [Codes, Hutchinson's 1848, ch. 60, art. 1 (116); 1857, ch. 61, art. 212; 1871, § 791; 1880, § 1611; 1892, § 1751; 1906, § 1928; Hemingway's 1917, § 1588; 1930, § 1542; 1942, § 1703]

§ 13-1-37. [Codes, 1857, ch. 61, art. 214; 1871, § 793; 1880, § 1613; 1892, § 1753; 1906, § 1930; Hemingway's 1917, § 1590; 1930, § 1543; 1942, § 1704]

§ 13-1-39. [Codes, Hutchinson's 1848, ch. 60, art. 14; 1857, ch. 61, art. 219; 1871, § 798; 1880, § 1618; 1892, § 1757; 1906, § 1934; Hemingway's 1917, § 1594; 1930, § 1541; 1942, § 1702]

§ 13-1-41. [Codes, Hutchinson's 1848, ch. 60, art 1 (120); 1857, ch. 61, art. 213; 1871, § 792; 1880, § 1612; 1892, § 1752; 1906, § 1929; Hemingway's 1917, § 1589; 1930, § 1544; 1942, § 1705]

§ 13-1-43. [Codes, 1857, ch. 61, art. 215; 1871, § 794; 1880, § 1614; 1892, § 1754; 1906, § 1931; Hemingway's 1917, § 1591; 1930, § 1545; 1942, § 1706]

§ 13-1-45. [Codes, 1857, ch. 61, art. 218; 1871, § 797; 1880, § 1617; 1892, § 1755; 1906, § 1932, Hemingway's 1917, § 1592; 1930, § 1546; 1942, § 1707]

§ 13-1-47. [Codes, Hutchinson's 1848, ch. 60, art. 1 (117); 1857, ch. 61, art. 216; 1871, § 795; 1880, §§ 1615, 1946; 1892, § 1756; 1906, § 1933; Hemingway's 1917, § 1593; 1930, § 1547; 1942, § 1708; Laws, 1956, ch. 236, eff. July 1, 1956]

§ 13-1-49. [Codes, 1857, ch. 61, art. 221, ch. 62, art. 93; 1871, § 1086; 1880, §§ 1620, 1948; 1892, § 1758; 1906, § 1935; Hemingway's 1917, § 1595; 1930, § 1548; 1942, § 1709]

§ 13-1-51. [Codes, 1857, ch. 62, art. 92; 1871, § 1085; 1880, § 1943; 1892, § 1761; 1906, § 1938; Hemingway's 1917, § 1598; 1930, § 1551; 1942, § 1712; Laws, 1956, ch. 237, eff. July 1, 1956]

§ 13-1-53. [Codes, 1880, § 1944; 1892, § 1762; 1906, § 1939; Hemingway's 1917, § 1599; 1930, § 1549; 1942, § 1710]

§ 13-1-55. [Codes, 1871, § 1076; 1880, § 1945; 1892, § 1763; 1906, § 1940; Hemingway's 1917, § 1600; 1930, § 1550; 1942, § 1711; Laws, 1882, p. 111]

§ 13-1-57. [Codes, 1880, § 1650; 1892, § 1766; 1907, § 1943; Hemingway's 1917, § 1603; 1930, § 1553; 1942, § 1714]

§ 13-1-59. [Codes, 1880, § 1651; 1892, § 1767; 1906, § 1944; Hemingway's 1917, § 1604; 1930, § 1554; 1942, § 1715]

§ 13-1-61. [Codes, 1880, § 1655; 1892, § 1768; 1906, § 1945; Hemingway's 1917, § 1605; 1930, § 1555; 1942, § 1716]

§ 13-1-63. [Codes, 1880, § 1652; 1892, § 1769; 1906, § 1946; Hemingway's 1917, § 1606; 1930, § 1556; 1942, § 1717]

§ 13-1-65. [Codes, 1880, § 1660; 1892, § 1770; 1906, § 1947; Hemingway's 1917, § 1607; 1930, § 1557; 1942, § 1718]

§ 13-1-67. [Codes, 1880, §§ 1653, 1654; 1892, §§ 1771, 1772; 1906, §§ 1948, 1949; Hemingway's 1917, §§ 1608, 1609; 1930, §§ 1558, 1559; 1942, §§ 1719, 1720]

§ 13-1-69. [Codes, 1880, § 1656; 1892, § 1773; 1906, § 1950; Hemingway's 1917, § 1610; 1930, § 1560; 1942, § 1721]

§ 13-1-71. [Codes, 1880, § 1657; 1892, § 1774; 1906, § 1951; Hemingway's 1917, § 1611; 1930, § 1561; 1942, § 1722]

§ 13-1-73. [Codes, 1880, § 1658; 1892, § 1775; 1906, § 1952; Hemingway's 1917, § 1612; 1930, § 1562; 1942, § 1723]

§ 13-1-75. [Codes, 1880, § 1659; 1892, § 1776; 1906, § 1953; Hemingway's 1917, § 1613; 1930, § 1563; 1942, § 1724]

**Editor's Note** — Laws, 1975, ch. 501, § 22, additionally provides that "the provisions of said section shall continue to apply to all actions and proceedings pending in the Supreme, chancery, circuit and county courts of this state prior to the repeal of said sections." As to current statutory provisions for civil discovery, see §§ 13-1-201 et seq.

Former § 13-1-27 related to depositions.

Former § 13-1-29 related to deposition for use in a justice's court.

Former § 13-1-31 related to affidavit to be made by party desiring to take deposition.

Former § 13-1-33 related to depositions of witnesses in state; before whom taken; notice.

Former § 13-1-35 related to interrogatories to nonresident witness filed.

Former § 13-1-37 related to persons to whom commissions may be directed.

Former § 13-1-39 related to service of copies of interrogatories and notices.

Former § 13-1-41 related to notice to nonresident or absent party.

Former § 13-1-43 related to taking, returning, and opening depositions.

Former § 13-1-45 related to examination from day to day.

Former § 13-1-47 related to admissibility of depositions; attendance of witness may be procured.

Former § 13-1-49 related to exceptions to depositions.

Former § 13-1-51 related to obtaining pre-trial testimony of adversary.

Former § 13-1-53 related to party may examine adversary in open court.

Former § 13-1-55 related to interested witness may be examined in open court.

Former § 13-1-57 related to filing of written statement to institute proceeding perpetuating testimony.

Former § 13-1-59 related to notice in case of resident witness.

Former § 13-1-61 related to notice in case of nonresident witness.

Former § 13-1-63 related to service, return, and publication of notices.

Former § 13-1-65 related to service of notice upon minor.

Former § 13-1-67 related to perpetuation of testimony — taking of deposition of witness in state.

Former § 13-1-69 related to perpetuation of testimony — taking of deposition of nonresident.

Former § 13-1-71 related to depositions received and recorded.

Former § 13-1-73 related to admissibility of depositions.

Former § 13-1-75 related to costs paid by party procuring services.

## **§ 13-1-77. State custodian of books authorized to certify copies; admissibility of copies.**

All public officers in this state having the charge or custody of any public books, records, papers, or writings, are authorized to certify copies of the same.

**SOURCES:** Codes, 1857, ch. 61, art. 235; 1871, § 814; 1880, § 1632; 1892, § 1791; 1906, § 1968; Hemingway's 1917, § 1628; 1930, § 1564; 1942, § 1725; Laws, 1991, ch. 573, § 88, eff from and after July 1, 1991.

**Cross References** — Furnishing by secretary of state of certificate of the official character of any state officer, see § 7-3-43.

Admissibility of bank's copy of customer's financial records, see § 13-1-245.

Furnishing copy of municipal ordinance in judicial proceeding, see § 21-13-17.

Prima facie evidentiary value of copies of records of state registrar of vital statistics, see § 41-57-9.

When book of record of conveyances shall not be removed from courthouse, see § 89-5-39.

Rule providing for the authentication of official documents, see Miss. R. Civ. P. 44.

Authentication and identification of evidence generally, see Miss. R. Civ. P. 901-903.

Evidence of contents of writings, recordings, and photographs generally, see Miss. R. Evid. 1001-1008.

## **JUDICIAL DECISIONS**

### **1. In general.**

Proof of prior convictions may be made by certified copies of judgments of convictions. Minnick v. State, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Certified copies of sentencing orders were proper proof of prior convictions, sufficient under habitual offender statute, where certification at issue contained attestation that copy was true and correct, and attestation bore seal of court; lack of

book and page number were not fatal. Monroe v. State, 515 So. 2d 860 (Miss. 1987).

Introduction into evidence at capital murder trial of records of defendant's conviction in municipal court via the custodian of such records was not error. Stringer v. State, 500 So. 2d 928 (Miss. 1986).

The certified abstract of a court record showing a defendant's prior conviction was competent evidence of such conviction and was not rendered incompetent by the fact that the abstract included the punish-



ment inflicted for the prior offense. *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982).

In a prosecution for the unlawful possession of a slot machine found upon the accused's premises during a search by national guardsmen under authority of an executive order, and a search warrant issued by the county judge, it was not error to introduce in evidence a copy of the executive order, certified by the secretary of state, since whatever right, if any, accused had to subpoena witnesses and contradict the facts set forth in the original executive order applied as well to the copy as to the original. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

This section [Code 1942, § 1725] is applicable to the commissioner of public safety and therefore certified copy of orders suspending defendant's driving license was competent evidence in prosecution for driving a motor vehicle upon a public highway without a driving license. *Middleton v. State*, 214 Miss. 697, 59 So. 2d 320 (1952).

A certified copy of the docket entries of a justice of peace showing charge of illegal

possession of liquor, issuance of warrant, trial, plea of guilty, fine and payment of fine is admissible in prosecution for second offense to show prior conviction. *Vincent v. State*, 200 Miss. 423, 27 So. 2d 556 (1946).

Statute [Code 1942, § 568], regulating manner of probating claims and providing for withdrawal of original note of deceased, when clerk has made and retained copy thereof, authorized withdrawal of original attached affidavit where clerk made and retained certified copy thereof. *Deposit Guar. Bank & Trust Co. v. Jordan's Estate*, 171 Miss. 332, 157 So. 876 (1934).

For copy or excerpt from journal of senate deposited with secretary of state to be admissible in evidence it must be certified to by him. *Witherspoon v. State*, 138 Miss. 310, 103 So. 134 (1925).

A board of supervisors' books showing duplicate receipts given by a convict contractor to a sheriff for convicts is admissible in an action against the contractor's bondsmen. *State ex rel. Panola County v. Oliver*, 78 Miss. 5, 27 So. 988 (1900).

## RESEARCH REFERENCES

**ALR.** What constitutes books of original entry within rule as to admissibility of books of account. 17 A.L.R.2d 235.

**Am Jur.** 29A Am. Jur. 2d (Rev), Evidence, §§ 1270 et seq.

23 Am. Jur. Proof of Facts 3d 621, Examination and Identification of Photocopies and Photocopiers.

**CJS.** 32 C.J.S., Evidence §§ 1133, 1144, 1145.

**Law Reviews.** McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss L J 547, Winter, 1997.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 22:3, 22:6, 22:20, 22:21.

## § 13-1-79. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 230; 1871, § 809; 1880, § 1624; 1892, § 1783; 1906, § 1960; Hemingway's 1917, § 1620; 1930, § 1583; 1942, § 1745]

**Editor's Note —** Former § 13-1-79 related to admissibility of certified copies of records of any united states office.

## § 13-1-81. Presumptions attending certificates, attestation, etc.

Any certificate, attestation, or authentication, purporting to have been made or given by any person as an officer of any state or of the United States, shall be prima facie evidence of the official character of such person.

**SOURCES:** Codes, 1880, § 1629; 1892, § 1796; 1906, § 1973; Hemingway's 1917, § 1633; 1930, § 1565; 1942, § 1726.

**Cross References** — Proof of documents generally, see Miss. R. Civ. P. 44.

Authentication and identification of evidence generally, see Miss. R. Civ. P. 901-903.

## JUDICIAL DECISIONS

### 1. In general.

Judicial record of another state cannot be proved or admitted in courts of this state as evidence of a fact until there has been compliance with authentication act of Congress, 28 USC § 687. *Wallace v. Herring*, 207 Miss. 658, 43 So. 2d 100 (1949).

Certificates of clerk of circuit court of Cook County and of clerk of superior court of Cook County which do not show that the signer of certificate is in fact clerk are not admissible in court of this state to prove that there was no divorce between

resident of this state and resident of Cook County, Illinois as certificates were not authenticated in manner provided by 28 USC § 687. *Wallace v. Herring*, 207 Miss. 658, 43 So. 2d 100 (1949).

Certificate of clerk of foreign court showing the amount paid under divorce decree directing payment in instalments of money for support of minor child is presumed to be correct and the clerk is presumed to have accounted for all payments received by him. *Hatrak v. Hatrak*, 206 Miss. 239, 39 So. 2d 779 (1949).

## §§ 13-1-83 through 13-1-117. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-1-83. [Codes, 1880, § 1628; 1892, § 1795; 1906, § 1972; Hemingway's 1917, § 1632; 1930, § 1566; 1942, § 1727]

§ 13-1-85. [Codes, 1942, § 4065.7-04; Laws, 1966, ch. 554, § 4]

§ 13-1-87. [Codes, 1857, ch. 61, art. 307; 1880, § 1787; 1892, § 1788; 1906, § 1965; Hemingway's 1917, § 1625; 1930, § 1567; 1942, § 1728]

§ 13-1-89. [Codes, 1880, § 1749; 1892, § 1792; 1906, § 1969; Hemingway's 1917, § 1629; 1930, § 1568; 1942, § 1729; Laws, 1896, ch. 101]

§ 13-1-91. [Codes, 1880, § 2211; 1892, § 1780; 1906, § 1957; Hemingway's 1917, § 1617; 1930, § 1569; 1942, § 1730]

§ 13-1-93. [Codes, 1857, ch. 8, art. 3; 1880, § 2388; 1892, § 1790; 1906, § 1967; Hemingway's 1917, § 1627; 1930, § 1570; 1942, § 1731]

§ 13-1-95. [Codes, 1892, § 1807; 1906, § 1984; Hemingway's 1917, § 1644; 1930, § 1571; 1942, § 1732]

§ 13-1-97. [Codes, Hutchinson's 1848, ch. 60, art. 11 (1); 1857, ch. 61, art. 228; 1871, § 807; 1880, § 1622; 1892, § 1779; 1906, § 1956; Hemingway's 1917, § 1616; 1930, § 1572; 1942, § 1733; Laws, 1896, chs. 101, 102]

§ 13-1-99. [Codes, 1857, ch. 61, art. 228; 1871, § 807; 1880, § 1622; 1892, § 1778; 1906, § 1955; Hemingway's 1917, § 1615; 1930, § 1584; 1942, § 1746]

§ 13-1-101. [Codes, Hutchinson's 1848, ch. 60, art. 2; 1857, ch. 61, art. 227; 1871, § 806; 1880, § 1621; 1892, § 1777; 1906, § 1954; Hemingway's 1917, § 1614; 1930, § 1585; 1942, § 1747]

§ 13-1-103. [Codes, Hutchinson's 1848, ch. 34, art. 1 (7); 1857, ch. 40, art 7; 1871, § 1761; 1880, § 1149; 1892, § 1789; 1906, § 1966; Hemingway's 1917, § 1626; 1930, § 1573; 1942, § 1734]

§ 13-1-105. [Codes, 1857, ch. 60, art. 48; 1871, § 1104; 1880, § 1975; 1892, § 1781; 1906, § 1958; Hemingway's 1917, § 1618; 1930, § 1574; 1942, § 1735]

§ 13-1-107. [Codes, 1857, ch. 61, art. 231; 1871, § 810; 1880, § 1625; 1892, § 1784; 1906, § 1961; Hemingway's 1917, § 1621; 1930, § 1575; 1942, § 1736]

§ 13-1-109. [Codes, Hutchinson's 1848, ch. 60, art. 4 (1); 1857, ch. 61, art. 232; 1871, § 811; 1880, § 1626; 1892, § 1785; 1906, § 1962; Hemingway's 1917, § 1622; 1930, § 1576; 1942, § 1737]

§ 13-1-111. [Codes, 1942, § 1749; Laws, 1936, ch. 253]

§ 13-1-113. [Codes, 1892, § 1786; 1906, § 1963; Hemingway's 1917, § 1623; 1930, § 1577; 1942, § 1738]

§ 13-1-114. [En Laws, 1979, ch. 389; Am 1986, ch. 359]

§ 13-1-115. [Codes, 1871, § 1700; 1880, § 526; 1892, § 1806; 1906, § 1983; Hemingway's 1917, § 1643; 1930, § 1578; 1942, §§ 1739, 1740]

§ 13-1-117. [Codes, 1857, ch. 60, art. 131; 1871, § 1189; 1880, § 2091; 1892, § 1787; 1906, § 1964; Hemingway's 1917, § 1624; 1930, § 1586; 1942, § 1748]

**Editor's Note** — Former § 13-1-83 related to admissibility and effect of certificate of officer of search in office.

Former § 13-1-85 related to admissibility of state records preserved by department of archives and history.

Former § 13-1-87 related to certificate of clerk of board of supervisors as evidence of default.

Former § 13-1-89 related to evidence of enrollment of judgment.

Former § 13-1-91 related to copies of records relating to conveyance under judgments of justices of the peace.

Former § 13-1-93 related to copies of taxes bill of costs as evidence of amount due.

Former § 13-1-95 related to admissibility and effect of certain transcribed records.

Former § 13-1-97 related to admissibility of original writings and the like or records or copies thereof.

Former § 13-1-99 related to admissibility of copies of writings recorded in any other state.

Former § 13-1-101 related to admissibility of copies of foreign writings and the like.

Former § 13-1-103 related to admissibility of certificates of marriages and copies thereof.

Former § 13-1-105 related to admissibility of certified copies of wills and records thereof.

Former § 13-1-107 related to admissibility and effect of certified copies from books of entries of land.

Former § 13-1-109 related to admissibility of certified copies of field-notes and maps.

Former § 13-1-111 related to admissibility of transcribed testimony.

Former § 13-1-113 related to surveyor's certificate as prima facie evidence of certain facts.



Former § 13-1-114 permitted the certificate of a physician, chemist, or technician to be admitted as proof of the identity of a controlled substance if the analysis was performed in an approved laboratory and the certificate was properly attested to by the analyst.

Former § 13-1-115 related to tax collector's conveyance and list of lands sold as prima facie evidence.

Former § 13-1-117 related to certified copy of appointment of foreign executor, administrator or guardian.

### § 13-1-119. Repealed.

Repealed by Laws of 1989, ch. 465, § 1, eff from and after July 1, 1989.

[Codes, 1880, § 1059; 1892, § 1808; 1906, § 1985; Hemingway's 1917, § 1645; 1930, § 1580; 1942, § 1741; Laws 1912, ch. 215]

**Editor's Note** — Former § 13-1-119 related to injuries to persons or property by railroads and certain others as prima facie evidence of want of skill.

### § 13-1-121. Injury to livestock in transit as prima facie evidence of carrier's want of skill.

In all actions against common carriers for injury or damage done to livestock while in transit, proof that the injury inflicted or damage done was inflicted or done to the livestock while in transit, shall be prima facie evidence of the want of reasonable skill and care on the part of the common carrier, their agents and employees in handling the shipment of livestock so injured or damaged.

**SOURCES:** Codes, Hemingway's 1921 Supp., § 1647a; 1930, § 1581; 1942, § 1743; Laws, 1920, ch. 241.

**Cross References** — Relevancy of evidence generally, see Rules 401-412, Mississippi Rules of Evidence.

### RESEARCH REFERENCES

**Am Jur.** 13 Am. Jur. 2d(Rev), Carriers §§ 375 et seq.      **CJS.** 13 C.J.S., Carriers §§ 411 et seq.

14 Am. Jur. 2d, Carriers §§ 587, 588; 29 Am. Jur. 2d, Evidence §§ 143, 229, 232.

### § 13-1-123. Injury to persons or property from operation of motor vehicle as making out prima facie case.

In any action brought to recover any damages, either to person or property, caused by running or operating a motor vehicle in violation of any of the provisions of Chapters 3 and 5 of Title 63 of the Mississippi Code of 1972, the plaintiff or plaintiffs shall be deemed to have made out a prima facie case by showing the fact of such injury, and that such person or persons operating, or causing to be run or operated, such motor vehicle, was at the time of the injury running or operating, or causing the said motor vehicle to be run or operated

in a manner contrary to the provisions of Chapters 3 and 5 of Title 63 of the Mississippi Code of 1972.

**SOURCES:** Codes, Hemingway's 1917, § 5785; 1930, § 5588; 1942, § 1742; Laws, 1916, ch. 116.

**Cross References** — Other sections derived from same 1942 code section, see §§ 63-3-11, 63-7-81.

Relevancy of evidence generally, see Miss. R. Evid. 401-412.

## JUDICIAL DECISIONS

### 1. In general.

In a personal injury action, a truck driver who struck a pedestrian was not negligent as a matter of law by virtue of the fact that he did not see the pedestrian in the highway in time to avoid striking him; the issue of the driver's negligence was for the jury to decide. *Hood v. Oakley*, 519 So. 2d 1236 (Miss. 1988).

In an action for damages resulting from an automobile accident, although negligence will not be presumed because the accident and the injury occurred, the accident is a proper circumstance or fact to be considered by the jury in deciding the issue of negligence. *Bigelow v. Sports Cars, Ltd.*, 221 So. 2d 108 (Miss. 1969).

In an action for damages resulting from an automobile accident, an instruction to the effect that if the rights of the plaintiff were doubtful in the minds of the jury, the jury should find for the defendant, because the burden is upon the plaintiff to prove his case by the greater weight of the believable evidence or the plaintiff has no right to recover, was improper, as leading to the conclusion that the jury was required to believe that the plaintiff must prove his case beyond a reasonable doubt, placing a greater burden of proof on the plaintiff than is required in a civil case.

*Bigelow v. Sports Cars, Ltd.*, 221 So. 2d 108 (Miss. 1969).

While a patrolman or police officer, not an eyewitness to an accident, who investigates the accident shortly after it happens may properly testify as to the matters and things that he finds at the scene, he cannot be allowed to invade the province of the jury by giving his opinion as to how the accident happened. *Lynch v. Suthoff*, 220 So. 2d 593 (Miss. 1969), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.* 465 So. 2d 311 (Miss. 1985).

Automobile driver killing mule while driving at excessive speed was prima facie negligent. *Lucedale Auto. Co. v. Daughdrill*, 154 Miss. 707, 123 So. 871 (1929).

Automobile held not dangerous instrumentality, rendering owner liable for driver's negligent use. *Vicksburg Gas Co. v. Ferguson*, 140 Miss. 543, 106 So. 258 (1925).

Judgment for guest injured in automobile not reversed because of instructions whose error, if any, was harmless. *Friis v. Gahan*, 139 Miss. 375, 104 So. 170 (1925).

Driver or owner of motor vehicle must show due care and observance of the statute. *Flynt v. Fondren*, 122 Miss. 248, 84 So. 188 (1920).

## RESEARCH REFERENCES

**ALR.** What constitutes "operation" or "negligence in operation" within statute making owner of motor vehicle liable for negligence in its operation. 13 A.L.R.2d 378.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or

was not involved in previous accidents. 20 A.L.R.2d 1210.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 A.L.R.2d 963.

Admissibility of opinion evidence as to whether vehicle involved in collision was

standing still or moving. 33 A.L.R.2d 866.

Admissibility in action involving motor vehicle accident of evidence as to manner in which participant was driving before reaching scene of accident. 46 A.L.R.2d 9.

Custom or practice of drivers of motor vehicles as affecting liability based on violation of law. 77 A.L.R.2d 1331.

**Am Jur.** 7A Automobiles and Highway Traffic §§ 30, 31.

8 Am. Jur. 2d, Automobiles and Highway Traffic §§ 386 et seq.

**CJS.** 60 C.J.S., Motor Vehicles §§ 500 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 19:19.

## §§ 13-1-124 through 13-1-129. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-1-124. [En Laws, 1981, ch. 361, § 1]

§ 13-1-125. [Codes, 1857, ch. 61, art. 233; 1871, § 812; 1880, § 1630; 1892, § 1793; 1906, § 1970; Hemingway's 1917, § 1630; 1930, § 1593; 1942, § 1756]

§ 13-1-127. [Codes, 1857, ch. 61, art. 234; 1871, § 813; 1880, § 1631; 1892, § 1794; 1906, § 1971; Hemingway's 1917, § 1631; 1930, § 1594; 1942, § 1757]

§ 13-1-129. [Codes, Hutchinson's 1848, ch. 60, art. 9; 1857, ch. 61, art. 240; 1871, § 816; 1880, § 1636; 1892, § 1802; 1906, § 1979; Hemingway's 1917, § 1639; 1930, § 1592; 1942, § 1755]

**Editor's Note** — Former § 13-1-124 provided that three forms of evidence, affidavits of the automobile owner and operator, an affidavit of the commissioner of public safety, or an affidavit of the claimant, would constitute prima facie evidence of an automobile owner and operator's uninsured status.

Former § 13-1-125 related to certified copies of bonds of officers and others as evidence.

Former § 13-1-127 related to copies of writings filed in other courts as evidence.

Former § 13-1-129 related to record of dishonor of bills and notes as evidence.

## § 13-1-131. Land-office certificates.

All certificates issued in pursuance of any act of Congress by any board of commissioners, register of any land office, or any other person authorized to issue such certificate, founded on any warrant, order of survey, entry, grant, confirmation, donation, preemption, or purchase from the United States of any land in this state, shall vest the full legal title to such land in the person to whom such certificate is granted, his heirs or assigns, so far as to enable the holder thereof to maintain an action thereon.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 11 (2); 1857, ch. 61, art. 229; 1871, § 808; 1880, § 1623; 1892, § 1782; 1906, § 1959; Hemingway's 1917, § 1619; 1930, § 1582; 1942, § 1744; Laws, 1991, ch. 573, § 89, eff from and after July 1, 1991.

**Cross References** — Records of land office, see §§ 7-11-13 et seq.

What lands shall be conveyed only by a writing signed and delivered, see § 89-1-3.



Recording of United States or state patents, see § 89-5-11.  
Evidence of public records generally, see Miss. R. Evid. 803.

## JUDICIAL DECISIONS

### 1. In general.

Evidence held inadmissible to contradict official map on file in general land office. *H. Weston Lumber Co. v. Strahan*, 128 Miss. 54, 90 So. 452 (1922).

Plaintiff introducing certificates from U. S. Land Office showing his entry of land involved and cancellation of prior entry under which defendants claimed, could bring ejectment. *Gilleylen v. Isbel*, 119 Miss. 566, 81 So. 161 (1919).

This section [Code 1942, § 1744] is only rule of evidence, and establishes only prima facie title which may be defeated by paramount title. *Halloway v. Miles*, 110 Miss. 532, 70 So. 697 (1916).

Plaintiff holding letter or writing signed by register of U. S. Land Office allowing his application to make homestead entry, may maintain ejectment. *Methodist Episcopal Camp Ground Ass'n v. Brown*, 105 Miss. 313, 62 So. 276 (1913).

Receiver's certificate to one in possession of public lands claiming as homestead constitutes title supporting action for cutting and removing timber. *Hiwannee Lumber Co. v. McPhearson*, 95 Miss. 589, 49 So. 741 (1909).

Grantee of certificate from register of land office holds full legal title to the land, and may maintain action thereon against a trespasser. *Johnson v. Davis*, 91 Miss. 708, 45 So. 979 (1908).

The certificate vests title only when properly issued and while in full force and

uncanceled. Where the certificate was indorsed "suspended for want of township plat," and was deposited in the general land-office at Washington City, but was sent to the plaintiff to be used for the purpose of testing his title to the land, and then to be returned, it was insufficient to vest title and sustain ejectment. *Davis v. Freeland's Lessee*, 32 Miss. 645 (1856).

The statute gives to the certificate the effect of vesting a complete legal title, to all intents and purposes, in the person to whom issued and his assignees, and not simply to entitle the holder to recover the land in an action. *Lindsey v. Henderson*, 27 Miss. 502 (1854).

A prior entry and a certificate thereof, without a patent, gives a better right in equity than a subsequent entry of the same land by another to whom a patent is issued; and a court of chancery, at the instance of the first enterer, will set aside the title of the patentee. *Hester v. Kembrough*, 20 Miss. (12 S. & M.) 659 (1849).

The certificate is but a substitute for a better title, and is not on an equal footing with a patent. If a patent be issued to another person to the same land after a certificate of entry to one without a patent, the holder of the patent will prevail in an action of ejectment against the holder of the certificate. *Dickinson v. Brown*, 17 Miss. (9 S. & M.) 130 (1847).

## RESEARCH REFERENCES

**Am Jur.** 29A Am. Jur. 2d (Rev), Evidence §§ 1226, 1227, 1229.

**CJS.** 32 C.J.S., Evidence §§ 1133, 1135.

### §§ 13-1-133 through 13-1-147. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-1-133. [Codes, 1857, ch. 61, art. 238; 1871, § 684; 1880, § 1634; 1892, § 1798; 1906, § 1975; Hemingway's 1917, § 1635; 1930, § 1588; 1942, § 1751]

§ 13-1-135. [Codes, 1857, ch. 61, art. 239; 1871, § 685; 1880, § 1635; 1892, § 1799; 1906, § 1976; Hemingway's 1917, § 1636; 1930, § 1589; 1942, § 1752]

§ 13-1-137. [Codes, 1892, § 1800; 1906, § 1977; Hemingway's 1917, § 1637; 1930, § 1590; 1942, § 1753]

§ 13-1-139. [Codes, 1857, ch. 61, art. 237; 1871, § 683; 1880, § 1633; 1892, § 1797; 1906, § 1974, § 1974; Hemingway's 1917, § 1634; 1930, § 1587; 1942, § 1750]

§ 13-1-141. [Codes, 1871, § 782; 1880, § 1627; 1892, § 1801; 1906, § 1978; Hemingway's 1917, § 1638; 1930, § 1591; 1942, § 1754]

§ 13-1-143. [Codes, Hutchinson's 1848, ch. 60, art. 7; 1857, ch. 61, art. 241; 1871, § 819; 1880, § 1637; 1892, § 1803; 1906, § 1980; Hemingway's 1917, § 1640; 1930, § 1595; 1942, § 1758]

§ 13-1-145. [Codes, 1880, § 1639; 1892, § 1804; 1906, § 1981; Hemingway's 1917, § 1641; 1930, § 1596; 1942, § 1759]

§ 13-1-147. [Codes, Hutchinson's 1848, ch. 61, art. 1 (79); 1857, ch. 61, art. 224; 1871, § 688; 1880, § 2297; 1892, § 1809; 1906, § 1986; Hemingway's 1917, § 1646; 1930, § 1597; 1942, § 1760]

**Editor's Note** — Former § 13-1-133 related to when partnership need not be proved.

Former § 13-1-135 related to when subscription of stock need not be proved.

Former § 13-1-137 related to when notice of dishonor of bills or notes need not be proved.

Former § 13-1-139 related to when signature, execution of instrument, identity or names of persons, or the like, need not be proved.

Former § 13-1-141 related to affidavit to correctness of account entitles affiant to judgment.

Former § 13-1-143 related to proof of publication of notices.

Former § 13-1-145 related to proof of posting of notice.

Former § 13-1-147 related to private acts of legislative as evidence although not specially pleaded.

## **§ 13-1-149. Courts to take notice of law of United States, other states, territories and foreign countries.**

When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 10; 1857, ch. 61, art. 226; 1871, § 805; 1880, § 2296; 1892, § 939; 1906, § 1015; Hemingway's 1917, § 735; 1930, § 1598; 1942, § 1761.

**Cross References** — Judicial notice of adjudicative facts, see Miss. R. Evid. 201.

## JUDICIAL DECISIONS

**1. In general.**

Parties to controversy involving validity and effect of power of attorney which has not been acknowledged and recorded in manner of conveyance of land with respect to conveyance of real property situated in Greece may stipulate to application and enforcement of Mississippi rules of law, rather than otherwise applicable to Greek law; if parties do so, trial judge may proceed to adjudge all issues according to Mississippi law and enter final judgment which, subject to appeal, would not doubt be enforceable against parties in courts of Mississippi, even though, in Republic of Greece, judgment may not be worth paper it is written on. *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985).

Before court may resolve question of whether power of attorney which has not been acknowledged and recorded in manner provided for instruments of conveyance of interests in land is valid and enforceable with respect to real property located in Republic of Greece, Greek law must be consulted to determine whether there is conflict between laws of Mississippi and those of Greece with respect to real property and powers of attorney. *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985).

Proceeding for enforcement of purchase-money lien was not invalid because seller

did not show notary public, before whom affidavit of seizure which was made in Ohio was taken, had authority to take and certify affidavits since court would take judicial notice of Ohio law authorizing notary public to administer and certify oaths. *Parker v. McCaskey Register Co.*, 177 Miss. 347, 171 So. 337 (1936).

Where right of action for employee's death was based on foreign statute, it was unnecessary to plead statute. *Floyd v. Vicksburg Cooperaage Co.*, 156 Miss. 567, 126 So. 395 (1930).

Courts will take judicial notice of another state's statute regarding residence necessary to maintain divorce action. *Williams v. State*, 151 Miss. 82, 117 So. 360 (1928).

In proceeding for custody of child in this state previous adjudication of another state not controlling. *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99 (1920).

Injury occurring in Tennessee governed by Tennessee law. *Turner v. Southern Ry. Co.*, 112 Miss. 359, 73 So. 62 (1916).

Action cannot be maintained in Mississippi for death in Louisiana unless permitted by law of Louisiana. *Runt v. Illinois Cent. R.R.*, 88 Miss. 575, 41 So. 1 (1906).

Courts will not take judicial notice of town ordinances. *Naul v. State*, 70 Miss. 699, 12 So. 903 (1893).

## RESEARCH REFERENCES

**ALR.** Uniform Judicial Notice of Foreign Law Act. 23 A.L.R.2d 1437.

Reception of evidence to contradict or rebut matters judicially noticed. 45 A.L.R.2d 1169.

Judicial notice of matters relating to public thoroughfares and parks. 48 A.L.R.2d 1102.

Federal or state law as governing federal court's authority, in diversity action

after *Erie R. Co. v. Tompkins*, to take judicial notice of law of sister state or foreign country. 7 A.L.R. Fed. 921.

**Am Jur.** 29 Am. Jur. 2d (Rev), Evidence §§ 117, 125, 126, 128 et seq.

**CJS.** 31A C.J.S., Evidence §§ 30-33, 38.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 18:3, 22:8.

## § 13-1-151. Reproduction of business records; disposal of originals.

Any business may cause any or all records kept by such business in the regular course of its operation to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly,



accurately and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material, and such business may thereafter dispose of the original record, provided that every original record pertaining to any claim, tax or report due the State of Mississippi or any of its agencies shall be preserved for five (5) years from the thirty-first day of December of the year in which such claim arose, or such tax or report was due.

**SOURCES:** Codes, 1942, § 1761.5; Laws, 1964, ch. 488, §§ 1-5; Laws, 1991, ch. 573, § 90, eff from and after July 1, 1991.

**Cross References** — Admissibility of business records and copies, thereof, see Miss. R. Evid. 803 and 1001-1008.

## JUDICIAL DECISIONS

### 1. In general.

A photostatic copy of a check from a purchaser of wood to the embezzler of it was properly admitted into evidence, and the original was not required, where ab-

sence of the original was explained and the photostatic copy was identified by an employee of the issuer of the check and the employee had signed the check. *Bass v. State*, 328 So. 2d 665 (Miss. 1976).

## RESEARCH REFERENCES

**ALR.** Admissibility in evidence of enlarged photographs or photostatic copies. 72 A.L.R.2d 308.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule. 76 A.L.R.2d 1356.

Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence. 68 A.L.R.3d 1069.

Admissibility in state court proceedings of police reports as business records. 77 A.L.R.3d 115.

Business records: authentication and verification of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence. 1 A.L.R.4th 316.

Admissibility of computerized private business records. 7 A.L.R.4th 8.

Admissibility of school records under hearsay exemptions. 57 A.L.R.4th 1111.

Admissibility in state court proceedings of police reports as business records. 111 A.L.R.5th 1.

Admissibility of credit reports under Federal Business Records Act (28 USCS § 1732(a)). 19 A.L.R. Fed. 988.

Admissibility of records other than police reports, under Rule 803(6), Federal Rules of Evidence, providing for business records exception to hearsay rule. 61 A.L.R. Fed. 359.

**Am Jur.** 29A Am. Jur. 2d (Rev), Evidence § 1099.

**CJS.** 32 C.J.S., Evidence §§ 1081, 1177, 1178 et seq.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 22:21, 24:13.

## § 13-1-153. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[Codes, 1942, § 1761.7; Laws, 1966, ch. 525, § 1]

**Editor's Note** — Former § 13-1-153 related to settlement of property damage claim under motor vehicle liability policy; effect.

**§ 13-1-155. Destruction or other disposal of exhibits following final determination of civil actions.**

After not less than ninety (90) days after the final determination or disposition of any civil action, or if an appeal shall have been taken, then after not less than ninety (90) days after receiving a certificate of the final disposition of the action, the clerk of the court in which the action was filed or tried shall destroy, return or otherwise dispose of all exhibits which were filed in the action. Provided, however, that no exhibit shall be destroyed, returned or otherwise disposed of until after the expiration of the time within which a bill of review may be filed in applicable cases as provided in Section 11-5-121, Mississippi Code of 1972. The clerk shall notify the attorneys for all parties to the action and the owner or person having custody of the property prior to the court action before the expiration of the ninety (90) day period that the exhibits may be claimed.

**SOURCES:** Laws, 1976, ch. 344, eff from and after passage (approved April 14, 1976).

**Editor's Note** — Section 11-5-121 referred to in this section was repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

**ATTORNEY GENERAL OPINIONS**

A court clerk may destroy, return, or dispose of all exhibits 90 days after the final disposition of a civil action, if the time for an appeal has expired; if a party has perfected an appeal, then the court

clerk may destroy, return, or dispose of all exhibits 90 days after receiving a certificate of the final disposition of the action. Parker, Mar. 30, 2001, A.G. Op #01-0159.

**RESEARCH REFERENCES**

**ALR.** Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting

suppression of evidence or dismissal of case against accused in state court. 40 A.L.R.4th 594.

**DISCOVERY PROCEEDINGS**

SEC.

13-1-201. Repealed.

13-1-203 through 13-1-325. Reserved.

13-1-226. Repealed.

13-1-227. Depositions before action or pending appeal.

13-1-228. Repealed.

13-1-229. Stipulations regarding discovery procedure.

13-1-230 through 13-1-243. Repealed.

13-1-245. Bank expenses related to disclosure of customer's financial records.

**§ 13-1-201. Repealed.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[En Laws, 1975, ch. 501, § 1]

**Editor's Note** — Former § 13-1-201 provided that §§ 13-1-226 through 13-1-237, and § 13-1-243 applied to civil proceedings in circuit, chancery, and county courts.

**§§ 13-1-203 through 13-1-225. Reserved.**

**§ 13-1-226. Repealed.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[En Laws, 1975, ch. 501, § 2]

**Editor's Note** — Former § 13-1-226 contained general provisions governing discovery.

**§ 13-1-227. Depositions before action or pending appeal.**

**(a) Before action. —**

(1) **Petition** — A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit or chancery court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and service** — The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served in the same manner of service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by law, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

(3) **Order and examination** — If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written



interrogatories. The depositions may then be taken in accordance with Sections 13-1-201, 13-1-226 through 13-1-237, 13-1-241, and 13-1-243; and the court may make orders of the character provided for by Section 13-1-234. For the purpose of applying Sections 13-1-201, 13-1-226 through 13-1-237, 13-1-241, and 13-1-243, to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of deposition** — If a deposition to perpetuate testimony is taken under Sections 13-1-201, 13-1-226 through 13-1-237, 13-1-241, 13-1-243, it may be used in any action involving the same subject matter subsequently brought in a circuit, chancery or county court in accordance with Section 13-1-232(a).

(b) **Pending appeal** — If an appeal has been taken from a judgment of a court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Section 13-1-234, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in Sections 13-1-201, 13-1-226 through 13-1-237, 13-1-241, and 13-1-243, for depositions taken in actions pending in the court.

(c) **Perpetuation by action.** — This section does not limit the power of a court to entertain an action to perpetuate testimony.

**SOURCES:** Laws, 1975, ch. 501, § 3, eff from and after January 1, 1976.

**Editor's Note** — Sections 13-1-201, 13-1-226, 13-1-228, 13-1-230 to 13-1-237, 13-1-241 and 13-1-243 referred to in (a)(3), (a)(4) and (b) were repealed by Laws of 1991, ch. 573, § 141, effective from and after July 1, 1991.

**Cross References** — Award of attorney fees and costs against attorney or party who abuses discovery procedures available under the rules of civil procedure, see § 11-55-5.

Depositions in court-martial proceedings, see § 33-13-327.

Depositions before action or pending appeal, see Miss. R. Civ. P. 27.

## JUDICIAL DECISIONS

### 1. In general.

Section 13-1-227 refers only to the taking of depositions before an action is commenced or pending an appeal, and does

not apply to the taking of a deposition after a law suit is filed but before trial. *Wallace v. Employers Mut. Cas. Co.*, 443 So. 2d 843 (Miss. 1983).

## RESEARCH REFERENCES

**ALR.** Right to take depositions in perpetual remembrance for use in pending action. 70 A.L.R.2d 674.

Production and inspection of premises, persons, or things in proceeding to perpetuate testimony. 98 A.L.R.2d 909.

Use of videotape to take deposition for presentation at civil trial in state court. 66 A.L.R.3d 637.

Permissibility of testimony by telephone in state trial. 85 A.L.R.4th 476.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure. 60 A.L.R. Fed. 924.

Taxation of costs associated with videotaped depositions under 28 U.S.C.S. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure. 156 A.L.R. Fed. 311.

**Am Jur.** 23 Am. Jur. 2d (Rev), Depositions and Discovery §§ 4, 84.

8 Am. Jur. Pl & Pr Forms (Rev), Depositions and Discovery, Forms 81 et seq. (depositions to perpetuate testimony before action).

8 Am. Jur. Pl & Pr Forms (Rev), Depositions and Discovery, Forms 111-114 (de-

positions to perpetuate testimony pending appeal).

11 Am. Jur. Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 891 et seq. (depositions to perpetuate testimony before action).

11 Am. Jur. Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 911-913 (depositions to perpetuate testimony pending appeal).

For interpretative notes and decisions construing similar Rule 27 of the Federal Rules of Civil Procedure, see Court Rules volumes of the United States Code Service.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Symposium on Mississippi Rules of Civil Procedure: Discovery-Rules 26-34, 36 and 37. 52 Miss. L. J. 119, March 1982.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 28:19.

## § 13-1-228. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[En Laws, 1975, ch. 501, § 4]

**Editor's Note** — Former § 13-1-228 set forth persons before whom depositions could be taken.

## § 13-1-229. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by Sections 13-1-201, 13-1-226 through 13-1-237, 13-1-241, and 13-1-243, for other methods of discovery, except that stipulations extending the time provided in Sections 13-1-233, 13-1-234 and 13-1-236 for responses to discovery may be made only with the approval of the court.

**SOURCES:** Laws, 1975, ch. 501, § 5, eff from and after January 1, 1976.

**Editor's Note** — Sections 13-1-201, 13-1-226, 13-1-228, 13-1-230 to 13-1-237, 13-1-241, and 13-1-243 referred to in this section were repealed by Laws of 1991, ch. 573, § 141, effective from and after July 1, 1991.

**Cross References** — Award of attorney fees and costs against attorney or party who abuses discovery procedures available under the rules of civil procedure, see § 11-55-5. Stipulations regarding discovery procedure, see Miss. R. Civ. P. 29.

### RESEARCH REFERENCES

**Am Jur.** 8 Am. Jur. Pl & Pr Forms (Rev), Depositions and Discovery, Forms 1 et seq. (stipulations relating to depositions).

11 Am. Jur. Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 851-855 (stipulations relating to depositions).

For interpretative notes and decisions construing similar Rule 29 of the Federal

Rules of Civil Procedure, see Court Rules volumes of the United States Code Service.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

### §§ 13-1-230 through 13-1-243.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-1-230. [En Laws, 1975, ch. 501, § 6]

§ 13-1-231. [En Laws, 1975, ch. 501, § 7]

§ 13-1-232. [En Laws, 1975, ch. 501, § 8]

§ 13-1-233. [En Laws, 1975, ch. 501, § 9]

§ 13-1-234. [En Laws, 1975, ch. 501, § 10]

§ 13-1-236. [En Laws, 1975, ch. 501, § 11]

§ 13-1-237. [En Laws, 1975, ch. 501, § 12]

§ 13-1-241. [En Laws, 1975, ch. 501, § 13]

§ 13-1-243. [En Laws, 1975, ch. 501, § 14]

**Editor's Note** — Former § 13-1-230 governed the procedures for depositions upon oral examination.

Former § 13-1-231 provided for procedures for depositions upon written questions.

Former § 13-1-232 provided for the use of depositions in court proceedings.

Former § 13-1-233 provided for the service of interrogatories upon parties and the use of responses at trial.

Former § 13-1-234 provided for inspection by a party of documents or other evidence in another's possession, and it prescribed procedure for entry upon another's land for inspection.

Former § 13-1-236 governed requests for admission.

Former § 13-1-237 provided remedies and sanctions for failure to comply with discovery.

Former § 13-1-241 governed methods of service of notices and other papers issued under §§ 13-1-226 through 13-1-237, and § 13-1-243.

Former § 13-1-243 excluded discovery expenses from court costs.

### § 13-1-245. Bank expenses related to disclosure of customer's financial records.

(1) As used in this section:

(a) "Bank" means any state or national bank located in Mississippi.



(b) "Custodian" includes a bank's operations officer and any other person who is an official custodian of the bank's records, as well as their deputies and assistants.

(c) "Customer" means any person or authorized representative of a person who has maintained or is maintaining an account or deposit of any type, or has utilized or is utilizing any service of a bank, or for whom a bank has acted or is acting as a fiduciary in relation to an account or deposit maintained in the person's name.

(d) "Financial record" means any record in any form, or information derived from such record, that is maintained by a bank and pertains to a deposit or account of a customer, a service of the bank utilized by a customer or any other relationship between a customer and the bank.

(e) "Governmental authority" includes the state, any political subdivision, district and court, and any agency, department, officer or authorized employee of any of those entities.

(2) In any state court proceeding, if any party, including a governmental authority, requests a subpoena duces tecum (to be construed hereinafter to include a court order) to require a bank to assemble or provide a customer's financial records, and the bank is not a party to the proceeding or is a party solely by reason of its holding assets of another party defendant with no cause of action alleged against the bank, the party requesting the subpoena shall pay to the court conducting the proceeding all reasonable charges of the bank in searching for, reproducing and transporting the records. This payment shall be made promptly when the copy of the records is delivered to the proper person, as provided in subsection (4) of this section, whether or not the financial records are entered into evidence, and the amount of the payment shall be the amount certified by the custodian in the affidavit required by subsection (6) of this section. The payment of these reasonable charges shall be in addition to any witness fees.

(3) Except as hereinafter provided, when a subpoena duces tecum is served upon a custodian of records of any bank in any state court proceeding in which the bank is not a party, or in which the bank is a party solely by reason of its holding assets of another party defendant with no cause of action alleged against the bank, and such subpoena requires the production of a customer's financial records, it shall be deemed sufficient compliance if the custodian shall furnish a true and correct copy of all records described in the subpoena.

(4) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness and date of subpoena clearly inscribed thereon. The sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows: If the subpoena directs attendance in court, to the clerk of such court or to the judge thereof; if the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at a place designated in the subpoena for the taking of the deposition or at his place of business; in other cases, to the officer, body or tribunal conducting the hearing, at a like address.

(5) Unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, upon the direction of the judge, court, officer, body or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition or hearing. However, the sealed envelope or wrapper may be opened and the records examined prior to the trial, deposition or hearing upon written consent of all parties or their counsel of record.

(6) The records shall be accompanied by an affidavit of a custodian stating in substance: (a) that the affiant is a duly authorized custodian of the records and has authority to certify such records; (b) that the copy is a true copy of all the records described in the subpoena; (c) that the records were prepared by the personnel of the bank, bank officers or persons acting under the control of either, in the ordinary course of the bank's business at or near the time of the act, condition or event reported therein; and (d) certifying the amount of the reasonable charges of the bank for furnishing such copies. If the bank has none of the records described or only part thereof, the custodian shall so state in the affidavit and furnish the affidavit and such records as are available. The furnishing of the affidavit with respect to such reasonable charges shall be sufficient proof of such expense, which shall be taxed as costs of the court. All reasonable charges paid hereunder shall be remitted to the bank not later than final determination of the suit by the court where the suit is initiated.

(7) The copy of the record shall be admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit shall be admissible in evidence and the matters stated therein shall be presumed true in the absence of a preponderance of evidence to the contrary.

(8) In rare cases where the personal attendance of the custodian may be required, the subpoena duces tecum shall contain a clause which reads: "The procedure authorized pursuant to subsection (3) of this section will not be deemed sufficient compliance with this subpoena."

(9) In rare cases where the personal attendance of the custodian and the production of the original record may be required, the subpoena duces tecum shall contain a clause which reads: "Original records are required and the procedure authorized pursuant to subsection (3) of this section will not be deemed sufficient compliance with this subpoena."

If the bank does not have such original record, it shall furnish such copies as it may have and shall be compensated as provided for in this section.

(10) Original records may be withdrawn after introduction into evidence and copies substituted, unless otherwise directed for good cause by the court, judge, officer, body or tribunal conducting the hearing. The custodian may prepare copies of original records in advance of testifying for the purpose of making substitution of the original record, and reasonable charges for furnishing such copies shall be taxed as costs of the court. If copies are not prepared in advance, they can be made and substituted at any time after introduction of the original record, and reasonable charges for furnishing such copies shall be taxed as costs of the court.

**SOURCES:** Laws, 1984, ch. 383, eff from and after July 1, 1984.

**Cross References** — General duty of nondisclosure of depositors' names, see § 81-5-55.

### RESEARCH REFERENCES

**ALR.** Existence of fiduciary relationship between bank and depositor or customer so as to impose special duty of disclosure upon bank. 70 A.L.R.3d 1344.

Admissibility of computerized private business records. 7 A.L.R.4th 8.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 A.L.R.4th 51.

**Am Jur.** 23 Am. Jur. 2d, Depositions and Discovery §§ 224-226.

29A Am. Jur. 2d, Evidence § 836.

29A Am. Jur. 2d, Evidence § 1255.

**CJS.** 27 C.J.S., Discovery §§ 122-129.

32 C.J.S., Evidence §§ 1197, 1198; 32A C.J.S., §§ 1202, 1259, 1278, 1351-1355.

### EXAMINATION OF JUDGMENT DEBTOR BY JUDGMENT CREDITOR

SEC.

- 13-1-261. Judgment creditor's right to examination of judgment debtor.
- 13-1-263. Venue for filing motion for examination and for conducting examination.
- 13-1-265. Order to appear for examination; effect of satisfaction of judgment.
- 13-1-267. Swearing of judgment debtor; use of testimony of judgment debtor in criminal proceeding.
- 13-1-269. Court costs.
- 13-1-271. Contempt.

### § 13-1-261. Judgment creditor's right to examination of judgment debtor.

(1) To aid in the satisfaction of a judgment of more than One Hundred Dollars (\$100.00), the judgment creditor may examine the judgment debtor, his books, papers or documents, upon any matter relating to his property as provided in Sections 13-1-261 through 13-1-271; except that no single judgment creditor may cause a judgment debtor to submit to examination under this section more than once in a period of six (6) months.

(2) In addition to the method of examination prescribed in subsection (1), the judgment creditor may, in the alternative, utilize the discovery procedures set forth in the Mississippi Rules of Civil Procedure for the purpose of examining the judgment debtor.

**SOURCES:** Laws, 1976, ch. 381, § 1; Laws, 1977, ch. 407; Laws, 1991, ch. 573, § 91, eff from and after July 1, 1991.

**Cross References** — Depositions and discovery, see Miss. R. Civ. P. 26 through 37. Judgment creditor's examination of judgment debtor or other persons, see Miss. R. Civ. P. 69.

Enforcement of judgments, see Uniform Rule of Procedure for Justice Court 2.15.



## JUDICIAL DECISIONS

### 1. In general.

A judgment creditor may conduct a post-judgment examination of a third party who is not employed by nor an agent of the judgment debtor, but such an examination is limited in scope to nonprivileged matters which are relevant to the judgment creditor's allegations that the judgment debtor has assets which properly should be discovered and used to satisfy the judgment. *Ex parte Burchinal*, 571 So. 2d 281 (Miss. 1990).

Circuit Court properly ordered examination of judgment debtor and production

of documents in county where suit was filed, where judgment debtor had waived its right to argue that it could not be found in that county, and thus statute concerning examination of judgment debtor by judgment creditor was construed consistently with venue already established for trial of action. *H & W Transf. & Cartage Serv., Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1987), mandate amended, 534 So. 2d 216 (Miss. 1988).

## ATTORNEY GENERAL OPINIONS

A plaintiff may not file an examination of a judgment debtor more than once every six months, however there is no limit

to the number of examinations that may be filed. *Strahan*, June 11, 2004, A.G. Op. 04-0249.

## RESEARCH REFERENCES

**Am Jur.** 30 *Am. Jur.* 2d, *Execution of Judgments* §§ 1 et seq.

**CJS.** 49 *C.J.S.*, *Judgments* §§ 919-921, 923 et seq.

### § 13-1-263. Venue for filing motion for examination and for conducting examination.

(1) Except as provided in subsection (2) of this section, the written motion for the examination of a judgment debtor shall be filed, and the proceedings conducted, in the court which rendered the judgment.

(2) If the judgment debtor is an individual who is domiciled in the state but not in the county where the judgment was rendered, or who has changed his domicile to another county after the institution of the suit, the written motion for his examination shall be filed, and the examination conducted, in a court of competent jurisdiction in the county of his then domicile. If the judgment debtor is a nonresident, the petition for his examination shall be filed, and the examination conducted, in a court of competent jurisdiction in any county where he may be found. In any case mentioned in this paragraph, a certified copy of the judgment shall be attached to the written motion for examination.

**SOURCES:** Laws, 1976, ch. 381, § 2, eff from and after passage (approved April 26, 1976).

**Cross References** — Rule governing judgment creditor's examination of judgment debtor or other persons, see *Miss. R. Civ. P.* 69.

## JUDICIAL DECISIONS

**1. In general.**

Circuit Court properly ordered examination of judgment debtor and production of documents in county where suit was filed, where judgment debtor had waived its right to argue that it could not be found in that county, and thus statute concern-

ing examination of judgment debtor by judgment creditor was construed consistently with venue already established for trial of action. *H & W Transf. & Cartage Serv., Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1987), mandate amended, 534 So. 2d 216 (Miss. 1988).

## ATTORNEY GENERAL OPINIONS

Where a person received a judgment in in the county of his residence against a defendant who is a resident of another county, since, pursuant to this section, the motion for examination is filed and the examination occurs in the county of the domicile of the defendant the fee would likewise be received by the court of that

county. Court costs in connection with examination should be taxed against the judgment debtor unless the court determines that the creditor invoked the remedy needlessly, in which case the court may tax the costs against the creditor. *Carlisle*, Dec. 10, 2004, A.G. Op. 04-0607.

**§ 13-1-265. Order to appear for examination; effect of satisfaction of judgment.**

On ex parte written motion of the judgment creditor, personally or through his attorney, the court shall order the judgment debtor to appear in court for examination at a time fixed by the court, not less than five (5) days from the date of service on him of the motion and order, and to produce any books, papers, and other documents relating to his property described in the motion; provided, however, that satisfaction of the judgment shall discharge the judgment debtor from his responsibility to appear for the examination as ordered by the court.

**SOURCES:** Laws, 1976, ch. 381, § 3, eff from and after passage (approved April 26, 1976).

**Cross References** — Rule governing judgment creditor's examination of judgment debtor or other persons, see Miss. R. Civ. P. 69.

## ATTORNEY GENERAL OPINIONS

An order to appear for an examination of judgment debtor should be served as in other civil cases and, therefore, may be posted on the door of the defendant's usual place of abode; however, service of process by means of posting on a door would not subject a defendant to contempt for failure to appear for an examination of judgment debtor hearing. *Parker*, May 3, 2002, A.G. Op. #02-0225.

Where a person received a judgment in in the county of his residence against a defendant who is a resident of another county, the motion of the judgment debtor filed in the county of domicile of the defendant and the order entered by that court should be served on the defendant by a process server. *Carlisle*, Dec. 10, 2004, A.G. Op. 04-0607.

**§ 13-1-267. Swearing of judgment debtor; use of testimony of judgment debtor in criminal proceeding.**

(1) The debtor shall be sworn to tell the truth in the same manner as a witness in a civil action.

(2) No testimony given by a debtor shall be used in any criminal proceeding against him, except for perjury committed at such examination.

**SOURCES:** Laws, 1976, ch. 381, § 4, eff from and after passage (approved April 26, 1976).

**Cross References** — Rule governing judgment creditor's examination of judgment debtor or other persons, see Miss. R. Civ. P. 69.

**§ 13-1-269. Court costs.**

Court costs in connection with the examination shall be taxed against the judgment debtor, except that if the court determines that the creditor invoked the remedy needlessly, the court may tax the costs against the creditor.

**SOURCES:** Laws, 1976, ch. 381, § 5, eff from and after passage (approved April 26, 1976).

**§ 13-1-271. Contempt.**

If the motion and order have been served personally on the judgment debtor, and he refuses to appear for the examination or to produce his books, papers, or other documents when ordered to do so, or if he refuses to answer any question held pertinent by the court, he may be punished for contempt.

**SOURCES:** Laws, 1976, ch. 381, § 6, eff from and after passage (approved April 26, 1976).

**ATTORNEY GENERAL OPINIONS**

Failure to comply with a court's order for the examination of a judgment debtor amounts to civil contempt, and a defendant should be sentenced accordingly. Boykin, Oct. 6, 2000, A.G. Op. #2000-0586.

If a defendant fails to appear for an examination of judgment debtor hearing

after being personally served, the court may issue a contempt warrant for the defendant's arrest. The defendant may be jailed until he complies with the examination of judgment debtor order. Strahan, June 11, 2004, A.G. Op. 04-0249.

**INTERPRETERS FOR THE DEAF**

Sec.

13-1-301.

Definitions.

13-1-303.

Appointment of interpreter; court proceedings; policy custody; statements of deaf person as evidence.

13-1-305.

Hearing to determine need for interpreter; notification of need.

13-1-307.

Duties of interpreter.



13-1-309.	Repealed.
13-1-311.	List of qualified interpreters.
13-1-313.	Affirmation of true interpretation.
13-1-315.	Fees for interpreters.

### § 13-1-301. Definitions.

As used in Sections 13-1-301 through 13-1-315 the following terms shall have the definition ascribed to them herein unless the context requires otherwise:

(a) “Deaf person” means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken to in a normal conversational tone. The term further includes, but is not limited to, a person who is mute and a person who is both deaf and mute.

(b) “Qualified interpreter” means an interpreter certified by the national registry of interpreters for the deaf, Mississippi Registry of Interpreters for the Deaf or, in the event a qualified interpreter so certified is not available, an interpreter whose qualifications are otherwise determined. Efforts to obtain the services of a qualified interpreter qualified with a legal skills certificate or a comprehensive skills certificate will be made prior to accepting services of an interpreter with lesser certification. No qualified interpreter may be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to interpret accurately the statements of the deaf person and interpret the proceedings in which a deaf person may be involved.

(c) “Oral interpreter” means a person who interprets language through facial and lip movements only and who does not use manual communication. An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign language. The right of a deaf person to have an interpreter may not be waived except by a deaf person who does not use sign language and who initiates such request for waiver in writing. Such waiver is subject to approval of counsel of such deaf person, if existent, and is subject to approval of the appointing authority.

**SOURCES:** Laws, 1984, ch. 414, § 1, eff from and after July 1, 1984.

**Cross References** — Appointment of interpreter, see Uniform Rule of Procedure for Justice Court 1.15.

### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in

presence of, witness through an interpreter. 12 A.L.R.4th 1016.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant. 86 A.L.R.4th 698.

**Am Jur.** 75 Am. Jur. 2d, Trials §§ 166-168.

**CJS.** 88 C.J.S., Trial § 96.

**§ 13-1-303. Appointment of interpreter; court proceedings; policy custody; statements of deaf person as evidence.**

(1) In any case in law or equity before any court or the grand jury, wherein any deaf person is a party to such action, either as a defendant or witness, the court shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to the deaf person and interpret his testimony or statements and to assist in preparation with counsel.

(2) Whenever any deaf person is a party in interest, either as a defendant or witness at a proceeding before any department, board, commission, agency or licensing authority of the state or any political subdivision of the state, the department, board, commissioner, agency or licensing authority conducting the proceedings shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to the deaf person and to interpret any testimony he may give.

(3) In the event that a deaf person has been detained in police custody or has been arrested for any alleged violation of a criminal law, a qualified interpreter or, upon request, an oral interpreter shall be provided by the arresting officer and his superiors prior to any interrogation or taking of a statement from the person.

(4) In the event any interrogation statements in writing are made to the arresting officer by the deaf person with the qualified interpreter present, such interrogation and answers thereto shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

(5) Any statement made by a deaf person to a law enforcement officer may be used as evidence against that person only if the statement was made, offered or elicited in the presence of a qualified interpreter of the deaf sign language. No statements taken from such deaf person prior to the presence of a qualified interpreter may be admissible in court.

**SOURCES:** Laws, 1984, ch. 414, § 2, eff from and after July 1, 1984.

**Cross References** — Duty of state to support institutions for the deaf, see Miss. Const. Art. 8, § 209.

Registration of persons with impaired hearing, see § 37-23-123.

Schools for the deaf, see §§ 43-5-1 et seq.

Rights and liabilities of deaf persons generally, see §§ 43-6-1 et seq.

Appointment of interpreter in criminal cases, see § 99-17-7.

## JUDICIAL DECISIONS

**1. In general.**

A search pursuant to a defendant's consent was constitutionally valid, even though the defendant, who was deaf, was not afforded an interpreter in accordance with § 13-1-303(3), where the testimony of the law enforcement officers clearly indicated that the defendant understood what he was doing when he agreed to the search, the defendant was asked ques-

tions to which he gave appropriate responses, he was specifically told that he did not have to consent to the search, both the request for and the granting of the consent were done in writing, and the defendant used communicative and cognitive faculties other than hearing when he consented to the search. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

## RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in

presence of, witness through an interpreter. 12 A.L.R.4th 1016.

Deaf-mute as witness. 50 A.L.R.4th 1188.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant. 86 A.L.R.4th 698.

**Am Jur.** 75 Am. Jur. 2d, Trials § 168.

**CJS.** 88 C.J.S., Trial § 96.

## **§ 13-1-305. Hearing to determine need for interpreter; notification of need.**

If the judge, or any other person charged under the provisions of Sections 13-1-301 through 13-1-315 with providing an interpreter, believes that a person claiming to be entitled to an interpreter may not actually be deaf or hearing impaired, unable to communicate verbally because of his hearing disability, or otherwise not entitled to such services, the judge may, on good cause shown, hold a hearing to determine the extent of the person's handicap or disability and the bona fide need for interpreting services. If it is determined that the person is not entitled to such services, an interpreter shall not be provided. Except in a preliminary hearing in a criminal case, every deaf person whose appearance before a proceeding entitles him to an interpreter shall notify the appointing authority of his disability not less than five (5) days prior to any appearance and shall request at such time the services of an interpreter. When a deaf person reasonably expects to need an interpreter for more than a single day, he shall so notify the appointing authority, and such notification shall be sufficient for the duration of his participation in the proceedings. When a deaf person receives notification of an appearance less than five (5) days before such appearance, he shall provide his notification and request for an interpreter as soon thereafter as practicable.

**SOURCES:** Laws, 1984, ch. 414, § 3, eff from and after July 1, 1984.



**Cross References** — Registration of persons with impaired hearing, see § 37-23-123.

Rights and liabilities of deaf persons generally, see §§ 43-6-1 et seq.

### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in

presence of, witness through an interpreter. 12 A.L.R.4th 1016.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant. 86 A.L.R.4th 698.

**Am Jur.** 75 Am. Jur. 2d (Rev), Trials §§ 166-168.

**CJS.** 88 C.J.S., Trial § 96.

## § 13-1-307. Duties of interpreter.

The duties of the interpreter may include:

- (a) Interpreting during court and court-related proceedings, including any and all meetings and conferences between client and his attorney;
- (b) Translating or interpreting documents;
- (c) Assisting in taking depositions;
- (d) Assisting in administering oaths; and
- (e) Such other duties as may be required by the judge of the court making the appointment.

**SOURCES:** Laws, 1984, ch. 414, § 4, eff from and after July 1, 1984.

### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 A.L.R.4th 1016.

**Am Jur.** 75 Am. Jur. 2d (Rev), Trials §§ 166-168.

**CJS.** 88 C.J.S., Trial § 96.

## § 13-1-309. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[En Laws, 1984, ch. 414, § 5]

**Editor's Note** — Former § 13-1-309 made communications through an interpreter for the deaf between an attorney and client privileged.

### § 13-1-311. List of qualified interpreters.

It shall be the responsibility of the appointing authority to channel requests for qualified interpreters through (a) the Mississippi Registry of Interpreters for the Deaf; (b) the community services program at the Mississippi School for the Deaf, or, (c) any community resource wherein the appointing authority or the deaf person is knowledgeable that such qualified interpreters can be found. It shall be the responsibility of the community services program at the Mississippi School for the Deaf to compile and update annually a listing of qualified interpreters and to make this listing available to authorities in possible need of interpreter services as provided in Sections 13-1-301 through 13-1-315.

**SOURCES:** Laws, 1984, ch. 414, § 6, eff from and after July 1, 1984.

**Cross References** — Mississippi School for the Deaf, see Miss. Const. Art. 8, § 209 and Code § 43-5-1 et seq.

Rights and liabilities of deaf persons generally, see §§ 43-6-1 et seq.

#### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 A.L.R.4th 1016.

**Am Jur.** 57 Am. Jur. 2d, Trials §§ 57, 58.

**CJS.** 88 C.J.S. Trials § 42.

### § 13-1-313. Affirmation of true interpretation.

Before participating in any proceedings subsequent to an appointment under the provisions of Sections 13-1-301 through 13-1-315, an interpreter shall make an oath or affirmation that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will repeat the statements of such persons in the English language to the best of his skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

**SOURCES:** Laws, 1984, ch. 414, § 7, eff from and after July 1, 1984.

**Cross References** — Oath or affirmation of witness, see Miss. R. Evid. 603.

#### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in

presence of, witness through an interpreter. 12 A.L.R.4th 1016. **CJS.** 88 C.J.S., Trial § 96.

**Am Jur.** 57 Am. Jur. 2d (Rev), Trials §§ 230-232.

### § 13-1-315. Fees for interpreters.

An interpreter appointed under the provisions of Sections 13-1-301 through 13-1-315 shall be entitled to a reasonable fee for such services in addition to actual expenses for travel and transportation. The court or appointing authority may consider standards established by the Mississippi Registry of Interpreters for the Deaf in determining a reasonable fee. When the interpreter is appointed by a court in a criminal case the fee shall be paid out of the general fund of the state, county or municipality, as the case may be. An interpreter's fee in a civil action shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs in the discretion of the court. When an interpreter is provided by an appointing authority pursuant to subsection (2) of Section 13-1-303, the fee shall be paid out of funds available to the appointing authority.

**SOURCES:** Laws, 1984, ch. 414, § 8, eff from and after July 1, 1984.

### RESEARCH REFERENCES

**ALR.** Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification for bias of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 A.L.R.4th 1016.

**Am Jur.** 75 Am. Jur. 2d (Rev), Trials §§ 166-168.

**CJS.** 88 C.J.S., Trial § 96.

### EVIDENCE OF CHILD ABUSE

SEC.

- 13-1-401. Applicability of special evidentiary provisions.
- 13-1-403. Admissibility of child's out-of-court statements.
- 13-1-405. Use of closed circuit television to show child's testimony.
- 13-1-407. Use of child's videotaped testimony; protective orders; destruction of videotape.
- 13-1-409. Expert testimony as to meaning of child's testimony; appointment of expert.
- 13-1-411. Behavioral indicators used to determine applicability of evidentiary provisions.
- 13-1-413. Court's power to prohibit contact with child not affected by evidentiary provisions.
- 13-1-415. Implementation of evidentiary provisions by rule.



### § 13-1-401. Applicability of special evidentiary provisions.

The rules of evidence prescribed in Sections 13-1-401 through 13-1-415 shall be applicable in any youth court proceeding and in any criminal prosecution under the following sections of the Mississippi Code of 1972:

- (a) Section 97-5-21, Mississippi Code of 1972, relating to seduction of a child under age eighteen (18);
  - (b) Section 97-5-23, Mississippi Code of 1972, relating to the touching of a child for lustful purposes;
  - (c) Section 97-5-35, Mississippi Code of 1972, relating to the exploitation of children;
  - (d) Section 97-5-39, Mississippi Code of 1972, relating to contributing to the neglect or delinquency of a child and felonious battery of a child;
  - (e) Section 97-5-41, Mississippi Code of 1972, relating to the carnal knowledge of a stepchild, adopted child or child of a cohabitating partner;
  - (f) Section 97-3-95, Mississippi Code of 1972, relating to sexual battery;
- or
- (g) Section 97-29-59, Mississippi Code of 1972, relating to unnatural intercourse.

**SOURCES:** Laws, 1986, ch. 345, § 1, eff from and after July 1, 1986.

**Editor's Note** — Section 97-5-21 referred to in (a) was repealed by Laws, 1998, ch. 549, § 7, effective from and after July 1, 1998. For similar provisions, see §§ 97-3-65, 97-3-95, 97-5-23, and 97-3-101.

### RESEARCH REFERENCES

**Law Reviews.** Comment: Recent amendments to the Mississippi Rules of Evidence — the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall 1991).

### § 13-1-403. Admissibility of child's out-of-court statements.

(1) An out-of-court statement made by a child under the age of twelve (12) describing any act of child abuse, sexual abuse or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence to prove the contents thereof, if:

- (a) Such statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses, or in order to obtain advice about the psychological, social or familial consequences associated with the offenses; and
- (b) Such statement is made to a person on whom the child should reasonably be able to rely for assistance, counseling or advice; and
- (c) The child either:
  - (i) Is available to testify; or
  - (ii) Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. A finding of unavailability, except

in those situations specified by Rule 804 of the Mississippi Rules of Evidence, shall require a finding by the court, based on the specific behavioral indicators described in Section 13-1-411, that the child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress; and

(d) The court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness. In determining the trustworthiness of the statement, the court may consider the age and maturity of the child, the nature and duration of the abuse or offense alleged, factors which may detract from the declarant's credibility, information provided about the child's reliability based on the specific behavioral indicators described in Section 13-1-411, or any other factor deemed appropriate.

(2) The defendant shall be notified no later than ten (10) days before trial that an out-of-court statement as described in this section shall be offered in evidence at trial. The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.

(3) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

**SOURCES:** Laws, 1986, ch. 345, § 2, eff from and after July 1, 1986.

## JUDICIAL DECISIONS

### 1. In general.

Since the promulgation of rules for the regulation of trial lie at the core of the judicial power, officers of neither the legislative nor executive departments of government, acting jointly or severally, had authority to confer legal validity upon the Evidence of Child Sexual Abuse Act. As that act enjoys no legal validity, it may not be regarded as "law" within Rule 802, Miss. R. Ev., which declares that hearsay

is not admissible "except as provided by law." Thus, a child's out-of-court statements of complaints against his father were inadmissible in a child sexual battery prosecution of the father even though expert testimony indicated that the child would experience traumatic or emotional distress if he were required to testify against his father in open court. *Hall v. State*, 539 So. 2d 1338 (Miss. 1989).

## RESEARCH REFERENCES

**ALR.** Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination. 18 A.L.R.3d 1433.

Accused's right to depose prospective witnesses before trial in state court. 2 A.L.R.4th 704.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial. 38 A.L.R.4th 378.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Sufficiency of evidence to establish parent's knowledge or allowance of child's

sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

Validity, construction, and application of child hearsay statutes. 71 A.L.R.5th 637.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 157-168.

41 Am. Jur. 2d, Incest §§ 26-28, 32.

65 Am. Jur. 2d, Rape §§ 40-65.

70C Am. Jur. 2d, Sodomy §§ 25-29.

2 Am. Jur. Proof of Facts 2d, pp 365-465, Child abuse-the battered child syndrome.

35 Am. Jur. Proof of Facts 2d 665, Qualifying Child Witness to Testify.

18 Am. Jur. Trials, pp 342-441, Cross-examination in rape prosecution.

**CJS.** 75 C.J.S., Rape §§ 62-101.

81A C.J.S., Sodomy §§ 8-11.

## § 13-1-405. Use of closed circuit television to show child's testimony.

(1) Upon motion and hearing in camera, the trial court may order that the testimony of a child under the age of sixteen (16) that an unlawful sexual act, contact, intrusion, penetration or other sexual offense was committed upon him or her, or that he or she witnessed its perpetration upon another child, be taken outside of the courtroom and shown in the courtroom by means of closed circuit television, upon a finding based on specific behavioral indicators described in Section 13-1-411, that there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court.

(2) The motion may be filed by the child, his attorney, parent, legal guardian or guardian ad litem, or any party to the case. The court may also raise the matter on its own motion.

(3) Upon stipulation of the parties, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting concerning the offense to aid in formulating methods of questioning the child and to assist the court in interpreting the answers of the child.

(4) Closed circuit television testimony may be taken by any method not inconsistent with the Mississippi Rules of Civil Procedure and the Mississippi Uniform Criminal Rules of Circuit Court Practice. After a determination that the defendant's presence would cause a substantial likelihood of traumatic emotional or mental distress to the child, the judge may exclude the defendant from the room where the testimony is taken. In any case in which the defendant is so excluded, arrangements must be made for the defense attorney to be in continual contact with the defendant by any appropriate private electronic or telephonic method throughout the questioning. The defendant and the jury must be able to observe the demeanor of the child witness at all times during the questioning.

(5) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this section.

(6) All parties must be represented by counsel at any taking of any testimony under this section.

**SOURCES:** Laws, 1986, ch. 345, § 3, eff from and after July 1, 1986.

**Cross References** — Use of depositions in court proceedings, see Miss. R. Civ. P. 32.



Form and admissibility of evidence generally, see Miss. R. Civ. P. 43.

### RESEARCH REFERENCES

**ALR.** Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination. 18 A.L.R.3d 1433.

Admissibility of videotape film in evidence in criminal trial. 60 A.L.R.3d 357.

Propriety of allowing absent witness to be examined over closed-circuit television. 80 A.L.R.3d 1212.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 157-168.

41 Am. Jur. 2d, Incest §§ 26-28, 32.

65 Am. Jur. 2d, Rape §§ 40-65.

70C Am. Jur. 2d, Sodomy §§ 25-29.

18 Am. Jur. Trials, pp 342-441, Cross-examination in rape prosecution.

2 Am. Jur. Proof of Facts 2d, pp 365-465, Child abuse — the battered child syndrome.

35 Am. Jur. Proof of Facts 2d, pp 665-690, Qualifying child witness to testify.

**CJS.** 75 C.J.S., Rape §§ 6-101.

81A C.J.S., Sodomy §§ 8-11.

98 C.J.S., Witnesses §§ 489-559.

**Law Reviews.** Recent amendments to the Mississippi Rules of Evidence — the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall 1991).

### § 13-1-407. Use of child's videotaped testimony; protective orders; destruction of videotape.

(1) On motion and hearing in camera and a finding based on information placed on the record which was subject to cross-examination:

(a) That there is a substantial likelihood, based on specific behavioral indicators described in Section 13-1-411 exhibited by the child, that a child who is under the age of sixteen (16) would suffer traumatic emotional or mental distress if he were required to testify in open court; or

(b) That such child is otherwise unavailable; a trial court may order the videotaping of the testimony of the victim or witness in a case in which the occurrence or non-occurrence of sexual abuse or child abuse is a material fact, which videotaped testimony is to be utilized at trial in lieu of testimony in open court.

(2) The motion may be made by:

(a) The child, or the attorney, parent, legal guardian or guardian ad litem of the child;

(b) The trial judge acting at his own discretion; or

(c) Any party to the case.

(3) The judge shall preside, or shall appoint a special master to preside, at the videotaping unless the following conditions are met:

(a) The child is represented by a guardian ad litem or counsel;

(b) The child's representative and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and

(c) The court finds, after a hearing, that the presence of a judge or special master is not necessary to protect the child.

(4) The defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right. Provided, however, that on motion of a party, or of the child's representative and hearing in camera and a finding based on information placed on the record which was subject to cross-examination that there is a substantial likelihood, based on specific behavioral indicators exhibited by the child, as described in Section 13-1-411, that the child would suffer traumatic emotional or mental distress if he or she were required to testify in the presence of an adult who is alleged to have abused the child, or to have participated in, or concealed such abuse, the court may require that adult, including without limitation a defendant, to view the testimony from outside the presence of the child by means of a two-way mirror or another similar method that will ensure that the defendant can directly observe and hear the testimony of the child, but that the child cannot hear or see the adult. If the defendant is excluded from the room in which testimony is being taken, the defendant and the attorney for the defendant may communicate by any appropriate private electronic or telephonic method.

(5) All questioning shall be done by attorneys for the prosecution and the defense; however, upon stipulation of all parties, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting concerning the offense to aid the court throughout proceedings conducted under this section.

(6) The motion for the taking of videotaped testimony may be made at any time with three (3) days' written notice of the time and place of the taking of the testimony provided to all parties to the proceeding, to the child and to the child's representative or guardian.

(7) Any videotape which is made pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the child. The court shall order the destruction of a videotape made pursuant to this section after five (5) years have elapsed since the entry of the judgment in the case in which the videotape was made. However, such order may be made before the expiration of five (5) years upon motion filed by the child, his attorney, parent, legal guardian or guardian ad litem after notice to the defendant. In no event shall such a videotape be destroyed before a final judgment has been rendered on an appeal.

(8) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this section.

(9) All parties must be represented by counsel at any taking of any testimony under this section.

**SOURCES:** Laws, 1986, ch. 345, § 4, eff from and after July 1, 1986.

#### RESEARCH REFERENCES

**ALR.** Requiring complaining witness in psychiatric examination. 18 A.L.R.3d 1433.

Admissibility of videotape film in evidence in criminal trial. 60 A.L.R.3d 357.

Propriety of allowing absent witness to be examined over closed — circuit television. 80 A.L.R.3d 1212.

Constitutionality of “rape shield” statute restricting evidence of victim’s sexual experiences. 1 A.L.R.4th 283.

Instructions to jury as to credibility of child’s testimony in criminal case. 32 A.L.R.4th 1196.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial. 38 A.L.R.4th 378.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Sufficiency of evidence to establish parent’s knowledge or allowance of child’s

sexual abuse by another under statute permitting termination of parental rights for “allowing” or “knowingly allowing” such abuse to occur. 53 A.L.R.5th 499.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 157-168.

41 Am. Jur. 2d, Incest §§ 26-28, 32.

65 Am. Jur. 2d, Rape §§ 40-65.

70C Am. Jur. 2d, Sodomy §§ 25-29.

2 Am. Jur. Proof of Facts 2d, pp 365-465, Child abuse — the battered child syndrome.

35 Am. Jur. Proof of Facts 2d, pp 665-690, Qualifying child witness to testify.

18 Am. Jur. Trials, pp 342-441, Cross-examination in rape prosecution.

**CJS.** 75 C.J.S., Rape §§ 62-101.

81A C.J.S., Sodomy §§ 8-11.

98 C.J.S., Witnesses §§ 489-559.

### § 13-1-409. Expert testimony as to meaning of child’s testimony; appointment of expert.

(1) If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the testimony of a child under the age of twelve (12) in a case in which the occurrence or non-occurrence of physical or sexual abuse of a child is a material issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify, based on such expertise, in the form of an opinion or otherwise.

(2) The facts or data in the particular case upon which such an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences about the occurrence or non-occurrence of physical or sexual abuse of children, or about children who may be victims or observers of such abuse, the facts or data need not be admissible in evidence.

(3) Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(4) The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(5) The court, in a case where the occurrence or non-occurrence of physical or sexual child abuse is a material issue, may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nomination. The court may appoint any expert witnesses agreed upon by the parties, and may



appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(6) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(7) Nothing in this subsection limits the parties in calling expert witnesses of their own selection.

**SOURCES:** Laws, 1986, ch. 345, § 5, eff from and after July 1, 1986.

### RESEARCH REFERENCES

**ALR.** Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination. 18 A.L.R.3d 1433.

Necessity and admissibility of expert testimony as to credibility of witness. 20 A.L.R.3d 684.

Admissibility of expert medical testimony on battered child syndrome. 98 A.L.R.3d 306.

Constitutionality of "rape shield" statute restricting evidence of victim's sexual experiences. 1 A.L.R.4th 283.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial. 15 A.L.R.4th 1043.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination. 17 A.L.R.4th 867.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 A.L.R.4th 120.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 A.L.R.4th 395.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. 43 A.L.R.4th 1203.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under Rule 702 of Federal Rules of Evidence. 75 A.L.R. Fed. 461.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 157-168.

31A Am. Jur. 2d, Expert and Opinion Evidence §§ 145-178.

41 Am. Jur. 2d, Incest §§ 26-28, 32.

65 Am. Jur. 2d, Rape §§ 40-65.

70C Am. Jur. 2d, Sodomy §§ 25-29.

10 Am. Jur. Pl & Pr Forms (Rev), Expert and Opinion Evidence, Forms 1 et seq. (appointment of expert witnesses).

2 Am. Jur. Proof of Facts 2d, pp 365-465, Child abuse — the battered child syndrome.

35 Am. Jur. Proof of Facts 2d, pp 665-690, Qualifying child witness to testify.

18 Am. Jur. Trials, pp 342-441, Cross-examination in rape prosecution.

**CJS.** 32 C.J.S, Evidence §§ 649-651.

75 C.J.S., Rape §§ 62-101.

81A C.J.S., Sodomy §§ 8- 11.

**Law Reviews.** Posner, Who can speak for our children? Qualification of experts

in cases of child sexual abuse. 12 Miss. C. L. Rev. 493, Spring, 1992.

### § 13-1-411. Behavioral indicators used to determine applicability of evidentiary provisions.

The phrase "specific behavioral indicators" when used herein to refer to evidence (regardless of admissibility) that a child has suffered physical or sexual abuse or might suffer traumatic emotional or mental distress if required to testify in court, shall include, by way of illustration and not of limitation, indications of physical or psychological trauma which are (a) well defined, (b) positively correlated or causally linked with the likelihood of traumatic emotional or mental distress on testifying, and (c) rarely, if at all, present in children who have not suffered child abuse, considering the combination or intensity present in the child at issue.

The evidence described in this section shall be provided by competent witnesses, including but not limited to child psychologists, child psychiatrists and other qualified witnesses.

**SOURCES:** Laws, 1986, ch. 345, § 6, eff from and after July 1, 1986.

**Cross References** — Relevance of the behavioral indicators described in this section to the admissibility of a child's out-of-court statements, see § 13-1-403.

Relevance of the behavioral factors described in this section to the use of closed circuit television to show a child's testimony, see § 13-1-405.

Relevance of the behavioral factors described in this section to the use of a child's videotaped testimony, see § 13-1-407.

### RESEARCH REFERENCES

**ALR.** Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination. 18 A.L.R.3d 1433.

Necessity and admissibility of expert testimony as to credibility of witness. 20 A.L.R.3d 684.

Admissibility of expert medical testimony on battered child syndrome. 98 A.L.R.3d 306.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial. 15 A.L.R.4th 1043.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination. 17 A.L.R.4th 867.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 A.L.R.4th 395.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. 43 A.L.R.4th 1203.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Sufficiency of evidence to establish parent's knowledge or allowance of child's sexual abuse by another under statute permitting termination of parental rights for "allowing" or "knowingly allowing" such abuse to occur. 53 A.L.R.5th 499.

**Am Jur.** 6 Am. Jur. 2d, Assault and Battery §§ 157-168.

31A Am. Jur. 2d, Expert and Opinion Evidence §§ 145-178.

41 Am. Jur. 2d, Incest §§ 26-28, 32.

65 Am. Jur. 2d, Rape §§ 40-65.

70C Am. Jur. 2d, Sodomy §§ 25-29.

2 Am. Jur. Proof of Facts 2d, pp 365-465, Child abuse — the battered child syndrome.

35 Am. Jur. Proof of Facts 2d, pp 665-690, Qualifying child witness to testify.

25 Am. Jur. Proof of Facts 3d 189, Corroboration of a Child's Sexual Abuse Allegations With Behavioral Evidence.

18 Am. Jur. Trials, pp 342-441, Cross-examination in rape prosecution.

**CJS.** 32 C.J.S., Evidence §§ 885, 886.

75 C.J.S., Rape 62-101.

81A C.J.S., Sodomy §§ 8-11.

**Law Reviews.** Posner, Who can speak for our children? Qualification of experts in cases of child sexual abuse. 12 Miss. C. L. Rev. 493, Spring, 1992.

### § 13-1-413. Court's power to prohibit contact with child not affected by evidentiary provisions.

Sections 13-1-401 through 13-1-415 do not in any way affect any court's power to order any person to refrain from contacting, or being in the presence of, any child.

**SOURCES:** Laws, 1986, ch. 345, § 7, eff from and after July 1, 1986.

### § 13-1-415. Implementation of evidentiary provisions by rule.

The Mississippi Supreme Court may, by rule, provide procedures to implement Sections 13-1-401 through 13-1-415.

**SOURCES:** Laws, 1986, ch. 345, § 8, eff from and after July 1, 1986.



## CHAPTER 3

### Process, Notice, and Publication

#### SEC.

- 13-3-1. Provisions of chapter applicable to all courts.
- 13-3-3. Style and date of process.
- 13-3-5. The summons.
- 13-3-7 through 13-3-13. Repealed.
- 13-3-15. Separate or additional summons; attachment against estate of defendant.
- 13-3-17. Substitution of parties in case of death of party.
- 13-3-19 through 13-3-23. Repealed.
- 13-3-25. Summons by publication for unknown heirs and unknown defendants.
- 13-3-27. Publication of summons.
- 13-3-29. Repealed.
- 13-3-31. Publication; requirements and procedures.
- 13-3-32. Publication—in what newspaper—presumption of continued qualification.
- 13-3-33 through 13-3-35. Repealed.
- 13-3-37. Sheriff to mark and return process.
- 13-3-39. Repealed.
- 13-3-41. Service on one carrying on business in state by or through trustee or attorney in fact.
- 13-3-43 through 13-3-47. Repealed.
- 13-3-49. Service when defendant is a corporation.
- 13-3-51. Repealed.
- 13-3-53. Service on one of several executors or administrators.
- 13-3-55. Suits by or against partnerships; service on one of several partners.
- 13-3-57. Service on nonresident business not qualified to do business in state; survival of cause of action in case of death or inability to act; service on nonresident executor, administrator, etc.
- 13-3-59 through 13-3-61. Repealed.
- 13-3-63. Service when defendant is nonresident motorist; appointment of secretary of state as agent.
- 13-3-65 through 13-3-67. Repealed.
- 13-3-69. Process not void for certain defects.
- 13-3-71. Repealed.
- 13-3-73. Plaintiff's options when sheriff kept off by force.
- 13-3-75. Return of alias where first writ served.
- 13-3-77. Process may be executed by an officer out of his county.
- 13-3-79. Repealed.
- 13-3-81. When justice court judge may execute process.
- 13-3-83. Service of notices, summonses, subpoenas, orders, pleadings, motions, etc.
- 13-3-85. Notice by summons of motions against officers for neglect of duty.
- 13-3-87. Return of officer may be questioned by parties.
- 13-3-89. Repealed.
- 13-3-91. Reversal, on appeal by defendant, for want of service or defective service as an appearance.
- 13-3-93. Subpoenas for witnesses.
- 13-3-95 through 13-3-101. Repealed.
- 13-3-103. Attachment for non-appearing subpoenaed witness.
- 13-3-105. Subpoenaed witness to attend until discharged; scire facias for defaulters.

- 13-3-107. Settlement of certain civil suits; notice to be given to subpoenaed witnesses and effect of failure to do so.
- 13-3-109. Issuance of process by supreme court and its return.
- 13-3-111. Time when executions shall be issued.
- 13-3-113. Issuance, execution, and return of executions.
- 13-3-115. Issuance of subsequent execution.
- 13-3-117. Issuance of execution against several defendants.
- 13-3-119. Effect of death of one or more of several defendants before issuance of execution.
- 13-3-121. Execution for costs of Supreme Court.
- 13-3-123. Levy of writs of execution and attachments—on land.
- 13-3-125. Levy of writs of execution and attachments — on personalty.
- 13-3-127. Levy of writs of execution and attachments — on choses in action.
- 13-3-129. Levy of writs of execution and attachments — on corporate stock and the like.
- 13-3-131. Levy of writs of execution and attachments — on interest of partners or co-owners.
- 13-3-133. Money, banknotes, judgments and the like may be levied on; endorsement and negotiation of seized instruments; proceeds to be applied against judgment debtor's obligations.
- 13-3-135. Purchaser's title to certain interests of defendant sold under execution or attachment.
- 13-3-137. Growing crop shall not be levied upon.
- 13-3-139. Lien of executions, and priority thereof.
- 13-3-141. Officer to care for property and allowed expenses.
- 13-3-143. Manner by which personal representative or successor thereof of plaintiff may have execution.
- 13-3-145. Effect of death of one or more of several plaintiffs before issuance of execution.
- 13-3-147. Assignee of a judgment may have execution.
- 13-3-149. Effect of death of party after execution issued.
- 13-3-151. Execution issued against dead defendant.
- 13-3-153. Motion to revive judgment.
- 13-3-155. Execution and garnishment on certain judgments and decrees of other courts may be issued by clerk.
- 13-3-157. When a bond of indemnity shall be required.
- 13-3-159. Remedy on bond of indemnity.
- 13-3-161. Where sales under execution or other process are to be made.
- 13-3-163. When sales of land may be made; advertising of sale.
- 13-3-165. When sales of personalty may be made; advertising of sale.
- 13-3-167. Sale of perishable goods.
- 13-3-169. Hours and mode of sale.
- 13-3-171. Lands to be sold to be offered in subdivisions and as an entirety.
- 13-3-173. Sale may be adjourned or continued from day to day.
- 13-3-175. Venditioni exponas.
- 13-3-177. Venditioni exponas to issue when officer taking property dies.
- 13-3-179. Procedure to be followed where property is not delivered by representatives of deceased officer taking property.
- 13-3-181. Duty of officer to examine judgment-roll; priority of liens.
- 13-3-183. Officer to restore money on injunction of execution.
- 13-3-185. How purchaser takes property sold at execution sale.
- 13-3-187. Conveyance of land sold under execution or other process.
- 13-3-189. Completion of title under justice's execution.

### § 13-3-1. Provisions of chapter applicable to all courts.

The law of process as declared in this chapter, except where its provisions are provided for by the Mississippi Rules of Civil Procedure or by the nature of the subject matter, shall govern in all courts.

**SOURCES:** Codes, 1892, § 3501; 1906, § 3999; Hemingway's 1917, § 3006; 1930, § 3052; 1942, § 1940; Laws, 1991, ch. 573, § 92, eff from and after July 1, 1991.

**Cross References** — For the rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

### JUDICIAL DECISIONS

1. In general.
2. Notice of sale sufficient.

#### 1. In general.

This section [Code 1942, § 1940] has no application to newspaper notices given by a board of supervisors to the public that equalized tax rolls are ready for inspection. *Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140, 3 A.L.R.2d 236 (1948).

This section [Code 1942, § 1940] applies only to process in courts proper where property rights are involved and not to the exercise of jurisdiction by the board of supervisors in binding out apprentices. *Moore v. Allen*, 72 Miss. 273, 16 So. 600 (1894).

#### 2. Notice of sale sufficient.

Although the Internal Revenue Service was correct that the company failed to meet its statutory duty to provide notice of the non-judicial foreclosure sale under 26 U.S.C.S. § 7425(c)(1), there was nothing in the record to suggest that the error was

in any way wilful; as for the company's efforts to market the property prior to obtaining it in the sale, there was no dispute that the company strictly followed Mississippi statutory law and published the Notices of Foreclosure Sale for four consecutive weeks pursuant to Miss. Code Ann. § 13-3-1 et seq., and it was not enough for the Internal Revenue Service (IRS) to simply claim that the company acted wilfully with respect to the sales. Moreover, although the IRS demonstrated a mistake, there was no evidence of a wilful act that transgressed equitable standards of conduct; therefore, as a matter of law, the company could rely on the equitable presumption against merger, its liens in the subject properties did not merge with legal title, and it maintained liens superior to the IRS's tax liens as to the subject properties. *Mountaineer Invs., L.L.C. v. United States*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 105390 (S.D. Miss. Nov. 4, 2009).

### RESEARCH REFERENCES

**ALR.** Civil liability of judicial officer for malicious prosecution or abuse of process. 64 A.L.R.3d 1251.

### § 13-3-3. Style and date of process.

The style of all process shall be, "The State of Mississippi." It shall not be necessary that any process bear teste in the name of any judge or of any term of the court, but all process, except where otherwise provided, shall be issued and signed by the clerk of the court, with the seal of his office affixed, and shall bear date of the day on which the process shall be issued.



**SOURCES:** Codes, Hutchinson's 1848, ch. 58, art. 1 (20); 1857, ch. 61, art. 60, ch. 62, art. 26; 1871, §§ 689, 1002; 1880, § 2284; 1892, § 3413; 1906, § 3912; Hemingway's 1917, § 2919; 1930, § 2964; 1942, § 1844.

**Cross References** — Constitution provision for style of process, see Miss. Const. Art. 6, § 169.

Criminal offense of resisting authorized person attempting to serve process, see § 97-9-75.

Criminal offense of forgery of process, see § 97-21-35.

Process for arrest on an indictment against a natural person, see § 99-9-1.

Issuance of process when an indictment is found against corporation, see § 99-9-3.

For the rule governing the service of summonses, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## JUDICIAL DECISIONS

1. In general.
2. Formal requisites.
3. Issuance of process.

### 1. In general.

This section [Code 1942, § 1844] has no application to newspaper notices given by a board of supervisors to the public that equalized tax rolls are ready for inspection. *Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140, 3 A.L.R.2d 236 (1948).

The term "process," within the meaning of the section [Code 1942, § 1844], stipulating that all process, except where otherwise provided, shall be issued and signed by the clerk of the court, includes the ordinary warrant for arrest, and certainly so when taken in connection with the section opening with the sentence that "the process for arrest on an indictment shall be a *capias*," etc. *Cooper v. State*, 193 Miss. 672, 10 So. 2d 764 (1942).

This section [Code 1942, § 1844] was not applicable to require a seal of the court to be affixed to a printed notice to taxpayers of validation proceedings in connection with the issuance of bonds for the construction or purchase of a municipal electric plant, since the process referred to in this section [Code 1942, § 1844] is not a newspaper notice to taxpayers such as is required under Code of 1930, § 313 (Code 1942, § 4314). *Mississippi Power & Light Co. v. Town of Batesville*, 187 Miss. 737, 193 So. 814 (1940).

This section [Code 1942, § 1844] does not require a seal to be affixed to notices by the board of supervisors to taxpayers of tax assessments, since the statute requir-

ing the seal to be upon process refers to process addressed to individuals and not publication of a general notice by a board of supervisors to the public or a part thereof not specifically named, the object of the statute as to seal being to advise the party upon whom the writ is to be served that its authenticity is genuine. *Mullins v. Lyle*, 183 Miss. 297, 183 So. 696 (1938).

This statute has no application to process issued by justice of the peace, the justice of the peace not being required or authorized to have a seal. *Matthews v. State*, 134 Miss. 807, 100 So. 18 (1924).

This section [Code 1942, § 1844] is not applicable to notices in disbarment proceedings. *Ex parte Cashin*, 128 Miss. 224, 90 So. 850 (1922).

In a disbarment proceeding reasonable notice so as to prevent injustice is all that is required. *Ex parte Cashin*, 128 Miss. 224, 90 So. 850 (1922).

### 2. Formal requisites.

A writ of garnishment is not rendered ineffective by an erroneous recital that judgment had been rendered in county court when in fact it was in circuit court, where it was issued under the signature of the clerk of the circuit court, bore its seal, was for an amount in excess of county court's jurisdiction, and was returnable on a date when the circuit court term, and not that of the county court, would begin. *Mid-South Pipeline Contractors v. Citizens Nat'l Bank*, 239 Miss. 621, 124 So. 2d 697 (1960).

Sealing of a writ of execution is requisite to its validity. *W.T. Rawleigh Co. v.*

Howell, 196 Miss. 489, 18 So. 2d 134 (1944).

Location of seal is not important in effecting authentication. *W.T. Rawleigh Co. v. Howell*, 196 Miss. 489, 18 So. 2d 134 (1944).

Mere fact that the seal had been placed upon a writ of execution elsewhere than upon the face of the writ proper, such as upon the unprinted margin or upon that part of the document utilized to detail accrued costs, does not render it invalid. *W.T. Rawleigh Co. v. Howell*, 196 Miss. 489, 18 So. 2d 134 (1944).

Affixing clerk's seal to writ of execution, consisting of printed form upon single sheet, the right half of which contained the writ proper and the left half an itemized cost bill, at the lower lefthand corner of the part containing the cost bill instead of upon that part of the writ proper, sufficiently satisfied this section [Code 1942, § 1844]. *W. W.T. Rawleigh Co. v. Howell*, 196 Miss. 489, 18 So. 2d 134 (1944).

Although the original subpoena has no seal, after thirty years, in a collateral attack, the law presumes the execution of a proper subpoena. *McAllum v. Spinks*, 129 Miss. 237, 91 So. 694 (1922).

All process of the court should bear a seal or should show there is no seal or it will be bad. *Burton v. Cramer*, 123 Miss. 848, 86 So. 578 (1920); *McAllum v. Spinks*, 129 Miss. 237, 91 So. 694 (1922).

Process without the seal of the court, or if there be no seal without a statement of that fact, is bad. *Pharis v. Conner*, 11 Miss. (3 S. & M.) 87 (1844).

### 3. Issuance of process.

The fact that a *capias* for arrest on a misdemeanor charge was issued on the affidavit of the county prosecuting attorney, by the clerk of the county court without any order therefor from the county judge did not render it invalid, or avoid jurisdiction, by the court over the person of the defendant, since, inasmuch as the affidavit of the county prosecuting attorney took the place of an indictment in the circuit court, the process on the charge of misdemeanor so made was a *capias* to be issued by the clerk of the county court. *Cooper v. State*, 193 Miss. 672, 10 So. 2d 764 (1942).

This section [Code 1942, § 1844], while it applies to the clerks of all courts, applies only as to process issuing out of the courts of which they are clerks, and vests no authority in a clerk of the circuit court to issue a warrant for the arrest of a person charged with the commission of a crime by an affidavit lodged with him. *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940).

If the process be issued by another, with the clerk's consent in his name, it is sufficient. *Barry v. Gamble*, 44 U.S. 32, 11 L. Ed. 479 (1845).

## RESEARCH REFERENCES

**ALR.** Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person. 37 A.L.R.2d 928.

**Am Jur.** 62 Am. Jur. 2d (Rev), Process §§ 63, 64 et seq.

**CJS.** 72 C.J.S., Process §§ 17, 18 et seq.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

### § 13-3-5. The summons.

(1) The process to bring in defendants in all civil actions in all courts except justice court shall be a summons, the form, issuance, service, waiver, return, amendment and time limits of which shall be governed by the Mississippi Rules of Civil Procedure.

(2) The process to bring in defendants in all civil actions in justice court shall be a summons which shall be served in one of the following modes:

**First.** — Upon the defendant personally, if to be found in the county, by handing him a true copy of the process.

**Second.** — If the defendant cannot himself be found in the county, then by leaving a true copy of the process at his usual place of abode, with his wife or some other person of his family above the age of sixteen (16) years, and willing to receive such copy.

**Third.** — If the defendant cannot himself be found, and if no person of his family aged sixteen (16) years can be found at his usual place of abode who is willing to receive such copy, then by posting a true copy on a door of the defendant's usual place of abode; provided, however, that if this mode is used when the defendant's usual place of abode is a multi-family dwelling, a copy of the summons shall be mailed to the defendant by the clerk of the court upon return of service.

**SOURCES:** Codes, 1871, §§ 693, 1001; 1880, §§ 1523, 1848; 1892, § 3414; 1906, § 3913; Hemingway's 1917, § 2920; 1930, § 2965; 1942, § 1845; Laws, 1991, ch. 573, § 93; Laws, 1992, ch. 427 § 1, eff from and after passage (approved May 4, 1992).

**Cross References** — Power of chancery court to issue summons, see § 9-5-85.

Notification and request for interpreter for deaf person following receipt of notice for appearance, see § 13-1-305.

Subpoena of witnesses generally, see § 13-3-93.

For the rule governing service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

Service of summons, see Uniform Rule of Procedure for Justice Court 2.04.

## JUDICIAL DECISIONS

### 1. In general.

A writ of garnishment is not rendered ineffective by an erroneous recital that judgment had been rendered in county court when in fact it was in circuit court, where it was issued under the signature of the clerk of the circuit court, bore its seal, was for an amount in excess of the county court's jurisdiction, and was returnable on a date when the circuit court term and not that of the county court would begin. *Mid-South Pipeline Contractors v. Citizens Nat'l Bank*, 239 Miss. 621, 124 So. 2d 697 (1960).

The requisites of a summons in chancery should be complied with in order to authorize a pro confesso. *Gulf & S.I.R.R. v. F.L. Riley Mercantile Co.*, 139 Miss. 158, 104 So. 81 (1925), error dismissed, 269 U.S. 579, 46 S. Ct. 120, 70 L. Ed. 432 (1925).

A judgment by default, while not void, is erroneous where the return-day named in

the summons is prior to the date of service of summons. *T.A. Howard Lumber Co. v. Hopson*, 136 Miss. 237, 101 So. 363 (1924).

A case where a bank is bound by service of summons although the summons was intended for a bank of like name which was defunct. *Campbell & Campbell v. Pickens Bank*, 134 Miss. 559, 99 So. 378 (1924).

There must be a valid service of process, an appearance of defendant or a waiver of process before there can be a valid judgment. *Boutwell v. Grayson*, 118 Miss. 80, 79 So. 61 (1918).

The writ should show in proper case that partition as well as injunction was sought. *Field v. Junkin*, 99 Miss. 834, 56 So. 172 (1911).

The failure of a writ to apprise the defendant of the nature of the suit does not render it void. *Guess v. Smith*, 100 Miss. 457, 56 So. 166, *Am. Ann. Cas.* 1914A,300 (1911).



The service of an injunction writ under a bill to restrain the commission of trespasses and demanding damages and the statutory penalty for cutting trees is not a

summons and does not authorize a decree pro confesso. *Sheffield v. Friedberg*, 84 Miss. 188, 36 So. 242 (1904).

### ATTORNEY GENERAL OPINIONS

A sheriff may hire an individual to serve process on a fee basis. *McWilliams*, Nov. 14, 1997, A.G. Op. #97-0711.

A summons for a replevin hearing wherein the property is not immediately seized may be served by placing a true copy on the door of the defendant's usual place of abode. *Parker*, May 3, 2002, A.G. Op. #02-0225.

A constable may serve a summons for a replevin by any of the means set forth in Section 13-3-5; if the constable is unable to determine whether or not the defendant is in possession of the property described in the declaration, he should note such on the return. *Enlow*, Nov. 15, 2002, A.G. Op. #02-0646.

If a constable posts process on the door of a home as allowed by this section and the process is later returned to the court with credible information that the defendant does not live at that address, then the constable is not entitled to a fee for service of process. *Davis*, Mar. 5, 2004, A.G. Op. 04-0093.

There is no statutory provision allowing for private process servers within the State of Mississippi other than the emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. *Huckaby*, Aug. 25, 2006, A.G. Op. 06-0378.

### RESEARCH REFERENCES

**ALR.** Validity of service of summons or complaint on Sunday or holiday. 63 A.L.R.3d 423.

**Am Jur.** 62 Am. Jur. 2d, Process §§ 8, 9.

Complaint, petition, or declaration against sheriff for failure to serve summons, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 31.

Summons, 20 Am. Jur. Pl & Pr Forms (Rev), Process, Forms 12-14.

Summonses, 16 Am. Jur. Pl & Pr Forms, Process, Forms 16:208-16:214.

Complaint against sheriff for failure to serve summons, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Form 18:556.

**CJS.** 72 C.J.S., Process §§ 6-11.

### §§ 13-3-7 through 13-3-13.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-7. [Codes, 1857, ch. 62, art. 29; 1871, § 1008; 1880, § 1853; 1892, § 3415; 1906, § 3914; Hemingway's 1917, § 2921; 1930, § 2966; 1942, § 1846]

§ 13-3-9. [Codes, Hutchinson's 1848, ch. 58, art. 1 (24); 1857, ch. 61, art. 66; 1871, § 697; 1880, § 1524; 1892, § 3416; 1906, § 3915; Hemingway's 1917, § 2922; 1930, § 2967; 1942, § 1847]

§ 13-3-11. [Codes, Hutchinson's 1848, ch. 58, art. 1 (20); 1857, ch. 61, art. 62; 1871, § 695; 1880, § 1525; 1892, § 3417; 1906, § 3916; Hemingway's 1917, § 2923; 1930, § 2968; 1942, § 1848]

§ 13-3-13. [Codes, 1857, ch. 62, art. 26; 1871, § 1005; 1880, § 1848; 1892, § 3418; 1906, § 3917; Hemingway's 1917, § 2924; 1930, § 2969; 1942, § 1849; Laws, 1924, ch. 151]

**Editor's Note** — Former § 13-3-7 provided that the names of all defendants who reside in the county where the process issues shall be included in the same summons.

Former § 13-3-9 provided that if any of the defendants reside in different counties from that in which the suit is brought, original process may issue at the same time to each county in which any of the defendants reside, and the clerk shall indorse on each writ issued to another county than that in which the suit is brought the names of the defendants upon whom it is to be served, and that it is a duplicate of a writ issued to the other county for the same cause of action and the sheriff shall execute and return such process as in other cases, and under the same penalties.

Former § 13-3-11 provided for when the summons, in actions in circuit court, shall be made returnable and when it shall be executed.

Former § 13-3-13 specified when the summons was returnable and when it was to be executed in suits in chancery.

### **§ 13-3-15. Separate or additional summons; attachment against estate of defendant.**

Upon the request of the plaintiff, separate or additional summons shall issue against any defendants. When the defendant shall not be found, the plaintiff may have an attachment against the estate of the defendant. If, upon such attachment, the sheriff shall seize or attach any property of the defendant, the same proceedings shall thereafter be had as if the suit had been originally commenced by attachment.

**SOURCES:** Codes, Hutchinson's 1848, ch. 58, art. 1 (40); 1857, ch. 61, art. 67; 1871, § 718; 1880, §§ 1534, 1851; 1892, § 3419; 1906, § 3918; Hemingway's 1917, § 2925; 1930, § 2970; 1942, § 1850; Laws, 1991, ch. 573, § 94, eff from and after July 1, 1991.

**Cross References** — Issuance of duplicate and alias writs by an officer granting an attachment, see § 11-33-21.

Return of alias where first process has been executed, see § 13-3-75.

Issuance of an alias where a *capias* has been returned unexecuted, see § 99-9-1.

For the rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## **JUDICIAL DECISIONS**

### **1. In general.**

When an action has been begun in accordance with the law of venue in personal actions and the defendant shall not be found, the plaintiff may have an attachment under this section [Code 1942,

§ 1850], but the record must properly show that the action was rightfully commenced, and that defendant cannot be "found" in the county. *McNair v. Kaiser*, 62 Miss. 783 (1885).

## **RESEARCH REFERENCES**

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 115-118.

62 Am. Jur. 2d (Rev), Process §§ 105, 136-139, 143, 149, 150, 183 et seq.

Alias summons, 16 Am. Jur. Pl & Pr Forms, Process, Form 16:223.

**CJS.** 33 C.J.S., Executions §§ 119-130. 72 C.J.S., Process § 29.

### § 13-3-17. Substitution of parties in case of death of party.

Substitution of parties in case of death of a party shall be governed by the Mississippi Rules of Civil Procedure.

**SOURCES:** [Codes, 1857, ch. 62, art. 32; 1871, § 1072; 1880, § 1852; 1892, § 3420; 1906, § 3919; Hemingway's 1917, § 2926; 1930, § 2971; 1942, § 1851.]; Laws, 1991, ch. 573, § 95, eff from and after July 1, 1991.

**Cross References** — For the rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## JUDICIAL DECISIONS

### 1. In general.

An amended bill or bill of revivor in chancery is not required under this stat-

ute [Code 1942, § 1851]. *Mitchell v. Conner*, 42 Miss. 550 (1869).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process § 134.

### §§ 13-3-19 through 13-3-23. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-19. [Codes, 1857, ch. 62, art. 34; 1871, § 1013; 1880, § 1855; 1892, § 3421; 1906, § 3920; Hemingway's 1917, § 2927; 1930, § 2972; 1942, § 1852; Laws, 1924, ch. 151; Laws, 1946, ch. 170]

§ 13-3-21. [Codes, 1857, ch. 62, art. 34; 1871, § 1013; 1880, § 1856; 1892, § 3422; 1906, § 3921; Hemingway's 1917, § 2928; 1930, § 2973; 1942, § 1853]

§ 13-3-23. [Codes 1880, § 1857; 1892, § 3423; 1906, § 3922; Hemingway's 1917, § 2929; 1930, § 2974; 1942, § 1854]

**Editor's Note** — Former § 13-3-19 provided for service of summons by publication for nonresident or absent defendant.

Former § 13-3-21 specified the duties of clerk when service of summons was by publication.

Former § 13-3-23 provided that publication could be dispensed with if summons served on the absent party.

### § 13-3-25. Summons by publication for unknown heirs and unknown defendants.

When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the complainant may have publication of summons for them and such proceedings shall be had thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.



**SOURCES:** Codes, 1857, ch. 62, art. 35; 1871, § 1069; 1880, § 1858; 1892, § 3424; 1906, § 3923; Hemingway's 1917, § 2930; 1930, § 2975; 1942, § 1855.

**Cross References** — Summons by publication of the heirs of an intestate deceased in an action brought by those praying to be declared heirs of the deceased, see § 91-1-29.

Amendment of an indictment where the name of an unknown defendant later becomes known, see § 99-7-25.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process § 182.

20 Am. Jur. Pl & Pr Forms (Rev), Process, Forms 162-164, 181, 182, 191-193, 201 (affidavit in support of motion for service of process by publication).

16 Am. Jur. Pl & Pr Forms, Process, Forms 16:325-16:341 (affidavit for publication of summons).

**CJS.** 72 C.J.S., Process § 83.

## § 13-3-27. Publication of summons.

Publication of summons in all cases and in every court, when authorized by law, shall be made as prescribed in the Mississippi Rules of Civil Procedure.

**SOURCES:** Codes, 1892, § 3425; 1906, § 3924; Hemingway's 1917, § 2931; 1930, § 2976; 1942, § 1856; Laws, 1991, ch. 573, § 96, eff from and after July 1, 1991.

**Cross References** — For the rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## JUDICIAL DECISIONS

### 1. In general.

A judgment in personam cannot be rendered against a foreign corporation on

publication of process. *Columbia Star Milling Co. v. Brand*, 115 Miss. 625, 76 So. 557 (1917).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process §§ 211-213, 138, 143 et seq.

62 Am. Jur. 2d (Rev), Process §§ 222 et seq.

Affidavit in support of motion for service of process by publication, 20 Am. Jur. Pl &

Pr Forms (Rev), Process, Forms 162-164, 181, 182, 191-193, 201, 282.

Affidavit for publication of summons, 16 Am. Jur. Pl & Pr Forms, Process, Forms 16:325-16:341.

**CJS.** 72 C.J.S., Process §§ 81 et seq.

## § 13-3-29. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 462; 1892, § 3426; 1906, § 3925; Hemingway's 1917, § 2932; 1930, § 2977; 1942, § 1857]

**Editor's Note** — Former § 13-3-29 provided for posting as a substitute for service by publication.

### § 13-3-31. Publication; requirements and procedures.

(1) Whenever it is required by law that any summons, order, citation, advertisement or other legal notice shall be published in a newspaper in this state, it shall mean, in addition to any other requirements imposed by law, publication in some newspaper which:

(a) Maintains a general circulation predominantly to bona fide paying subscribers within the political subdivision within which publication of such legal notice is required. The term "general circulation" means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers. In no event shall the term "general circulation" be interpreted to require that legal notices be published in a newspaper having the greatest circulation. The term "bona fide paying subscribers" means persons who have subscribed at a subscription rate which is not nominal, whether by mail subscriptions, purchases through dealers and carriers, street vendors and counter sellers, or any combination thereof, but shall not include free circulation, sales at a token or nominal subscription price and sales in bulk for purposes other than for resale for individual subscribers.

(b) Maintains a legitimate list of its bona fide paying subscribers by the following categories where applicable:

- (i) Mail subscribers;
- (ii) Dealers and carriers; and
- (iii) Street vendors and counter sellers.

(c) Is not published primarily for advertising purposes and has not contained more than seventy-five percent (75%) advertising in more than one-half ( $\frac{1}{2}$ ) of its issues during the period of twelve (12) months next prior to the first publication of any legal notice therein, excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues.

(d) Has been established and published continuously for at least twelve (12) months next prior to the first publication of such matter to be published, is regularly issued at stated intervals no less frequently than once a week, bears a date of issue, and is numbered consecutively; provided, however, that publication on legal holidays of this state or of the United States and on Saturdays and Sundays shall not be required, and failure to publish not more than two (2) regular issues in any calendar year shall not disqualify a paper otherwise qualified.

(e) Is issued from a known office of publication, which shall be the principal public business office of the newspaper and need not be the place at which the newspaper's printing presses are physically located. A newspaper shall be deemed to be "published" at the place where its known office of publication is located.

(f) Is formed of printed sheets. However, the word "printed" does not include reproduction by the stencil, mimeograph or hectograph process.

(g) Is originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter.

(h) Is not designed primarily for free circulation or for circulation at nominal rates.

(2) "Newspaper," as used in this section, shall not include a newspaper, publication, or periodical which is published, sponsored by, is directly supported financially by, or is published to further the interests of, or is directed to, or has a circulation restricted in whole or in part to any particular sect, denomination, labor or fraternal organization or other special group or class of citizens, or which primarily contains information of a specialized nature rather than information of varied, broad and general interest to the general public, or which is directed to any particular geographical portion of any given political subdivision within which publication of such legal notice is required, rather than to such political subdivision as a whole. No newspaper otherwise qualified under this section shall be disqualified from publishing legal notices for the sole reason that such newspaper does not have as great a circulation as some other newspaper publishing in the same political subdivision.

(3) In the event of the discontinuance of the publication of all newspapers in any county qualified under this section to publish legal notices, any other such newspaper published in the same county, regardless of the length of time it has been published, shall be deemed qualified to publish such legal notices, provided such newspaper meets all requirements of this section other than the requirements of subsection (1) (d) of this section.

(4) A newspaper otherwise qualified under this section which is published in a municipality whose corporate limits encompass territory in more than one (1) county shall be qualified to publish legal notices, including foreclosure sale notices as described in Section 89-1-55, for any county a portion of whose territory is included within the municipality, irrespective of the actual physical location within the municipality of the principal public business office of the newspaper.

**SOURCES:** Codes, 1942, § 1858; Laws, 1936, ch. 313; Laws, 1948, ch. 427; Laws, 1976, ch. 479, § 1; Laws, 1984, ch. 400; Laws, 2004, ch. 453, § 1, eff from and after passage (approved Apr. 28, 2004.)

**Editor's Note** — The preamble to Chapter 479 of the Laws of 1976 reads as follows:

"Whereas, it is in the public interest of the people of this state to assure that legal notices required by law to be published in a newspaper in this state are published in newspapers having numerically substantial, extensive and widespread circulation to bona fide paying subscribers, to the end that effective general notice to the public is given by such publication; now, therefore,

Be it enacted by the legislature of the State of Mississippi:"

**Cross References** — Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.



## JUDICIAL DECISIONS

1. In general.
2. General circulation requirement.

**1. In general.**

City Board of Aldermen (Board) never concluded that the publisher was unqualified, and to the contrary, the Board expressly stated in its motion that no determination could be made whether the publisher was qualified or in compliance with Miss. Code Ann. § 13-3-31 since it did not receive any circulation information; the circuit court properly held that the determining issue in this case, however, was not that of circulation figures, but it was instead the lower bid submitted by the newspaper. *Stone County Publ., Inc. v. Prout*, 18 So. 3d 300 (Miss. Ct. App. 2009).

Judgment determining that appellee's publication was a newspaper qualified to publish legal notices in DeSoto County within the meaning of Miss. Code Ann. § 13-3-31 was affirmed, where appellee presented sufficient evidence to sustain the trial court's finding that the publication's principal public business office was in DeSoto County. The publication had more than 20 employees in Southaven, a city in DeSoto County, including a general manager, editor, advertising staff, advertising manager, advertising sales staff, a deputy editor, several reporters, clerical staff, and circulation staff consisting of a district manager and one or two field representatives. *DeSoto Times Today v. Memphis Publ. Co.*, 991 So. 2d 609 (Miss. 2008).

State supreme court reversed the denial of a summary judgment motion filed by bank and trustee as the city where the newspaper was published encompassed two different counties and thus, the newspaper was deemed to be published in both counties under Miss. Code Ann. § 13-3-31(4) for purposes of the publication of foreclosure sale notices. *Warren v. Johnston*, 908 So. 2d 744 (Miss. 2005).

Trial court misapplied Miss. Code Ann. § 13-3-31 in finding that the successful bidder's newspaper section was not adequate under § 13-3-31 for the publication of legal notices, because it was not pub-

lished every day, it was not identified by letter like other sections, and it contained different information depending upon its destination; § 13-3-31 did not determine when a section of the newspaper was treated as a separate and independent newspaper, and instead it simply defined a newspaper and provided the criteria that a newspaper had to satisfy in order to publish legal notices. *Gannett River States Publ'g Corp. v. Jackson Advocate*, 856 So. 2d 247 (Miss. 2003).

City council did not err in finding that the successful bidder satisfied the requirements under Miss. Code Ann. § 13-3-31 when it determined that the successful bidder's proposal to publish the legal notices in a section of its newspaper that was published once a week was a qualified bid; the section of the paper at issue was sold with the newspaper, it was a section of the paper despite not being identified by letter like the other sections, and it did not matter that the section was only included in papers sold in the city, as notices only had to be published there. *Gannett River States Publ'g Corp. v. Jackson Advocate*, 856 So. 2d 247 (Miss. 2003).

Whether the publication of notice to creditors required by § 91-7-145 is made in an appropriate newspaper brings into bearing § 13-3-31, which sets forth the requirements a newspaper must meet in order to qualify as a valid publisher of legal notices. *Myers v. Myers*, 498 So. 2d 376 (Miss. 1986).

Contention that notice to creditors was not published in a newspaper which qualified as a valid publisher of legal notices, which was not raised in the court below, would not be considered by the Supreme Court on appeal. *Myers v. Myers*, 498 So. 2d 376 (Miss. 1986).

Municipal authorities cannot let a contract to publish legal notices to a newspaper not qualified under § 13-3-31, regardless of whether or not it is the lowest bidder; thus a city council's order dividing the publication of its legal notices equally among three newspapers was null and void where it was subsequently determined that one of the newspapers was not legally qualified; a subsequent order of the

council awarding the contract to the other two newspapers was not arbitrary, capricious, discriminatory, illegal or without substantial basis and the circuit court thus erred in setting it aside. *City of Jackson v. Capital Reporter Publishing Co.*, 373 So. 2d 802 (Miss. 1979).

Object of statute is to avoid publication of important notices in newspapers so recently established as not to assure general notice to the public. *Elliott v. Board of Supvrs.*, 182 Miss. 631, 179 So. 344 (1938), error overruled, 182 Miss. 634, 180 So. 72 (1938).

Order of supervisors excluding beer and wine pursuant to popular vote held not invalid for failure to recite that newspaper in which notice of election published had been in existence for more than one year prior to publication, since such recital is not a jurisdictional requirement. *Elliott v. Board of Supvrs.*, 182 Miss. 631, 179 So. 344 (1938), error overruled, 182 Miss. 634, 180 So. 72 (1938).

Proof of publication of notice of election, held not invalid because of failure to recite newspaper had been established for twelve months prior to first publication, in view of exception as to discontinuance of any newspaper in county qualified to publish legal notices. *Elliott v. Board of*

*Supvrs.*, 182 Miss. 631, 179 So. 344 (1938), error overruled, 182 Miss. 634, 180 So. 72 (1938).

## 2. General circulation requirement.

The statute does not require that a newspaper break down its subscription base by zip code in order to demonstrate that it is a newspaper of general circulation. *Sunland Publishing Co. v. City of Jackson*, 710 So. 2d 879 (Miss. 1998).

Although a newspaper may be directed towards one particular area, locality or group within a relevant area, as long as that newspaper publishes news, human interest, advice columns, sports, arts, etc., which are of interest to the general public, its distribution is not entirely limited to one geographic area, is available to anyone who wishes to subscribe, and there exists paid subscribers, the newspaper is one of general circulation. *Sunland Publishing Co. v. City of Jackson*, 710 So. 2d 879 (Miss. 1998).

A finding that three members of the city council had not personally seen a particular newspaper in their neighborhoods was insufficient to support a determination that the newspaper did not meet the general circulation requirement. *Sunland Publishing Co. v. City of Jackson*, 710 So. 2d 879 (Miss. 1998).

## ATTORNEY GENERAL OPINIONS

All qualifications of statute are equally important and newspaper must meet all qualifications to be qualified to publish legal notices. *Haque*, May 22, 1990, A.G. Op. #90-0336.

A newspaper with a principal public business office in a county in Mississippi is deemed to be published in Mississippi regardless of the fact it can be purchased only as part of a Tennessee newspaper. *Chamberlin*, Feb. 19, 2002, A.G. Op. #02-0033.

The fact that a subscription to a subsidiary Mississippi newspaper cannot be effected without a subscription to the Tennessee newspaper is immaterial to whether the Mississippi newspaper under the statute; similarly, the fact that the purchase price of a newspaper and the purchase price of the subsidiary Mississippi newspaper are part of a single price

package is also immaterial. *Chamberlin*, Feb. 19, 2002, A.G. Op. #02-0033.

If a school district has either made a finding of fact that its current publisher is qualified under this section or has not made a finding of fact that it fails to meet the requirements and provisions of this section, there is no statutory requirement that the school district respond to a request by another newspaper to be designated as the official newspaper of the school district for legal notices. *Wallace*, January 15, 1999, A.G. Op. #98-0804.

As between qualified newspapers, a newspaper with a known office of publication within the municipality must be selected to publish the legal notices of that municipality. *Edens*, July 23, 1999, A.G. Op. #99-0289.

The qualifications of the statute are equally important, and a newspaper must

meet all the qualifications to publish legal notices. Dickerson, Dec. 3, 1999, A.G. Op. #99-0630.

Notice must be published in a newspaper that is numbered consecutively. Chamberlin, Dec. 13, 2002, A.G. Op. #02-0678.

If a newspaper was established and continued uninterrupted publication for twelve or more months and is now numbered consecutively, the fact that it was not numbered consecutively during the entire twelve or more months would not be material. Chamberlin, Dec. 13, 2002, A.G. Op. #02-0678.

The best definition of the phrase “numbered consecutively” is found in its common usage: a series of items or events which are numbered beginning with the number one and continuing in unbroken, numerical sequence. Chamberlin, Dec. 13, 2002, A.G. Op. #02-0678.

Municipal governing authorities may require newspapers submitting bids for the municipality’s publishing contract to provide evidence of compliance with Section 13-3-31. Taylor, Oct. 27, 2006, A.G. Op. 06-0530.

## RESEARCH REFERENCES

**ALR.** Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication. 21 A.L.R.2d 929.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service. 46 A.L.R.2d 1364.

Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

**Am Jur.** 62 Am. Jur. 2d (Rev), Process § 236.

**CJS.** 72 C.J.S., Process § 94.

**Law Reviews.** Abbott, Some Basic Priority Problems in a Land Development Project in Mississippi with Emphasis Upon Power of Sale Foreclosure Procedures. 50 Miss. L. J. 665, September 1979.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L. J. 49, March, 1985.

## § 13-3-32. Publication—in what newspaper—presumption of continued qualification.

All newspapers which were qualified to publish legal notices and which were publishing legal notices prior to July 1, 1976, shall be presumed to qualify under Section 13-3-31 unless and until a determination has been made by competent authority that such newspaper fails to meet the requirements and provisions of Section 13-3-31.

**SOURCES:** Laws, 1976, ch. 479, § 2, eff from and after July 1, 1976.

**Cross References** — Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## ATTORNEY GENERAL OPINIONS

If, as a matter of fact, a newspaper was not qualified pursuant to this section to publish legal notices and publishing legal notices prior to July 1, 1976, then no

presumption of validity of legal notices published therein could attach thereto. Wallace, January 15, 1999, A.G. Op. #98-0804.



**§§ 13-3-33 through 13-3-35.**

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-33. [Codes, Hutchinson's 1848, ch. 58, art. 1 (44); 1857, ch. 61, art. 64; 1871, § 701; 1880, § 1527; 1892, § 3427; 1906, § 3926; Hemingway's 1917, § 2933; 1930, § 2978; 1942, § 1859]

§ 13-3-35. [Codes, 1892, § 3428; 1906, § 3927; Hemingway's 1917, § 2934; 1930, § 2980; 1942, § 1861]

**Editor's Note** — Former § 13-3-33 specified how a summons was to be executed. Former § 13-3-35 provided form for the sheriff's return on original process.

**§ 13-3-37. Sheriff to mark and return process.**

The sheriff shall mark on all process the day of the receipt thereof by him, and he shall return the same promptly and in any event within the time during which the person served must respond to the process, with a written statement of his proceedings thereon, and of his fees, for serving it. For failing to note the time of the receipt of process, or for failing to return the same, the sheriff shall forfeit to the party aggrieved the sum of One Hundred Dollars (\$100.00), and shall be liable for all damages, and the court may enforce return of the process by fine and imprisonment for contempt. Whenever a sheriff of any county shall receive from another county any writ or other process directed to him, he shall not be liable for a failure to return the same to the county from which the same was issued if he shall show to the court that he mailed the same in the post office, directed to the clerk of the court by whom the same was issued, at least two (2) days before the sitting of the court to which the same was returnable.

**SOURCES:** Codes, 1857, ch. 61, art. 63; 1871, § 700; 1880, § 1526; 1892, § 3429; 1906, § 3928; Hemingway's 1917, § 2935; 1930, § 2981; 1942, § 1862; Laws, 1991, ch. 573, § 97, eff from and after July 1, 1991.

**Cross References** — Jurisdiction of the circuit court to hear and determine all motions against sheriffs for money collected and not paid over to party entitled to same, see § 9-7-89.

Showing the return of any officer serving process to be untrue, see § 13-3-87.

Duty of the sheriff to execute and return process, see § 19-25-37.

Liability of the sheriff for failing to execute or return process, see § 19-25-37.

Liability of a sheriff for failing to return any execution, see § 19-25-41.

Liability of the sheriff for making false return on any process, see § 19-25-47.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

**JUDICIAL DECISIONS****1. In general.**

The penalty provided under this section [Code 1942, § 1862] for a failure of the sheriff to note on the execution the date of its receipt, was not recoverable against the sheriff and his sureties where the

execution plaintiffs suffered no loss or injury by reason thereof and were not "aggrieved." *McInnis v. Parker*, 183 Miss. 648, 184 So. 418 (1938).

List of special venire and copy of the indictment need not be served on accused

by sheriff. *Ivey v. State*, 154 Miss. 60, 119 So. 507 (1928).

The officer's return may be amended after judgment. *H. Lupkin & Sons v. Russell*, 108 Miss. 742, 67 So. 185 (1915).

An officer's return of service of a summons which merely recites that the writ was on a certain day "executed by personal service" on the defendant is insuffi-

cient. The return should state the facts. *Dogan v. Barnes*, 76 Miss. 566, 24 So. 965 (1899).

A defective return attempting to show personal service of process is not equivalent to the general return "executed" heretofore authorized under Code 1880, § 1528. *Dogan v. Barnes*, 76 Miss. 566, 24 So. 965 (1899).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process § 286.

**CJS.** 72 C.J.S., Process §§ 105, 106 et seq.

### § 13-3-39. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1942, § 2910-09; Laws, 1962, ch. 257, § 9, eff from and after passage (approved June 1, 1962)]

**Editor's Note** — Former § 13-3-39 provided for the execution and return of process from courts of the separate district in Harrison County.

### § 13-3-41. Service on one carrying on business in state by or through trustee or attorney in fact.

All persons, firms, copartnerships or corporations carrying on business in the State of Mississippi, by or through trustees or attorneys in fact, may be served with process in all suits or proceedings in any court, by serving a copy of such process upon an agent of such trustees or attorneys in fact, in the same manner as is now provided for service of process upon foreign corporations.

**SOURCES:** Codes, 1930, § 2979; 1942, § 1860; Laws, 1924, ch. 185.

**Cross References** — Notice to attorney at law being as effectual as if made to his client, see § 11-49-11.

Service of process upon a corporation, see § 13-3-49.

Service of process upon nonresident doing business within the state, see § 13-3-57.

Service of process upon nonresident motorist, see § 13-3-63.

Notification given foreign insurance company when process is served upon insurance commissioner as attorney for insurance company, see § 83-5-11.

For the rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

Requirement that corporate plaintiffs be represented by counsel, and circuit court rules concerning the filing and service of pleadings and motions, see Miss. Uniform Rules of Circuit and County Court Practice 1.06, 2.06.

## RESEARCH REFERENCES

**Am Jur.** 19 Am. Jur. 2d (Rev), Corporations §§ 1897-1899, 1901 et seq.

36 Am. Jur. 2d, Foreign Corporations §§ 476 et seq.

59A Am. Jur. 2d, Partnership §§ 468-487.

4 Am. Jur. Proof of Facts, Doing Business, Proof No. 1.

**CJS.** 72 C.J.S., Process §§ 53, 54, 76.

**Lawyers' Edition.** State regulation of judicial proceedings as violating commerce clause (Art. I, § 8, cl 3) of Federal Constitution — Supreme Court cases. 100 L. Ed. 2d 1049.

## §§ 13-3-43 through 13-3-47.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-43. [Codes, 1857, ch. 61, art. 64; 1871, § 704; 1880, § 1530; 1892, § 3430; 1906, § 3929; Hemingway's 1917, § 2936; 1930, § 2982; 1942, § 1863]

§ 13-3-45. [Codes, 1857, ch. 61, art. 64; 1871, § 705; 1880, § 1531; 1892, § 3431; 1906, § 3930; Hemingway's 1917, § 2937; 1930, § 2983; 1942, § 1864]

§ 13-3-47. [Codes, 1892, § 3432; 1906, § 3931; Hemingway's 1917, § 2938; 1930, § 2984; 1942, § 1865]

**Editor's Note** — Former § 13-3-43 provided for service when defendant was an infant or an infant was a codefendant.

Former § 13-3-45 provided for service when defendant was of unsound mind.

Former § 13-3-47 provided for service when defendant was a county, city, town, or village.

## § 13-3-49. Service when defendant is a corporation.

If the defendant in any suit or legal proceeding be a corporation, process may be served on the president or other head of the corporation, upon the cashier, secretary, treasurer, clerk, or agent of the corporation, or upon any one of the directors of such corporation. If the defendant corporation be a sleeping-car company, process may be served upon any conductor thereof. If the defendant corporation be a steamboat company, process may be served upon the captain or other officer of a boat thereof. If no such person or persons be found in the county, then it shall be sufficient to post a true copy of the process on the door of the office or principal place of business of the corporation. In suits against railroads, sleeping-car, telegraph, telephone, express, steamboat, and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such companies or corporations, the process may be served on any agent of the defendant or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized, or process may be served on any one of the foregoing officers of such corporation or company, and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon them in person. When any writ or process against such corporation, company, receiver or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons. All process and notices to be served upon such companies, corporations, or receivers may be served as herein directed.



**SOURCES:** Codes, *Hutchinson's* 1848, ch. 15, art. 3 (1); 1857, ch. 61, art. 64; 1871, § 703; 1880, §§ 1035, 1529; 1892, § 3433; 1906, § 3932; *Hemingway's* 1917, § 2939; 1930, § 2985; 1942, § 1866; *Laws*, 1894, ch. 61.

**Cross References** — Service of process on one carrying on business in state by or through trustee or attorney in fact, see § 13-3-41.

Issuance and execution of process when an indictment is found against a corporation, see § 99-9-3.

Rule governing the service of summons, summons by publication, return of process, and the like, see *Miss. R. Civ. P.* 4.

Circuit court filing and service requirements for pleadings and motions, see *Miss. Uniform Rule of Circuit and County Court Practice* 2.06.

## JUDICIAL DECISIONS

1. In general.
2. Service on railroad company.
3. Service on insurance company.

### 1. In general.

Where city's process server placed summons and complaint for contract action in a box for registered agent of utility because the agent's office was closed for holidays, service was not effected under *Miss. R. Civ. P.* 4(d)(4) and *Miss. Code Ann.* § 13-3-49 until five days later when the offices reopened and the papers could be processed and sent to the utility. Thus, filing of the utility's removal notice was timely under 28 U.S.C.S. § 1446(b). *City of Clarksdale v. Bellsouth Telcoms., Inc.*, 428 F.3d 206 (5th Cir. 2005).

The Mississippi statutes providing for the method of services on a resident or a qualified foreign corporation, the "doing business" statute, and the statute providing for substituted service on any corporation doing business in the state, must be read together, and such reading leads to the inescapable conclusion that effective process under these statutes presupposes a factual determination that the foreign corporation is doing business in the state of Mississippi. *Hyde Constr. Co. v. Koehring Co.*, 321 F. Supp. 1193 (S.D. Miss. 1969).

Summons was not effective where, at time received, there was no legal authority for service to be made by mail. *Western Tar Prods. Corp. v. Alton Sheet Metal & Roofing Works, Inc.*, 515 So. 2d 932 (Miss. 1987).

An employee of a corporation whose duties are generally those of a stenogra-

pher and receptionist is not an "agent" or "clerk" of the corporation within the meaning of this section [*Code* 1942, § 1866], and the service upon her of a writ of garnishment issued against the corporation will not suffice to support a judgment against the corporation as garnishee where the writ was not brought to the attention of any of the corporation's officers or agents. *First Jackson Sec. Corp. v. B.F. Goodrich Co.*, 253 Miss. 519, 176 So. 2d 272 (1965).

This statute presupposes a doing of business in Mississippi in the case of a foreign corporation. *Alabama, Tenn. & N.R. Co. v. Howell*, 244 Miss. 157, 141 So. 2d 242 (1962).

Where a copy of summons and complaint in a suit against a domestic corporation was delivered to an individual for delivery to the president of the corporation and this individual was a clerk who later delivered the process to the president, this did not constitute a personal service on the defendant corporation. *Hyde Constr. Co. v. Elton Murphy-Walter Travis, Inc.*, 227 Miss. 615, 86 So. 2d 455 (1956).

Suit having been filed and process for defendant having been issued promptly by a clerk, a suit was pending which tolled running of statute of limitations though process was served on plantation manager of defendant corporation and not on its designated agent for receiving of service of process. *Frederick Smith Enter. Co. v. Lucas*, 204 Miss. 43, 36 So. 2d 812 (1948).

Service of process by person delivering copy of writ to president of corporation held not defective so as to make judgment

void on collateral attack. *McIntosh v. Munson Rd. Mach. Co.*, 167 Miss. 546, 145 So. 731 (1933).

This statute must be complied with substantially in service on a corporation or it will be void. *Anderson Mercantile Co. v. Cudahy Packing Co.*, 127 Miss. 301, 90 So. 11 (1921).

Principal place of business is synonymous with domicile. *Plummer-Lewis Co. v. Francher*, 111 Miss. 656, 71 So. 907 (1916).

A return of summons against a corporation where served on an agent should show that the party was an agent. *Watkins Mach. & Foundry Co. v. Cincinnati Rubber Mfg. Co.*, 96 Miss. 610, 52 So. 629 (1910).

A return of personal service by delivery of a copy of the summons to one described as the agent of a corporation, being good on its face, objection thereto should be made by plea. *Lamb v. Russel*, 81 Miss. 382, 32 So. 916 (1902).

## 2. Service on railroad company.

Service of summons on a foreign railroad company's station agent is sufficient to bring it into court. *Illinois Cent. R.R. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805 (1963).

In an attachment suit brought in chancery court by an Alabama citizen to recover damages from an Alabama corporation for personal injuries received as a result of a railroad crossing accident in Alabama, and to attach funds in the

hands of a Mississippi corporation, where the defendant corporation owned no property or did no business in Mississippi, service of process upon an employee designated as a superintendent of the defendant corporation but who was employed by another corporation, and received no compensation from defendant corporation, was not effective to confer territorial jurisdiction over the defendant corporation. *Alabama, Tenn. & N.R. Co. v. Howell*, 244 Miss. 157, 141 So. 2d 242 (1962).

Service of summons on a station agent of a railroad company is binding and this whether its principal place of business is in the county in which the suit is brought or not. *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 255, 13 So. 844, 30 Am. St. R. 541 (1891).

Where the declaration, summons, judgment by default and execution were against "Alabama & Vicksburg Railroad Company," "The Alabama & Vicksburg Railway Company," the real corporation, whose station agent was served with the summons, having failed to appear at the return term and to object to the misnomer, is bound by the judgment. *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 255, 13 So. 844, 30 Am. St. R. 541 (1891).

## 3. Service on insurance company.

Under the provisions of this section [Code 1942, § 1866], process in suits against insurance companies may be served on any agent of the defendant. *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. 183, 65 Am. St. R. 611 (1898).

# ATTORNEY GENERAL OPINIONS

A scire facias may be personally served on a limited surety agent, and that process will be binding on the insurer represented by that agent. *Johnson*, November 6, 1998, A.G. Op. #98-0672.

A defendant corporation may be served by serving any of the persons enumerated in the statute, the president or other head of the corporation, the cashier, secretary, treasurer, clerk, or agent of the corporation; if garnishment papers are properly served on one of the required persons, the

corporation is considered properly served even if the papers are not forwarded to the payroll department. *Aldridge*, Feb. 1, 2002, A.G. Op. #02-0031.

A defendant corporation may be served by serving any of the persons enumerated in Section 13-3-49. A defendant does not have the option of "refusing service." Refusing to accept service is equal to being served. *Case*, June 22, 1995, A.G. Op. #95-0325.

RESEARCH REFERENCES

**ALR.** Foreign corporation's purchase within state of goods to be shipped into other state or country as doing business within state for purposes of jurisdiction or service of process. 12 A.L.R.2d 1439.

Service of process upon dissolved domestic corporation in absence of express statutory direction. 75 A.L.R.2d 1399.

**Am Jur.** 19 Am. Jur. 2d (Rev), Corporations §§ 1897-1899, 1901 et seq.

36 Am. Jur. 2d (Rev), Foreign Corporations §§ 476 et seq.

62 Am. Jur. 2d, Process § 129.

**CJS.** 19 C.J.S., Corporations §§ 802 et seq.

72 C.J.S., Process §§ 53, 54.

§ 13-3-51. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 64; 1871, § 706; 1880, § 1532; 1892, § 3434; 1906, § 3933; Hemingway's 1917, § 2940; 1930, § 2986; 1942, § 1867]

**Editor's Note** — Former § 13-3-51 provided for service when defendant was a prisoner.

§ 13-3-53. Service on one of several executors or administrators.

If there be two or more executors or administrators of the same estate, if process cannot be served on all of them in suits against them, service on one shall be sufficient to authorize a judgment against all.

**SOURCES:** Codes, 1857, ch. 60, art. 134; 1871, § 1192; 1880, § 1513; 1892, § 3435; 1906, § 3934; Hemingway's 1917, § 2941; 1930, § 2987; 1942, § 1868.

**Cross References** — Liability of executors and administrators to be sued in personal actions which might have been maintained against the deceased, see § 91-7-233.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

Circuit court filing and service requirements for pleadings and motions, see Miss. Uniform Rule of Circuit and County Court Practice 2.06.

§ 13-3-55. Suits by or against partnerships; service on one of several partners.

A partnership may sue or be sued in the partnership name, or in the names of the individuals composing the partnership, or both and service of process on any partner shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned.

**SOURCES:** Codes, 1880, § 1519; 1892, § 3436; 1906, § 3935; Hemingway's 1917, § 2942; 1930, § 2988; 1942, § 1869; Laws, 1977, ch. 405, eff from and after April 1, 1977.



**Cross References** — Circuit court filing and service requirements for pleadings and motions, see Miss. Uniform Rule of Circuit and County Court Practice 2.06.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## JUDICIAL DECISIONS

1. In general.
2. Partnership property separate from partner's personal property.

### 1. In general.

In action on partnership notes, one partner held not indispensable party since obligation joint and several and judgment against some would not affect plaintiff's right against others unless satisfaction obtained. *Enochs-Flowers, Ltd. v. Bank of Forest*, 172 Miss. 36, 157 So. 711 (1934), error overruled 172 Miss. 36, 159 So. 407.

A judgment against all of several partners, when only one has been summoned, is erroneous as to those not served, unless it appear by the return or elsewhere in the record that those not summoned were nonresident or could not be found. *Tabler, Cradup & Co. v. Bryant*, 62 Miss. 350 (1884).

### 2. Partnership property separate

### from partner's personal property.

Judgment of the district court in a case to determine ownership of cattle, granting summary judgment for the buyer of the cattle on the ground that the apparent seller was the owner and passed title to the buyer free of a lien, was reversed and remanded, because a fact issue existed on the ownership of the apparent seller; plaintiff bank's and defendant bank's security interests properly perfected on an individual and his property, attached to the cattle only if the apparent seller was a sole proprietorship of the individual, but if the apparent seller operated as a partnership or limited liability company, the individual did not have sufficient rights in the cattle to encumber them. *Peoples Bank v. Bryan Bros. Cattle Co.*, 504 F.3d 549 (5th Cir. 2007).

## RESEARCH REFERENCES

**ALR.** What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state. 10 A.L.R.2d 200.

**Am Jur.** 59A Am. Jur. 2d (Rev), Partnership §§ 468-478.

**CJS.** 68 C.J.S., Partnership §§ 252-256.

72 C.J.S., Process § 76.

## § 13-3-57. Service on nonresident business not qualified to do business in state; survival of cause of action in case of death or inability to act; service on nonresident executor, administrator, etc.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process

upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served, made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

**SOURCES:** Codes, 1942, §§ 1437, 1438; Laws, 1940, ch. 246; Laws, 1958, ch. 245, § 1; Laws, 1964, ch. 320, § 1; Laws, 1968, ch. 330, § 1; Laws, 1971, ch. 431, § 1; Laws, 1978, ch. 378, § 1; Laws, 1980, ch. 437; Laws, 1991, ch. 573, § 98, eff from and after July 1, 1991.

**Cross References** — For another section derived from same 1942 code section, see § 11-11-11.

Service of process when defendant is a nonresident motorist, see § 13-3-63.

Service of process upon carnivals, circuses, and fairs doing business in state but not permanently domiciled therein, see §§ 75-75-1 and 75-75-3.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

Circuit court filing and service requirements for pleadings and motions, see Miss. Uniform Rule of Circuit and County Court Practice 2.06.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application, generally.
3. What constitutes doing business within state.
4. Non-resident heirs of alleged tortfeasor.
5. Illustrative cases.

### 1. Validity.

Dismissal of the insured's action against her insurer in Mississippi for bad

faith was improper where there was no personal or subject matter jurisdiction over the insurer, Miss. Code Ann. § 13-3-57; the only connection Mississippi had to the lawsuit was that the car accident occurred in Mississippi and the lawsuit was not about the accident. *Hogrobrooks v. Progressive Direct*, 858 So. 2d 913 (Miss. Ct. App. 2003).

The long-arm statute was clearly enacted for the benefit of residents only, and it has not been expanded through the

process of judicial interpretation to include nonresident plaintiffs not qualified to do business within the state; there is no defect under federal constitutional standards for limiting the long-arm statute to resident plaintiffs, since the state is not obligated to make its courts available to nonresidents, who themselves are not doing business in the state, to sue other nonresidents. *American Int'l Pictures, Inc. v. Morgan*, 371 F. Supp. 528 (N.D. Miss. 1974).

This section [Code 1942, § 1437] and Code 1942, § 8072 do not violate the due process clause of the Constitution of the United States. *Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*, 237 Miss. 660, 115 So. 2d 309 (1959).

If a nonresident is doing such business in the state as would subject him to the jurisdiction of the court and such business is of such nature that it is hazardous or subject to the police powers of the state to be regulated, and the cause of action grows out of such business so done, then the substituted service is good and the statute is constitutional. *Davis v. Nugent*, 90 F. Supp. 522 (S.D. Miss. 1950).

There is no denial of due process under the 14th Amendment of the United States Constitution in extending this section [Code 1942, § 1437] to contract, as well as to tort actions, arising out of business or acts done within state.\**Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

Nonresident who engages in business in this state which is subject to state control is subject to suit for damages in this state on cause of action accruing here out of business transacted in this state and is properly brought into court by service of process upon secretary of state in manner provided by Code 1942, § 1438, and statutes so providing do not violate due process or immunities and privileges clauses of federal constitution. *Condon v. Snipes*, 205 Miss. 306, 38 So. 2d 752 (1949).

This statute, as applied to a corporate citizen of another state engaged in levy construction work of large proportions in Mississippi employing many men to operate trucks and other heavy and cumbersome machinery and equipment, is not unconstitutional as denying defendant

equal protection of the law, due process of law, or privileges and immunities afforded to residents, or as burdening interstate commerce. *Sugg v. Hendrix*, 142 F.2d 740 (5th Cir. 1944).

Power of state to confer jurisdiction on courts over individual nonresidents by substituted service depends upon whether such enabling statute is a reasonable exercise of the state's police power to regulate the business of such nonresident, and if the regulation is one for the protection of health, safety and welfare of those within its borders, rather than a mere attempt to extend the jurisdiction of its courts over citizens beyond its borders, the state may properly legislate to that end. *Sugg v. Hendrix*, 142 F.2d 740 (5th Cir. 1944).

## 2. Construction and application, generally.

In a breach of contract and tortious inference with business relations case that was removed to federal court pursuant to 28 U.S.C.S. § 1446 and in which the court accepted as true a Mississippi company's assertion that it and a foreign company contemplated that the contract would be performed in part in Mississippi and that the contract was in fact performed in part in Mississippi, the district court had no difficulty concluding that Mississippi's long-arm statute, Miss. Code Ann. § 13-3-57, was satisfied; since the district court also found that the requirements of due process were met, the foreign company's Fed. R. Civ. P. 12(b)(2) motion to dismiss was denied. *Barbour Int'l, Inc. v. Permasteel, Inc.*, 507 F. Supp. 2d 602 (S.D. Miss. 2007).

In a matter arising out of a high speed chase, which allegedly resulted in decedents' deaths, neither an Alabama county or that county's sheriff from Alabama entered upon the highways of Mississippi, involving themselves in efforts to stop the fleeing felons, or in any other way subjected themselves to jurisdiction under Miss. Code Ann. § 13-3-63; therefore, the supreme court proceeded with a long-arm analysis to determine if jurisdiction could be conferred upon them under the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, and the supreme court found no minimum contacts, so the county and



the sheriff were not subject to personal jurisdiction in Mississippi. *City of Cherokee v. Parsons*, 944 So. 2d 886 (Miss. 2006).

To establish the “contract” prong of the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, a plaintiff must show that a nonresident defendant entered into a contract with the plaintiff which has been, or is to be, performed, at least in part, in Mississippi. *Durham v. Katzman*, 375 F. Supp. 2d 495 (S.D. Miss. June 9, 2005).

Trial court erred in denying New York commuter van company’s motion to dismiss for lack of personal jurisdiction under Miss. R. Civ. P. 12(b) in the Mississippi residents’ wrongful death action that arose following an auto accident that occurred in New York because, although the van company was not qualified to do business in Mississippi and, therefore, met the threshold requirement for coverage by the long-arm statute, Miss. Rev. Stat. § 13-3-57, there was no evidence in the record to demonstrate that the van company’s actions had brought it under either the contract, tort, or “doing business in” provisions of the long-arm statute. *Rockaway Commuter Line, Inc. v. Denham*, 897 So. 2d 156 (Miss. 2004).

Defendants, by demonstrating that the individuals’ claims against the non-diverse defendants were time-barred, sustained their burden of showing that no reasonable possibility of recovery existed against the non-diverse defendants on the claims raised in the individuals’ original complaint; while the individuals argued that their claims were not time-barred because defendants’ fraudulent concealment tolled the statute of limitations, they were unable to support their fraudulent concealment claim. Thus, the individuals’ motion to remand was denied. *White v. City Fin. Co.*, 277 F. Supp. 2d 646 (S.D. Miss. 2003).

The contract prong of the long-arm statute was satisfied by the allegations of breach of implied warranty of merchantability and the breach of implied warranty of fitness for a particular purpose claims where at least part of the warranty work was performed in the forum state; the misrepresentation claim against the manufacturer was sufficient to support juris-

diction under the tort prong of the long-arm statute because the materials and a representative were sent to the forum state. *Jones v. Tread Rubber Corp.*, 199 F. Supp. 2d 539 (S.D. Miss. 2002).

In an action arising from a contract under which the plaintiff was to sell 80 percent of its oil and gas working interest in an oil and gas field, the plaintiff set out a prima facie case for personal jurisdiction under the contract prong of the statute and, therefore, the district court erred in dismissing the defendant for lack of personal jurisdiction where the plaintiff argued that a codefendant entered into a contract with the plaintiff on behalf of itself and the defendant, which financed and purchased 75 percent of the 80 percent working interest in the oil and gas field. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863 (5th Cir. 2000).

The defendant was subject to personal jurisdiction within Mississippi in an action for libel and slander where the plaintiff alleged that the defendant published the alleged defamatory information complained of on the Internet and allowed access and publication within Mississippi and among Mississippi residents. *Lofton v. Turbine Design, Inc.*, 100 F. Supp. 2d 404 (N.D. Miss. 2000).

The defendants were subject to personal jurisdiction in an action for breach of a contract regarding a distribution agreement where part of the contract required the plaintiff to perform acts in Mississippi and where the plaintiff also alleged, with evidentiary support, that the defendants committed various torts at least in part in Mississippi which resulted in injury to the plaintiff and that the defendants were engaged in doing business in Mississippi. *Genesis Press, Inc. v. Carol Publ. Group, Inc.*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 4595 (N.D. Miss. Mar. 30, 2000).

The parties did not enter into a contract to be performed in whole or in part by any party in Mississippi where the defendant agreed to provide certain land accommodations in Greece and round-trip airfare from New York to Greece, but did not agree to deliver air tickets to the plaintiffs in Mississippi. *Christian Tours, Inc. v. Homeric Tours, Inc.*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 4594 (N.D. Miss.

Mar. 30, 2000), affirmed by 239 F.3d 366, 2000 U.S. App. LEXIS 30099 (5th Cir. Miss. 2000).

A contract between the plaintiff Mississippi corporation and the defendant Tennessee corporation involving the purchase of the defendant's assets required actions in Mississippi, and therefore, the defendant fell under the broad reach of the Mississippi long-arm statute. *Willowbrook Found., Inc. v. Visiting Nurse Ass'n.*, 87 F. Supp. 2d 629 (N.D. Miss. 2000).

Where resident plaintiffs alleged, with evidentiary support, that the defendants committed the torts of defamation and tortious interference with business relations, at least in part, through their activities in Mississippi, such was sufficient to establish a prima facie case of personal jurisdiction under the tort prong of the statute. *Wells v. Taylor*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 17891 (N.D. Miss. Oct. 25, 1999).

The defendant Arkansas corporation was not subject to personal jurisdiction under the Mississippi long-arm statute where the defendant had limited contact with Mississippi, such contacts were sporadic, incidental and indirectly associated with the forum, and the defendant did not and had not conducted business in Mississippi. *Thrash Aviation, Inc. v. Kelner Turbine, Inc.*, 72 F. Supp. 2d 709 (S.D. Miss. 1999).

Under tort prong of Mississippi long-arm statute, personal jurisdiction is proper if any element of tort (or any part of any element) takes place in Mississippi. *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

Under Mississippi law, malicious prosecution requires institution or continuation of original judicial proceedings, either criminal or civil; by, or at instance of defendants; termination of such proceedings in plaintiff's favor; malice in instituting proceedings; want of probable cause in proceedings; and suffering of damages as result of action or prosecution complained of. *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

Suffering of damages within state from alleged malicious prosecution was insufficient, without more, to support personal jurisdiction under tort prong of Mississippi long-arm statute. *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

For purposes of Mississippi long-arm statute, injury suffered in malicious prosecution tort is institution of criminal or civil proceedings where institution ought not to have occurred (and occurred for an improper reason); Mississippi does not permit damages to serve as a proxy for injury in personal jurisdiction calculus. *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

Service of process by certified mail from out of state, apart from actual filing of suit, was not basis for malicious prosecution claim and could not support exercise of personal jurisdiction under tort prong of Mississippi long-arm statute. *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

In a medical malpractice action against a Tennessee hospital and its emergency room personnel arising from the death of a patient who was to be transported from Mississippi to the hospital, neither the contract nor the doing business prong of the long-arm statute (§ 13-3-57) was available to the plaintiff as a means of acquiring jurisdiction over the hospital where the plaintiff was a nonresident of Mississippi. *Cowart v. Shelby County Health Care Corp.*, 911 F. Supp. 248 (S.D. Miss. 1996).

In a medical malpractice action against a Tennessee hospital and its emergency room personnel arising from the death of a patient who was allegedly treated with inappropriate medication while being transported from a Mississippi hospital to the hospital in Tennessee, the plaintiff made a prima facie showing of jurisdiction over the Tennessee hospital pursuant to § 13-3-57 for the alleged actions of an emergency room physician who agreed to accept the transfer. *Cowart v. Shelby County Health Care Corp.*, 911 F. Supp. 248 (S.D. Miss. 1996).



In an action by a Mississippi plaintiff alleging various torts arising from a Missouri defendant's repair and replacement of the plaintiff's diesel engines, the defendant was not subject to personal jurisdiction in Mississippi, although the tort prong of Mississippi's long arm statute (§ 13-3-57) applied because the engines malfunctioned in Mississippi, where, *inter alia*, the defendant was not qualified to do business in Mississippi, had never done business in Mississippi, owned no property in Mississippi, had no place of business in Mississippi, did not advertise or sell products in Mississippi, and was careful to protect its distribution agreement, which forbid it from providing any sales and services outside Kansas and part of Missouri; exercise of jurisdiction under the long-arm statute would not comport with the dictates of Fourteenth Amendment. *Fava Custom Applicators, Inc. v. Cummins Mid-America, Inc.*, 907 F. Supp. 224 (N.D. Miss. 1995).

A foreign defendant was not amenable to suit under the "contract" provision of Mississippi's long-arm statute (§ 13-3-57) where the final version of the contract was signed in Louisiana, the parties never contemplated that the contract would be performed in whole or in part in Mississippi, and the work under the contract was actually performed in Algeria; the fact that the plaintiff flew to the job site in Algeria from Mississippi did not render his travel from Mississippi equivalent to part performance in Mississippi. *Peterson v. Test Int'l, E.C.*, 904 F. Supp. 574 (S.D. Miss. 1995).

In an action for alleged interference with an employment contract, a foreign defendant was not amenable to suit under the "tort" provision of Mississippi's long-arm statute (§ 13-3-57) where the plaintiff was hired to provide services in Algeria, and the alleged injury occurred in Algeria (where the plaintiff was terminated); the fact that the plaintiff, as a Mississippi resident, might have suffered adverse economic consequences in Mississippi from his termination in Algeria did not recategorize the tort as occurring "in whole or in part" in Mississippi. *Peterson v. Test Int'l, E.C.*, 904 F. Supp. 574 (S.D. Miss. 1995).

In a personal injury action by a Mississippi plaintiff arising from an automobile accident that occurred in Tennessee, the nonresident defendant's consummation of an agreement to breed her dog in Mississippi, and her installation of a telephone line at a friend's home in Mississippi when she briefly stayed there, were insufficient to meet the "contract" prong of the Mississippi long arm statute (§ 13-3-57) where the Tennessee automobile accident was unrelated to the contracts performed by the defendant in Mississippi. *McLaurin v. Nazar*, 883 F. Supp. 112 (N.D. Miss. 1995), *aff'd*, 71 F.3d 878 (5th Cir. 1995).

In an action for an alleged breach of an agreement to purchase shares of stock in a coal mining company located in Kentucky, the requirements of the Mississippi long-arm statute (§ 13-3-57) were met as to the Kentucky defendants where all parties had duties of performance in Mississippi under the sale and escrow agreements, and negotiations conducted by one defendant by telephone or facsimile to Mississippi were made on behalf of both defendants. *First Miss. Corp. v. Thunderbird Energy, Inc.*, 876 F. Supp. 840 (S.D. Miss. 1995).

In an action by a Mississippi insurer against an Alabama resident and his Alabama attorney for breach of a settlement agreement arising out of a medical malpractice action, the defendants were subject to jurisdiction under Mississippi's long-arm statute (§ 13-3-57), although the defendants received and cashed the settlement check in Alabama, and executed (and altered) the release document in Alabama, where the parties negotiated and ultimately entered the settlement agreement with the Mississippi insurance company in Mississippi, the settlement check was sent from Mississippi and ultimately paid by a Mississippi bank, and the release was sent to the defendants from Mississippi and was to be returned to Mississippi. *Medical Assurance Co. v. Jackson*, 864 F. Supp. 576 (S.D. Miss. 1994).

A nonresident defendant must do more than merely place its product in the "stream of commerce" before its actions will be deemed "purposefully directed" at Mississippi for purposes of due process



analysis. *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So. 2d 668 (Miss. 1994).

A nonresident manufacturer's placement of its product into the stream of commerce did not constitute an act "purposefully directed" toward Mississippi where there was no evidence of any activity by the manufacturer indicative of an intent to serve the Mississippi market; thus, the limitations of the due process clause prevented utilization of § 13-3-57 to gain personal jurisdiction over the manufacturer. *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So. 2d 668 (Miss. 1994).

In an action against a nonresident church and archdiocese, alleging that a priest engaged in homosexual activity with the plaintiff at homes in Mississippi and that church officials knew that the plaintiff was staying overnight with the priest, and should have known that homosexual activity would occur, personal jurisdiction did not exist over the church and archdiocese under the Mississippi long-arm statute (§ 13-3-57), since the plaintiff failed to prove a prima facie case on which jurisdiction was based predicated on theories of respondeat superior, negligent hiring, or negligent supervision. *Tichenor v. Roman Catholic Church of Archdiocese*, 869 F. Supp. 429 (E.D. La. 1993), *aff'd*, 32 F.3d 953 (5th Cir. La. 1994).

Long-arm statute could not be used as basis for obtaining personal jurisdiction in product liability action brought against non-resident defendants who were doing business in Mississippi and who were licensed as automobile manufacturers or dealers under Mississippi Motor Vehicle Commission Law, where defendants were not registered to do business in Mississippi, automobile accident which gave rise to action occurred in another state, and action was brought by non-resident plaintiffs. *Herrley v. Volkswagen of Am., Inc.*, 957 F.2d 216 (5th Cir. 1992).

A Louisiana railroad corporation which was not qualified to do business in Mississippi was not amenable to suit in Mississippi under § 13-3-57 where neither the plaintiff nor the accident giving rise to the action had any connection with Mississippi or with any business conducted by the railroad corporation in Mississippi.

*Southern Pac. Transp. Co. v. Fox*, 609 So. 2d 357 (Miss. 1992).

Personal jurisdiction could be exercised over a nonresident putative father in a paternity and support action where the nonresident had been present in the state as a student at a state university, he had sexual relations with the mother in the state, and he had subsequently failed to support the child who resided in the state. *Jones v. Chandler*, 592 So. 2d 966 (Miss. 1991).

"Doing business" prong of long-arm statute may not be utilized by nonresident plaintiff. *Madison v. Revlon, Inc.*, 789 F. Supp. 758 (S.D. Miss. 1991).

In action, brought by truck driver who was injured when rubber strap broke as driver was attempting to attach it to tarp, against Ohio manufacturer of strap which sold strap to Alabama company which in turn sold it to plaintiff's employee, evidence failed to establish that part of tort occurred in Mississippi for purposes of determining whether personal jurisdiction could be asserted there over Ohio manufacturer; although plaintiff made products liability allegation that he received box containing allegedly defective straps from his employer in Mississippi, plaintiff did not attempt to use strap until he reached Oklahoma, injury occurred in Oklahoma, none of manufacturer's actions were directed towards Mississippi, and none of alleged acts took place in Mississippi. *Yates v. Turzin*, 786 F. Supp. 594 (S.D. Miss. 1991).

In action, brought by truck driver injured when rubber strap broke as he attempted to attach it to tarp, against Ohio manufacturer of strap which sold strap to Alabama company which in turn sold it to plaintiff's employer, evidence failed to establish sufficient basis to subject manufacturer to long-arm jurisdiction on theory of strict tort liability, notwithstanding that manufacturer was sufficiently engaged in business of selling rubber strap to be considered "seller," as none of manufacturer's sales activities or solicitations took place in or were directed towards Mississippi. *Yates v. Turzin*, 786 F. Supp. 594 (S.D. Miss. 1991).

Non-resident plaintiff may not use "doing business" prong of long-arm statute to

obtain in personam jurisdiction over non-resident defendant. *Prince v. F. Hoffmann-La Roche & Co.*, 780 F. Supp. 417 (S.D. Miss. 1991).

Assuming it was otherwise available to plaintiff, Mississippi statute providing that non-resident corporations found doing business in Mississippi would be subject to suit in state to same extent as domestic corporations, regardless of whether cause of action accrued within or outside of state, did not provide statutory basis for assertion of personal jurisdiction over nonresident corporation in personal injury action by nonresident plaintiff, where Mississippi long-arm statute would not allow that result. *Prince v. F. Hoffmann-La Roche & Co.*, 780 F. Supp. 417 (S.D. Miss. 1991).

Nonresident defendant is amenable to personal jurisdiction in federal diversity case to extent permitted by state court in state in which federal court sits. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

Under particular facts, it would not be unfair or offend due process for Mississippi court to exercise jurisdiction in suit by Mississippi corporation against Illinois corporation which had agreed to move Mississippi corporation's barges which had become stranded in river; defendant's activities in Mississippi were such that it could reasonably foresee being hailed into court in Mississippi. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

In determining whether exercise of long arm jurisdiction under state statute comports with due process requirements, court must determine whether defendant has established sufficient contacts with forum state indicating purposeful availment of privilege of conducting activities within forum and thereby invoking benefits and protection of its laws, with focus of inquiry at this stage being upon nature of underlying litigation. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

Extent of jurisdiction of federal court over nonresident defendant depends on whether defendant is amenable to service of process under forum state's long arm statute and whether such exercise of ju-

risdiction would comport with dictates of due process. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

In deciding whether federal court sitting in diversity has jurisdiction over non-resident defendant, reach of long arm statute should be determined before considering whether exercise of jurisdiction would comport with due process, for if service was defective under state statute, constitutional issue should not even be considered. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

State's long-arm statute relating to tort actions did not authorize jurisdiction over foreign corporation which had entered into charter agreement with Mississippi corporation seeking damages for loss of use of barges which allegedly went aground as result of Illinois corporation's negligence in maintaining and operating tug. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

Mississippi's long arm statute's contract provision served to confer personal jurisdiction over Illinois corporation which had entered into charter agreement with Mississippi corporation seeking damages for loss of use of barges which allegedly ran aground as result of Illinois corporation's negligent maintenance and operation of tug. *Falco Lime, Inc. v. Tide Towing Co.*, 779 F. Supp. 58 (N.D. Miss. 1991).

In order for "tort" prong of long-arm statute to apply, at least some part of tort must have been committed within Mississippi. *Murray v. Remington Arms Co.*, 795 F. Supp. 805 (S.D. Miss. 1991).

In products liability action brought against defendant manufacturer of rifle, tort provision of long-arm statute would not form basis for jurisdiction over nonresident manufacturer where allegations are that injuries to various plaintiffs occurred in Texas, Washington, and Canada. *Murray v. Remington Arms Co.*, 795 F. Supp. 805 (S.D. Miss. 1991).

Nonresident plaintiffs may not utilize "doing business" provision of long-arm statute to obtain jurisdiction over nonresident defendant. *Murray v. Remington Arms Co.*, 795 F. Supp. 805 (S.D. Miss. 1991).

In products liability action, nonresident plaintiffs could not use "doing business"



provision of long-arm statute to obtain personal jurisdiction over nonresident defendant manufacturer, even if court considered as true, for purposes of litigation, assertion that defendant manufacturer was alter ego of co-defendant, its parent corporation, which had registered agent in state and had not challenged personal jurisdiction; there was no Mississippi law to support intended use of alter ego theory to impute residency of parent corporation to subsidiary. *Murray v. Remington Arms Co.*, 795 F. Supp. 805 (S.D. Miss. 1991).

Nonresidents may not utilize "doing business" provision of long-arm statute to invoke jurisdiction in Mississippi over foreign corporation. *Ferry v. Langston Corp.*, 792 F. Supp. 512 (S.D. Miss. 1990).

For defendant to be amenable to process under "doing business" provision of long-arm statute, there must be nexus between defendant's activities in Mississippi and plaintiff's cause of action; however, there is no requirement that there be direct relation or nexus between the two, claim must merely be "incident to" such business. *Ferry v. Langston Corp.*, 792 F. Supp. 512 (S.D. Miss. 1990).

There was no sufficient connection, to form basis for long-arm jurisdiction, between defendant manufacturer's business activity in Mississippi and injury sustained by plaintiffs' deceased by machine manufactured by defendant, where defendant was New Jersey corporation which sold machine to deceased's employer in Louisiana, deceased had lived and worked in Louisiana, and plaintiffs resided in Louisiana; all that appeared from submissions to court was that defendant sold equipment in interstate commerce and had sold equipment which was distributed to Mississippi purchasers. *Ferry v. Langston Corp.*, 792 F. Supp. 512 (S.D. Miss. 1990).

Nonresident of state of Mississippi may not utilize "doing business" provision of long-arm statute as basis for jurisdiction over foreign corporation in Mississippi. *Bailiff v. Manville Forest Prods. Corp.*, 792 F. Supp. 509 (S.D. Miss. 1990).

Personal jurisdiction would not lie, over nonresident manufacturer, under long-arm statute or under due process clause, where manufacturer was organized or ex-

isted under laws of Federal Republic of Germany, was not qualified to do business in Mississippi, had no real estate, personal property, bank accounts, or other property in state, had never entered into contract to be performed within state, and had never performed any act which had or could have had effect within state. *Bailiff v. Manville Forest Prods. Corp.*, 792 F. Supp. 509 (S.D. Miss. 1990).

Mississippi long-arm statute allows for assertion of jurisdiction over person of nonresident defendant who makes contract with resident of Mississippi to be performed in whole or in part, by either party, within Mississippi; or who commits tort in whole or in part in Mississippi; or who does any business or performs any character of work or service in state. *Bailiff v. Manville Forest Prods. Corp.*, 792 F. Supp. 509 (S.D. Miss. 1990).

In action brought by California residents against asbestos products manufacturers alleging damages as result of presence of asbestos-containing materials in buildings located outside Mississippi, claims for fraud and conspiracy accrued at time of sale of products, which was before 1980 when § 13-3-57 was amended, thus District Court in Mississippi lacked jurisdiction under tort prong of statute. *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120 (S.D. Miss. 1990).

Sale of asbestos-containing products in Mississippi and alleged misrepresentation by defendant manufacturers as to consequences of exposure of such products did not subject defendants to service of process under tort provisions of § 13-3-57; otherwise all manufacturers who commit mass torts would be subject to service of process under tort provisions of statute, which would swallow all restrictions placed on long-arm statute. *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120 (S.D. Miss. 1990).

In order for jurisdiction to have been proper as to defendants who owned a weekend home in Mississippi but whose "usual place of abode" was in Louisiana, service of process should have been made pursuant to Mississippi's long-arm statute, since the defendants owned real property in Mississippi, and thus had taken advantage of the laws of Mississippi and



the protections afforded under such laws. *Alpaugh v. Moore*, 568 So. 2d 291 (Miss. 1990).

A court had personal jurisdiction over a former Mississippi resident in an action brought by his former wife who alleged that she incurred \$5,000 in debts by reason of his desertion, where the allegations included a debt incurred in Mississippi by reason of the former husband's conduct in Mississippi. *Petters v. Petters*, 560 So. 2d 722 (Miss. 1990).

By virtue of the supremacy clause, the Federal Uniformed Services Former Spouses' Protection Act overrides Mississippi's long-arm statutes to the extent that Mississippi law would exceed the limitations of the federal enactment. Thus, a former husband's absence from Mississippi for 15 continuous years precluded personal jurisdiction by reason of residence or domicile since the language of the federal Act makes it clear that only current domicile or residence may suffice to confer authority upon a court to adjudicate rights in a former service person's military retirement pension. *Petters v. Petters*, 560 So. 2d 722 (Miss. 1990).

Mississippi long-arm statute could not bring owners of trucking company located and primarily doing business in Nevada and Colorado into court in Mississippi where only contacts between defendants and Mississippi were permit to carry property through the state and purchase of operating authorities permitting shipment into Mississippi. *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612 (5th Cir. 1989).

The "doing-business" provision of Mississippi's long-arm statute may not be used by nonresident plaintiffs to bring nonresident defendants into court in the state; even residents must establish a nexus between plaintiff's cause of action and defendant's in-state business contacts to use such long-arm provision. *Mills v. Dieco, Inc.*, 722 F. Supp. 296 (N.D. Miss. 1989).

Section 13-3-57 requires no direct nexus to the non-resident's business done in Mississippi, but requires only that the claim be incident thereto. The statute thus requires far less than that the liability generating conduct have occurred in Mississippi. There is no constitutional

imperative that the action arise out of the non-resident defendant's contacts/activities in this state. All that is required is that the non-resident defendant have continuous and systematic general contacts with Mississippi. These contacts must amount to something more than occasional "fortuitous" instances where the defendant had in the past come into some casual, isolated contact with an in-state resident. *McDaniel v. Ritter*, 556 So. 2d 303 (Miss. 1989).

An airline passenger's personal representatives' claim against the estate of an airline pilot arose out of facts sufficiently incident to business done by the pilot in Mississippi that the pilot's estate was amenable to suit in Mississippi under § 13-3-57 where the pilot and the passenger were employees of a Mississippi corporation which had an office in Mississippi, and the airplane crash which gave rise to the passenger's claim occurred during a trip made on behalf of the corporation. *McDaniel v. Ritter*, 556 So. 2d 303 (Miss. 1989).

The use of the word "representative" in § 13-3-57 encompasses executors and administrators of an estate and contemplates that the actions of a decedent during his or her lifetime which would have rendered him or her amenable to suit will similarly subject his or her administrator or executor (i.e. his or her personal "representative") to in personam jurisdiction in Mississippi. *McDaniel v. Ritter*, 556 So. 2d 303 (Miss. 1989).

Writers of book "published" or "communicated" allegedly defamatory writing to publisher, which republished book on widespread basis, and therefore writers are subject to in personam jurisdiction by virtue of fact that they committed tort within state. *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989).

Negotiations conducted telephonically and through use of mails by out of state business do not evidence "purposeful availment" of benefits of forum state so as to permit in personam jurisdiction over business, where no representative of business ever visited state during negotiation process or at anytime, and where contract in question calls for performance and in-

terpretation of contract under Pennsylvania law. *General Equip. Mfrs. v. Coco Bros.*, 702 F. Supp. 608 (S.D. Miss. 1988).

When nonresident defendant moves to dismiss for lack of personal jurisdiction, plaintiffs need not make full showing on merits that jurisdiction is proper, but must make *prima facie* showing of facts upon which in personam jurisdiction is predicated; plaintiffs failed to come forward with proof in acceptable form to controvert defendant's un rebutted affidavit, which conclusively established that defendant was not doing business and had never done business in Mississippi. *Strong v. RG Indus., Inc.*, 691 F. Supp. 1017 (S.D. Miss. 1988).

Jurisdiction under Mississippi Long-Arm statute based on contract with non-resident to be performed in whole or in part in Mississippi does not apply where patient alleging medical malpractice for acts that had taken place in Tennessee had not identified any act that she, doctor, or professional corporation had performed, or were to be performed, in Mississippi, pursuant to either explicit or implicit contract. *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), but see, *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995).

Physician and professional corporation were not amenable to jurisdiction under tort prong of long-arm statute because act of alleged negligence was committed and completed in Tennessee. *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), but see, *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995).

Non-resident defendant who initiated contractual relationship out of which litigation arose with resident plaintiff, was subject to exercise of personal jurisdiction of court pursuant to Miss Code § 13-3-57 where language of contract itself and defendant's subsequent correspondence with plaintiff clearly reflected defendant's intent and understanding that critical and meaningful work in furtherance of contract was to be performed, and in fact was performed, in Mississippi. *Owen v. Woods*, 661 F. Supp. 15 (S.D. Miss. 1986).

Individual defendants' motions for dismissal are properly denied, where motions are apparently based on plaintiff's failure

to specifically designate in both his original and his first amended complaints the provision of § 13-3-57 upon which jurisdiction is based, where plaintiff's second amended complaint, filed subsequent to defendants' motions, premises long-arm jurisdiction on tort prong of statute, and where plaintiff has sufficiently alleged tortious acts committed in whole or in part in Mississippi to support long-arm jurisdiction against individual defendants in their individual capacities. *White v. Franklin*, 637 F. Supp. 601 (N.D. Miss. 1986).

Tests for determining whether foreign corporation is "doing business" includes purposeful commission of act which consummates in transaction in Mississippi with cause of action arising from or being connected with such acts or transactions and consistency of assumption of personal jurisdiction with traditional notions of fair play and substantial justice; foreign corporation's mailing of royalty checks to Mississippi residents for oil and gas production of out of state properties is not sufficient for jurisdictional purposes; execution of employment contracts and power of attorney in foreign state concerning administration of estate located in foreign state does not support Mississippi jurisdiction over claim by Mississippi law firm concerning work performed in Alabama for Alabama residents. *Martin & Martin v. Jones*, 616 F. Supp. 339 (S.D. Miss. 1985).

Sections 13-3-57 and 79-1-27[Repealed] must be harmonized to support state's valid policy of opening doors of Mississippi courts to foreign corporations found doing business in state to sue and be sued from all bona fide causes of action; merely doing business in Mississippi is not sufficient to support exercise of personal jurisdiction, and business in Mississippi of non-resident defendant must be of systematic and ongoing nature, cause of action must be incident to business activity, and assertion of jurisdiction must not offend notions of fairness and substantial justice; busline which does not maintain ticket agents, representatives, employees, offices, or property in Mississippi and which does not advertise or solicit business or negotiate or execute contracts in Mississippi but whose charter service has merely passed



through state is not subject to jurisdiction for cause of action which does not arise out of activities of busline in state. *Allen v. Jefferson Lines*, 610 F. Supp. 236 (S.D. Miss. 1985).

Despite fact that none of the plaintiffs in wrongful death action is resident of Mississippi, long-arm statute is available to plaintiffs where decedents, in whose shoes plaintiffs stand, were residents of Mississippi. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

If plaintiffs in wrongful death action amend pleadings to specifically allege that automobile accident giving rise to suit was caused by defect in master cylinder, plaintiffs will have satisfied minimum contacts test for determining whether personal jurisdiction over defendant satisfies federal due process requirements, where, although vehicle in question was sold and delivered by defendant dealer, who is Alabama Corporation, to decedents in Alabama, dealer aided Mississippi dealership in latter's attempt to repair brakes by selling and shipping master cylinder to Mississippi dealership. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

Provision of § 13-3-57 giving Mississippi courts jurisdiction over nonresident who commits tort in whole or in part in Mississippi potentially confers jurisdiction over Alabama car dealership in action arising from Mississippi automobile accident notwithstanding that dealer sold car involved in accident to decedent in Alabama, since tort is not complete until injury occurs and thus at least part of tort allegedly committed by dealer was committed in Mississippi. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

Subjecting Alabama car dealership to jurisdiction of Mississippi court in wrongful death action arising from automobile accident occurring in Mississippi but allegedly resulting from dealer's sale and shipment to Mississippi dealership of master cylinder for use in attempting to repair vehicle's brakes would not offend traditional notions of fair play and substantial justice so as to violate federal due process requirements, where (1) most of witnesses reside in Mississippi, (2) two or

three defendants reside in Mississippi, (3) only Mississippi court can resolve matter in single action, and (4) Alabama dealer is not inconvenienced unreasonably since distance between Alabama and Mississippi is not great; moreover, Mississippi has exceptionally strong interest in providing forum for redress of injuries to its residents occurring within its borders and caused by allegedly defective product shipped from outside state. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

Tripartite test, under which applicability of long-arm statute is determined on basis of whether nonresident defendant has purposefully done act or consummated transaction in forum state, whether cause of action has arisen from or is connected with such act of transaction, and whether assumption of jurisdiction by forum state offends traditional notions of fair play and substantial justice, applies only to "doing business" category of statute. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

1980 amendment to § 13-3-57 allowing nonresident plaintiff to obtain service of process upon nonresident defendant who has committed tort in whole or in part in Mississippi against nonresident plaintiff applies so as to permit nonresident plaintiff injured in automobile accident to obtain service upon Alabama car dealership to extent that dealership is subject to in personam jurisdiction of Mississippi Court where accident occurred after effective date of amendment. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985).

Where a New York resident brought an action against a nonresident for alienation of affection and criminal conversation with his wife, and where the complaint contained sufficient allegations that the defendant committed a tort at least in part within Mississippi, the trial court had in personam jurisdiction over defendant by virtue of § 13-3-57. *Camp v. Roberts*, 462 So. 2d 726 (Miss. 1985).

Mississippi Code § 79-1-27[Repealed], providing that any corporation doing business in Mississippi is subject to suit there, must be construed and harmonized with § 13-3-57 "doing business" clause, which



cannot be used by non-resident plaintiff; to extend jurisdiction over nonresident corporation in suit by non-resident plaintiff on authority of § 79-1-27[Repealed] would be contrary to intention of Mississippi legislature. *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277 (5th Cir. 1984).

Plaintiff in products liability action against Pennsylvania corporation cannot avoid requirements of Mississippi long-arm statute on ground that "equality of treatment" requires that Pennsylvania corporation, which would not be precluded from bringing suit in Mississippi, should also be subject to suit in Mississippi as defendant. *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277 (5th Cir. 1984).

"Doing-business" provision of § 13-3-57 is not available to non-resident plaintiffs. *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277 (5th Cir. 1984).

Nonresident plaintiff who serves process on registered agent of nonresident defendant, qualified to do business in Mississippi, acquires in personam jurisdiction over defendant, even though cause of action arose outside of Mississippi. *Herrley v. Volkswagen of Am., Inc.*, 598 F. Supp. 690 (S.D. Miss. 1984), *aff'd*, 957 F.2d 216 (5th Cir. 1992).

Mississippi long-arm statute applies in product liability action against foreign corporation where Mississippi resident employed as truckdriver died in Mississippi as result of accident caused by defective design and manufacture of hauler-container being transported by deceased at time of accident. *Cannon v. Tokyu Car Corp.*, 580 F. Supp. 1451 (S.D. Miss. 1984).

In a diversity action one long-distance telephone call that was alleged to constitute a tort committed "in whole or in part" in Mississippi was a proper basis on which to predicate federal diversity jurisdiction under Code § 13-3-57, since the statute includes in its reach defendants who commit a single tort, an alleged tortfeasor need not have been present in the state, and if the alleged tortfeasor causes injury in Mississippi he is covered by the statute. *Brown v. Flowers Indus., Inc.*, 688 F.2d 328 (5th Cir. 1982), *reh'g denied*, 691 F.2d 502 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023, 103 S. Ct. 1275, 75 L. Ed. 2d 496 (1983).

Service of process in an action for personal injuries sustained in an automobile accident was improperly made pursuant to § 13-3-57, where although the plaintiff was a Mississippi resident when the accident occurred, she was not a resident when suit was filed and, at that time, the Mississippi statute could be used against nonresident defendants only by a plaintiff who was a resident when the suit was filed. *Golden v. Cox Furn. Mfg. Co.*, 683 F.2d 115 (5th Cir. 1982), *reh'g denied*, 685 F.2d 1385 (5th Cir. 1982).

The 1980 amendment to § 13-3-57 merely creates a right in nonresidents to make use of the statute where the tort is committed in whole or in part in the state; otherwise the statute remains the same and the amendment strengthens the view that a nonresident may not use the statute as a vehicle to bring suit in the courts of the state against nonresidents or foreign corporations not qualified under the constitution or state law to do business in the state when incidents giving rise to the cause of action occur outside of Mississippi. *Thompson v. F.W. Woolworth Co.*, 508 F. Supp. 522 (N.D. Miss. 1981).

In an action arising out of the sale of a grinding machine, service of summons on the nonresident defendants pursuant to the state long-arm statute was improper, notwithstanding plaintiff buyers' allegations that defendants, the company's owner and sales director, had committed a tort in part in Mississippi against a resident and that the owner had also made a contract to be performed by a party in Mississippi, where the sales had been made through a Tennessee corporation doing business in Tennessee, where the contacts leading up to the sales at issue had been made in Tennessee, and where the transactions had been closed in that state and the machines delivered to plaintiffs at their place of business in Tennessee; thus, the court did not possess in personam jurisdiction over defendants. *Blanton v. American Tool & Grinding Co.*, 472 F. Supp. 257 (N.D. Miss. 1979).

In an action against a nonresident corporate landowner for personal injuries sustained by plaintiff's minor child in the waters surrounding defendant's land, the trial court committed reversible error in

sustaining a motion to dismiss for lack of in personam jurisdiction where allegations of negligence and of knowledge of a dangerous condition in such waters were sufficient for the trial court to acquire jurisdiction under the long-arm statute. *Mandel v. James Graham Brown Found., Inc.*, 375 So. 2d 1017 (Miss. 1979).

If a plaintiff can obtain process on a non-resident defendant, in a suit filed under the long arm statute, he will not be excused for his failure to sue and will not be entitled to claim that the statute of limitations is tolled during the absence of the defendant from the state; if a plaintiff makes such a claim, the burden is on him to show the duration of the defendant's absence from the state and to show that defendant cannot be served with process under any of the ways provided by the long arm statute. *Gulf Nat'l Bank v. King*, 362 So. 2d 1253 (Miss. 1978).

The application of the long-arm statute did not deny defendants due process of law where, inter alia, the execution of the contract at issue occurred largely in Mississippi, following telephone negotiations initiated in the state, and where defendant partially performed its part of the contract in Mississippi. *Sheridan, Inc. v. C.K. Marshall & Co.*, 360 So. 2d 1223 (Miss. 1978).

In an action to collect an amount allegedly due on a sale of products manufactured in Mississippi and sold to a Maine buyer on open account, the court lacked in personam jurisdiction over defendant buyer where the sale of the system at issue, for use on an egg farm, had been negotiated by telephone and correspondence, where defendant had not been present in Mississippi at any time and where he had no other business connections in the state; the only fact that could arguably justify in personam jurisdiction was that the system had been fabricated in Mississippi according to plans and specifications especially prepared in the state by plaintiff, but this activity was performed by plaintiff in order to place itself in a position to make the sale to its Maine customer. *Reed-Joseph Co. v. DeCoster*, 461 F. Supp. 748 (N.D. Miss. 1978).

In an action arising when a Tennessee auctioneer sold certain livestock over

which the Mississippi plaintiff had a security interest, defendant's motion to dismiss for lack of in personam jurisdiction would be granted, in accordance with the state long arm statute, where the contract between defendant and the plaintiff's debtor was wholly performed in Tennessee and where, if treated as a tort action, the action in its entirety occurred in Tennessee; although defendant's contacts with the state would satisfy the mandate of due process, the presence of one representative within the state and the act of advertising within the state would not constitute doing business within the meaning of the statute where there was no causal relationship between the cause of action alleged and the activities of the defendant within the forum state. *Indianola Prod. Credit Ass'n v. Burnette-Carter Co.*, 450 F. Supp. 303 (N.D. Miss. 1977).

Defendants' motion to dismiss for lack of personal jurisdiction would be granted where, according to their uncontradicted affidavits, neither defendant was qualified to do business, was doing business, or had ever done business in the state, where neither had committed a tort in the state, and where neither had entered into a contract with a resident of the state to be performed in whole or in part in the state. *Haire v. Miller*, 447 F. Supp. 57 (N.D. Miss. 1977).

In an action for breach of contract brought by a New York corporation qualified to do and doing business in Mississippi against a Belgian corporation not otherwise connected with the state, in personam jurisdiction would be exercised pursuant to the long-arm statute and in accordance with the requirements of due process where the contract was partly performed in the state. *Chromcraft Corp. v. Mirox, S.A.*, 446 F. Supp. 342 (N.D. Miss. 1977).

A Louisiana shipping corporation was subject to personal jurisdiction in Mississippi in an action for breach of contract where, inter alia, the shipper either loaded or unloaded petroleum products at a port in Mississippi on 8 different occasions and where it submitted reports concerning the movement of petroleum products to proper state officials. *Smego Marine Transp., Inc. v. International*



Trading & Transp., Ltd., 446 F. Supp. 21 (N.D. Miss. 1977).

In personam jurisdiction over a third-party nonresident defendant was not available under the long-arm statute in an action concerning certain defective goods which it shipped to a Mississippi retailer and which were, in turn, delivered to a Mississippi buyer where the nonresident's only contact with the state consisted of the isolated acts of receiving a telephone call and supplying goods from a point outside Mississippi; the exercise of personal jurisdiction under such circumstances would also be a violation of due process. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

Service of process under this section was available to a non-resident plaintiff in an action against a non-resident corporate defendant arising from an injury arising in Mississippi. *Daniels v. McDonough Power Equip., Inc.*, 430 F. Supp. 1203 (S.D. Miss. 1977).

In an action against a foreign corporation alleging that the corporation interfered in a business relationship between its Mississippi subsidiary and a Mississippi resident, a foreign merger agreement involving the subsidiary was not a contract with a Mississippi resident within the meaning of this section; The corporation's exercise of its legitimate business interest in selling its subsidiary did not constitute a tort against a Mississippi resident within the meaning of this section; The corporation was not doing business in Mississippi within the meaning of this section, even though its Mississippi subsidiary was wholly owned, the subsidiary's financing had to be obtained through the corporation, the subsidiary's long range plans were submitted to the corporation for approval, the boards of directors of the two corporations were nearly identical and board meetings of the subsidiary were held at the corporate offices of the corporation, where the formal legal requirements dividing the two corporations were scrupulously observed, where the subsidiary was recognized as a corporate entity legally distinct from its parent, where the subsidiary was adequately financed, where the subsidiary paid all of the salaries of its employees

and its own expenses, including payment for services rendered by its parent, where there was no commingling of funds, and where the subsidiary maintained its own books, records, and a balance sheet. *Johnson v. Warnaco, Inc.*, 426 F. Supp. 44 (S.D. Miss. 1976).

Nonresident limited partners of a nonresident limited partnership doing business in the state could not be made subject to jurisdiction of the state's courts in an action against the partnership where they had done none of the acts specified by the long arm statute (§ 13-3-57) as prerequisites to jurisdiction, and had paid their indebtedness to the partnership in full, thus, under the statute governing circumstances in which limited partners are proper parties to a suit against the partnership (§§ 79-13-3, 79-13-51), not being subject to being made parties. *Ga-Pak Lumber Co. v. Nalley*, 337 So. 2d 1270 (Miss. 1976).

Where the notice of service of a nonresident corporation was delivered to the president of the corporation in accord with statutory requirements, and an interlocutory default judgment was entered upon failure of the defendant to answer, the default judgment could not be set aside on the grounds that the president of the corporation mislaid the notice due to anxiety over his wife's recent death. *Western Chain Co. v. Brownlee*, 317 So. 2d 418 (Miss. 1975).

Where the consideration for a contract was the agreement between the plaintiff and the nonresident defendant to cause a merger of Mississippi and Arkansas corporations, which would require a partial performance of the contract by both plaintiff and defendant in Mississippi, the defendant was within the reach of this statute. *Pierce v. Alleluia Cushion Co.*, 397 F. Supp. 338 (N.D. Miss. 1975).

The Mississippi long-arm statute could be utilized in an action for the wrongful death, pursuant to Code 1972, § 11-7-13, of a nonresident decedent, where the plaintiff was a Mississippi resident suing as administrator of the decedent's estate pursuant to letters of administration granted by a Mississippi chancery court. *McAlpin v. James McKoane Enters., Inc.*, 395 F. Supp. 937 (N.D. Miss. 1975).



This statute (formerly § 1437, Mississippi Code (1942)) does not require the attachment of the complaint to the summons. *Western Chain Co. v. American Mut. Liab. Ins. Co.*, 527 F.2d 986 (7th Cir. Ill. 1975).

Where the Associated Press sent a dispatch from Louisiana to its Mississippi members incorrectly indicating that plaintiff, a Mississippi resident, had been convicted of marijuana possession, the district court had jurisdiction of plaintiff's libel action under the terms of the amended Mississippi long-arm statute; the AP's contacts with Mississippi were sufficient to justify, under the due process clause, Mississippi's exercise of its jurisdiction. *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975).

A nonresident executor administering an estate in and under the supervision of the Tennessee courts, whose only contact with Mississippi touching upon the court administration of the estate had been the probation of the foreign will and the recording of a certified copy of the record of his appointment and qualification in Tennessee, had such minimal and tenuous contact with Mississippi as to be outside the coverage of this section [Code 1972, § 13-3-57]. *Riley v. Communications Consultants, Inc.*, 385 F. Supp. 296 (N.D. Miss. 1974).

The long-arm statute was clearly enacted for the benefit of residents only, and it has not been expanded through the process of judicial interpretation to include nonresident plaintiffs not qualified to do business within the state; there is no defect under federal constitutional standards for limiting the long-arm statute to resident plaintiffs, since the state is not obligated to make its courts available to nonresidents, who themselves are not doing business in the state, to sue other nonresidents. *American Int'l Pictures, Inc. v. Morgan*, 371 F. Supp. 528 (N.D. Miss. 1974).

Process served pursuant to § 13-3-57 is not valid or effective to subject the nonresident defendant to in personam jurisdiction unless the cause of action arises from, or is connected with, the consummation of some transaction or performance of some act within the state by such nonresident

defendant. *Holvitz v. Norfleet-Ashley, Inc.*, 369 F. Supp. 394 (N.D. Miss. 1973).

Code 1942, § 1437 could not be used to sustain in personam jurisdiction over individual defendants on grounds that the activities of the individual defendants in connection with the contract performed, or to be performed in Mississippi by the defendant corporation, created a situation under which this section would reach the individual defendants' in personam jurisdiction, since jurisdiction over individual officers and employees of a corporation cannot be predicated merely upon the jurisdiction over the corporation itself. *Webb v. Culberson, Heller & Norton, Inc.*, 357 F. Supp. 923 (N.D. Miss. 1973).

A "single contract" is sufficient to confer jurisdiction of a nonresident under Code 1942, § 1437. *Kaydee Metal Prods. Corp. v. Sintex Mach. Tool Mfg. Corp.*, 342 F. Supp. 902 (N.D. Miss. 1972).

An administratrix, residing outside and being a nonresident of the state of Mississippi has, by her actions in administering an estate in Mississippi, subjected herself to process under Code 1942, § 1437, on a cause of action arising out of an automobile accident which occurred in Alabama. *Galloway v. Korcekwa*, 339 F. Supp. 801 (N.D. Miss. 1972).

The statutory purpose is to afford to Mississippi residents a right of action locally against the nonresident who commits a tort, in whole or in part, in this state against a resident of this state, and to limit the reach of this section [Code 1942, § 1437] and products liability cases "to injuries in this state" unduly restricts the clear meaning of the statute. *Breedlove v. Beech Aircraft Corp.*, 334 F. Supp. 1361 (N.D. Miss. 1971).

There is no statutory requirement that the part of the tort which causes the injury be committed in Mississippi; the words require only that a part of the tort be committed in this state. *Breedlove v. Beech Aircraft Corp.*, 334 F. Supp. 1361 (N.D. Miss. 1971).

Through the enactment of Code 1942, § 1438, actions brought pursuant to this section [Code 1942, § 1437] shall be issued and served in the same manner and with the same effect as process issued and served pursuant to Code 1942, § 9352-61.

McKnight v. Dyer, 331 F. Supp. 343 (N.D. Miss. 1971).

Under Code 1942, § 1438, providing that service of process made upon the secretary of state shall be made in the same manner and by the same procedure and with the same force and effect as is provided by the nonresident motorist statute as amended and supplemented, service can be made pursuant to a subsequently inserted provision of the nonresident motorist statute, Code 1942, § 9352-61, so as to permit service upon any person who is a nonresident at the time the action is filed, even though at the time of the incident giving rise to the action, such person was a resident of Mississippi. McKnight v. Dyer, 331 F. Supp. 343 (N.D. Miss. 1971).

In a malpractice action against a nonresident doctor who resided in Mississippi at the time of the alleged tort, the court held that the addition in this section [Code 1942, § 1438] of the words "as amended and supplemented" indicate that the legislature intended to give those suing nonresidents under Code 1942, § 1437 the same rights to service and effect of process as are given to those suing nonresident motorists under Code 1942, § 9352-61. McKnight v. Dyer, 331 F. Supp. 343 (N.D. Miss. 1971).

It is well settled that the Mississippi "long arm" statute applies to individual as well as to corporate defendants. Alford v. Whitsel, 322 F. Supp. 358 (N.D. Miss. 1971).

For amenability of a nonresident individual defendant to process served pursuant to the Mississippi "long arm" statute, the nonresident must purposefully do some act or consummate some transaction in Mississippi, the cause of action must arise from or be connected with such act or transaction, and the assumption of jurisdiction by the state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in Mississippi, the relative convenience of the parties, the benefits and protection of the laws of the state afforded the respective parties, and the basic equities of the situation. Alford v. Whitsel, 322 F. Supp. 358 (N.D. Miss. 1971).

The personal appearance of the defendant before a Mississippi grand jury, and his alleged malicious and willful withholding of facts which would have exonerated the plaintiff, a Mississippi resident, from criminal charges relating to a check given the defendant by the plaintiff, constituted the commission of a tort within Mississippi against a resident of the state, within the meaning of the Mississippi "long arm" statute. Alford v. Whitsel, 322 F. Supp. 358 (N.D. Miss. 1971).

In applying the so-called long-arm statute the courts should be sensitive to any conflict between the letter of the law and traditional notions of fair play and substantial justice, and if the latter is offended, the former may have to yield. Beacham v. Beacham, 243 So. 2d 62 (Miss. 1971).

Where a nonresident corporation signed a sales representative agreement with a resident of Mississippi, which resident fully performed the contract in the state by making sales of the corporation's products and furnishing other information to the corporation as well as supervising the installation of the product, which installation required representatives of the corporation to make numerous trips to the facility site to assist in the installation, the corporation was amenable to the process and jurisdiction of the courts of Mississippi in a suit by the Mississippi resident to recover commissions allegedly due under the agreement. Beacham v. Beacham, 243 So. 2d 62 (Miss. 1971).

In a suit to recover commissions allegedly due under a sales representative agreement between the plaintiff and the defendant, a nonresident corporate manufacturer, where the defendant made a special appearance and moved for dismissal of the suit on the ground that it was not subject to process of the court, which motion was overruled, the corporate defendant's action in answering the bill of complaint and in participating in defending the suit did not estop it from making a further attack on the court's jurisdiction on appeal. Beacham v. Beacham, 243 So. 2d 62 (Miss. 1971).

The Mississippi statutes providing for the method of service on a resident or a qualified foreign corporation, the "doing



business" statute, and the statute providing for substituted service on any corporation doing business in the state, must be read together, and such reading leads to the inescapable conclusion that effective process under these statutes presupposes a factual determination that the foreign corporation is doing business in the state of Mississippi. *Hyde Constr. Co. v. Koehring Co.*, 321 F. Supp. 1193 (S.D. Miss. 1969).

A foreign corporation qualified to do business in Mississippi is a resident within the meaning of subd (a) of this section [Code 1942, § 1437] so that it may bring a suit under the terms of the section. *C.H. Leavell & Co. v. Doster*, 211 So. 2d 813 (Miss. 1968).

Nonresident plaintiff corporations qualified to do business in Mississippi are residents of the state within the meaning of the first category mentioned in subd (a) of this section [Code 1942, § 1437]. *C.H. Leavell & Co. v. Doster*, 211 So. 2d 813 (Miss. 1968).

A foreign corporation qualified to do business under the laws of Mississippi should have the same privileges and advantages of invoking the aid of the courts of this state under this section [Code 1942, § 1437] as resident corporations if they are to have equal protection of the laws. *C.H. Leavell & Co. v. Doster*, 211 So. 2d 813 (Miss. 1968).

A foreign corporation qualified to do business in Mississippi may not be sued under the terms of this section [Code 1942, § 1437] because a foreign corporation, to be reached by the section, must not be qualified as doing business in the state. *C.H. Leavell & Co. v. Doster*, 211 So. 2d 813 (Miss. 1968).

It is now settled that there is little reason to distinguish between nonresident individuals and foreign corporations with respect to obtaining jurisdiction over them under this section [Code 1942, § 1437]. *Smith v. Barker*, 306 F. Supp. 1173 (N.D. Miss. 1968).

The "long arm" amendment to this section [Code 1942, § 1437] which became effective July 1, 1964 does not apply retroactively to torts committed prior to its effective date. *Mladinich v. Kohn*, 186 So. 2d 481 (Miss. 1966).

The three basic factors which must coincide if jurisdiction is to be entertained by courts of this state over nonresident individuals and foreign corporations are (1) the nonresident defendant or foreign corporation must purposely do some act or consummate some transaction in the state, (2) the cause of action must arise from, or be connected with, such act or transaction, and (3) the assumption of jurisdiction by the state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of activity in this state, the relative convenience of the parties, the benefits and protection of the laws of this state afforded the respective parties, and the basic equities of the situation. *Mladinich v. Kohn*, 250 Miss. 138, 164 So. 2d 785 (1964), superseded by statute as stated in *Southern Pac. Transp. Co. v. Fox*, 609 So. 2d 357 (Miss. 1992), and superseded by statute as stated in *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995), cert. denied, 516 U.S. 1094, 116 S. Ct. 817, 133 L. Ed. 2d 761 (1996); *Republic-Transcon Indus., Inc. v. Templeton*, 253 Miss. 132, 175 So. 2d 185 (1965); *Breckenridge v. Time, Inc.*, 253 Miss. 835, 179 So. 2d 781 (1965).

This is a remedial statute to be liberally construed and applied without enlarging upon its provisions. *Mississippi Chem. Corp. v. Vulcan-Cincinnati, Inc.*, 224 F. Supp. 11 (S.D. Miss. 1963), aff'd, 338 F.2d 662 (5th Cir. 1964).

In the absence of motion attacking the service of process under this section [Code 1942, § 1438], the court, although informed that the secretary of state had failed to mail a copy of the summons to defendant, may properly proceed with the trial. *Aerial Agric. Serv. v. Richard*, 264 F.2d 341 (5th Cir. 1959).

While the statute forbidding access by foreign corporations to the courts of the state because of their failure to comply with statutory provisions for doing business is strictly construed so that exclusion from access to the courts of the state requires a strong showing that the statute has been violated, the statute providing for services on a designated agent where, without a compliance with the statute, a corporation has undertaken to do business



in-state is liberally construed since otherwise citizens of a state would be forced to resort to another jurisdiction in order to maintain suits against foreign corporations as to matters arising out of transactions had within the state. *Mississippi Wood Preserving Co. v. Rothschild*, 201 F.2d 233 (5th Cir. 1953).

This section [Code 1942, §§ 1437, 1438] applies to contract, as well as to tort actions, growing out of business or acts done within the state. *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

Change of status of defendant from that of resident of this state at time of entering into contract on which suit is brought to that of nonresident at time suit is filed does not affect validity of service of process under this section [Code 1942, § 1438] when defendant is still engaged in same business within state. *Condon v. Snipes*, 205 Miss. 306, 38 So. 2d 752 (1949).

This statute is to be given a prospective rather than a retrospective operation and therefore does not apply to an action arising out of an automobile accident occurring prior to its enactment. *Bouchillon v. Jordan*, 40 F. Supp. 354 (S.D. Miss. 1941).

### 3. What constitutes doing business within state.

Personal jurisdiction over a parent corporation of an extended care facility was lacking under Miss. Code Ann. § 13-3-57 in an action alleging negligence in the facility's care of a decedent, since there was no showing of sufficient domination by the parent to impute the alleged negligence of the facility to the parent; although the facility was a wholly owned subsidiary of the parent and the entities shared common officers, the parent and the facility meticulously observed corporate formalities in that they did not commingle funds, did not pool insurance coverage, and did not share financial books, records, or bank accounts, and the facility independently operated its own daily activities and paid its own operating expenses. *Samples v. Vanguard Healthcare, LLC*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 70822 (N.D. Miss. Sept. 18, 2008).

Where a pharmaceutical company sought a declaratory judgment regarding

patent infringement, personal jurisdiction was lacking over a laboratory under a long-arm statute, Miss. Code Ann. § 13-3-57, as the laboratory's mere plan to reintroduce a drug, which might place it into the state's stream of commerce, did not qualify as doing business there. Further, the laboratory's correspondence and license negotiations with the company did not support a finding that it was doing business in Mississippi as such would be inconsistent with due process. *Cypress Pharm., Inc. v. Tiber Labs., LLC*, 504 F. Supp. 2d 129 (S.D. Miss. July 19, 2007).

Mobile home moving service licensed to do business in Mississippi, which had performed some moves into or out of Mississippi over the years, was not "doing business" in the state for purposes of personal judgment in an out-of-state collision case, unrelated to any business in Mississippi. *Williams v. Bud Wilson's Mobile Home Serv.*, 887 So. 2d 830 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Summary judgment granted against two corporations licensed to do business in the State of Mississippi on the grounds that the State's three-year statute of limitations did not apply to an incident that occurred in the State because the corporations were foreign corporations was reversed because the two corporations should have been considered residents for purposes of invocation of the State statute of limitations, in much the same way as the corporations would be able to invoke the use of the Mississippi long arm statute, Miss. Code Ann. § 13-3-57. *St. Paul Fire & Marine Ins. Co. v. Paw Paw's Camper City, Inc.*, 346 F.3d 153 (5th Cir. 2003).

An oral contract for goods to be manufactured in Mississippi for sale to the defendant in Florida was sufficient to support a finding that there was a contract to be performed in part in Mississippi. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000).

The parties' agreement that an oral contract existed for goods to be manufactured in Mississippi for sale to the defendant was sufficient to support a finding that there was a contract to be performed in part in Mississippi, therefore, the de-

defendant was amenable to suit under the long-arm statute. *American Cable Corp. v. Trilogy Communications, Inc.*, 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), *subst. op.*, 754 So. 2d 545 (Miss. Ct. App. 2000).

A corporation which owned drug stores in Louisiana did not do business in Mississippi so as to be subject to long arm jurisdiction since there were no substantial, continuous, and deliberate contacts with Mississippi, no purposeful availment of the Mississippi market, and no invocation of the benefits and protections of Mississippi laws, notwithstanding that the corporation paid for advertising by a separate corporation in Mississippi and ran advertisements on Louisiana television stations which broadcasted into Mississippi. *Kekko v. K & B La. Corp.*, 716 So. 2d 682 (Miss. Ct. App. 1998).

In an action for alleged interference with an employment contract, a foreign defendant was not amenable to suit under the "doing business" provision of Mississippi's long-arm statute (§ 13-3-57) on the sole basis that the contract was mailed to the plaintiff at his home address in Mississippi. *Peterson v. Test Int'l, E.C.*, 904 F. Supp. 574 (S.D. Miss. 1995).

In a personal injury action by a Mississippi plaintiff arising from an automobile accident that occurred in Tennessee, the nonresident defendant's consummation of an agreement to breed her dog in Mississippi, and her installation of a telephone line at a friend's home in Mississippi when she briefly stayed there, were insufficient to meet the "doing business" prong of the Mississippi long arm statute (§ 13-3-57) where the Tennessee automobile accident was not incidental to the defendant's activities in Mississippi. *McLaurin v. Nazar*, 883 F. Supp. 112 (N.D. Miss. 1995), *aff'd*, 71 F.3d 878 (5th Cir. 1995).

Plaintiff failed to demonstrate nexus between defendant product manufacturer's activities in Mississippi and plaintiff's cause of action, as required for assertion of jurisdiction under "doing business" clause of § 13-3-57, where only allegations contained in complaint were that defendant sells products nationwide and that these products have been purchased by Mississippians. *Madison v. Revlon, Inc.*, 789 F. Supp. 758 (S.D. Miss. 1991).

In action by truckdriver injured when rubber strap broke as he attempted to attach it to tarp, against Ohio manufacturer of strap which sold strap to Alabama company which in turn sold it to plaintiff's employee, evidence failed to establish that manufacturer was "doing business" in Mississippi so as to bring it within personal jurisdiction under statute, where there was no evidence that manufacturer had systematic and continuous contact with Mississippi. *Yates v. Turzin*, 786 F. Supp. 594 (S.D. Miss. 1991).

Federal Court in Mississippi properly exercised in personam jurisdiction over publishers of swinger magazines in action for defamation and invasion of privacy for publication of personal ad pertaining to plaintiff because such publication constituted commission of tort in the state which would be deemed to be doing business in the state. *Mize v. Harvey Shapiro Enters., Inc.*, 714 F. Supp. 220 (N.D. Miss. 1989).

The Mississippi court had personal jurisdiction over an out-of-state bank since the bank's financing of a customer's gas well operation in Mississippi was an action purposefully directed toward Mississippi. By perfecting its security interests in the customer's assets in Mississippi through filing financing statements and deeds of trust, the bank purposefully availed itself of the protection of Mississippi law. *Wilkinson v. Mercantile Nat'l Bank*, 529 So. 2d 616 (Miss. 1988).

Test to determine jurisdiction under "doing business" prong of long-arm statute is: (1) nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in forum state; (2) cause of action must arise from, or be connected with, such action or transaction; and (3) assumption of jurisdiction by forum state must not offend traditional notions of fair play and substantial justice, consideration being given to quality, common nature, and extent of activity in forum state, relative convenience of parties, benefits and protection of laws of forum state afforded respective parties, and basic equities of situation. *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), but see, *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995).



Physician and professional corporation were not amenable to jurisdiction under doing business prong of Mississippi's Long-Arm statute because relevant facts did not satisfy tri-partite test established to determine jurisdiction. There was no evidence in record that professional corporation ever purposefully did some act or consummated some transaction in Mississippi, instead confining practice to hospitals in Memphis, and corporation did not solicit patients from Mississippi or advertise there; based on this, plaintiff had not even shown that professional corporation met first element of tri-partite test. *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), but see, *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995).

Physician was not subject to jurisdiction, although physician had consummated transaction in Mississippi by purchasing property there, not related to lawsuit; therefore, nexus requirement was not satisfied. *Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987), but see, *Gross v. Chevrolet Country*, 655 So. 2d 873 (Miss. 1995).

Out of state company which entered into contract with in-state company, which contract required at least partial performance within state, has purposefully availed itself of privileges of conducting activities within state and its connection with forum was such that it should reasonably have anticipated being brought into court within state, as certain elements of contract and subsequent agreements were to be performed by out of state company within state relating to specifications of work to be done and testing of completed work, all to be performed within state. *Sorrels Steel Co. v. Great S.W. Corp.*, 651 F. Supp. 623 (S.D. Miss. 1986).

Plaintiffs failed to make prima facie showing that corporate veil of subsidiary corporation should be preliminarily pierced for purposes of attaining long-arm jurisdiction over parent corporation or individual alleged to have been president of both corporations when cause of action arose, where, although there existed commonality of ownership or officers of both corporations, plaintiffs made no attempt to satisfy requirement of particularized

factual allegations tending to show applicability of "piercing" doctrine, and they have not pled specific facts sufficient to establish that subsidiary corporation at anytime operated as alter ego of corporate officer. *McCardle v. Arkansas Log Homes, Inc.*, 633 F. Supp. 897 (S.D. Miss. 1986).

Mississippi court lacks jurisdiction over out-of-state corporate defendant where corporate defendant has no contract with resident of state to be performed in whole or in part by any party in state and the corporate defendant has no other contacts with state; Mississippi court lacks jurisdiction over corporate defendant in transaction arising over sale of out-of-state property which took place outside of Mississippi where only arguable contact with State of Mississippi is assembly and transfer of collateral to plaintiff in Mississippi which would transpire between plaintiff and trustee bank. *Cappaert v. Preferred Equities Corp.*, 613 F. Supp. 264 (S.D. Miss. 1985).

Miss. Code § 13-3-57 does not confer jurisdiction over out-of-state corporate defendant in action for fraud, negligent misrepresentation, breach of fiduciary duties, and violations of federal commodities laws, notwithstanding plaintiff's contentions (1) that his economic loss in Mississippi causes tort to have occurred in Mississippi, and (2) that defendant's advertisement in Wall Street Journal circulated and read by plaintiff in Mississippi, telephone calls to and from Mississippi, and fact that plaintiff's checks were drawn on his Mississippi account are sufficient bases for exercise of in personam jurisdiction. *Paul v. International Precious Metals Corp.*, 613 F. Supp. 174 (S.D. Miss. 1985).

When defendant in securities action took funds beyond borders of Mississippi in violation of injunction and in furtherance of his plan to secrete funds with knowledge and consent of its agents, such action satisfied in-state requirement of § 13-3-57 as far as agents are concerned. *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), reh'g denied, 770 F.2d 1081 (5th Cir. 1985), cert. denied, 474 U.S. 1056, 106 S. Ct. 794, 88 L. Ed. 2d 771 (1986).

Before personal jurisdiction may be exercised under "doing-business" provision



of § 13-3-57, there must be sufficient nexus between activities of defendant within state and plaintiff's cause of action; mere fact that defendant power saw manufacturer markets its products nationally and that some of these goods find their way into Mississippi is not sufficient nexus to subject manufacturer, which is corporation domiciled in Pennsylvania and is division of Maryland corporation, to in-personam jurisdiction under "doing-business" provision. *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277 (5th Cir. 1984).

Contacts between defendant foreign corporation and forum state in wrongful death and negligence action were insufficient to assert in personam jurisdiction over defendant where contacts consisted of sending defendant's chief executive officer to forum state for contract-negotiation session, accepting checks drawn on bank located in forum state, purchasing equipment and services from a manufacturer located in forum state, and sending personnel to manufacturer's facilities for training in the state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984), on remand, 677 S.W.2d 19 (Tex. 1984).

Publishing corporation's regular circulation of magazines in forum state is sufficient to support assertion of jurisdiction in libel action based on contents of magazine, even where single publication rule is applied. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984).

In an action brought by a bank to foreclose its deed of trust executed by a corporation and secured by the personal guarantees of five of the corporation's stockholders, the chancery court had jurisdiction under § 13-3-57 over a nonresident stockholder, even though the instruments had been executed out of state, since they were to be performed in Mississippi, were construed according to Mississippi law, and were also excepted in Mississippi. *First Miss. Nat'l Bank v. S & K Enters., Inc.*, 460 So. 2d 839 (Miss. 1984).

In an action by a Mississippi citizen charging breach of contract and fraud against a Texas corporation arising out of an oral agreement for an exclusive dealer-

ship to sell the corporation's product in Mississippi, the trial court erred in granting the corporation's motion to dismiss for lack of jurisdiction where, by purposefully availing itself of the privilege of doing business with a Mississippi resident, accepting several orders made through the resident and shipping its product to the purchasers in Mississippi, the corporation subjected itself to the jurisdiction of the courts of Mississippi under the long arm statute. *Murray v. Huggers Mfg., Inc.*, 398 So. 2d 1323 (Miss. 1981).

Personal jurisdiction over Louisiana corporation existed in Mississippi under § 13-3-57 where Louisiana corporation did business of a systematic and ongoing nature in Mississippi, plaintiffs' cause of action was incident to that business activity, and assertion of jurisdiction over Louisiana corporation did not offend notions of fairness or substantial justice. *Aycock v. Louisiana Aircraft, Inc.*, 617 F.2d 432 (5th Cir. 1980), reh'g denied, 625 F.2d 1016 (5th Cir. 1980), cert. denied, 450 U.S. 917, 101 S. Ct. 1361, 67 L. Ed. 2d 343 (1981).

A nonresident manufacturer of grinding machines was not amenable to suit in Mississippi by a Louisiana resident who had worked in Mississippi as an operator of such machine and who had allegedly become permanently disabled as a result of the constant inhalation of dust particles at work, where, *inter alia*, defendant manufacturer did not have a single employee in the state when the cause of action accrued or when the complaint was filed, even though a single corporate employee subsequently moved to the state and was served with process, and where defendant had never paid state taxes or availed itself of the protection of any state laws; further, plaintiff had only availed himself of the protection of Mississippi's law to the limited extent that he worked and traveled in the state. *Washington v. Norton Mfg., Inc.*, 588 F.2d 441 (5th Cir. 1979), cert. denied, 442 U.S. 942, 99 S. Ct. 2886, 61 L. Ed. 2d 313 (1979).

The "doing business" provision of the Mississippi long-arm statute cannot be invoked by a nonresident plaintiff in a diversity action against a nonresident defendant and the statute, so construed, does not deny a nonresident plaintiff

privileges and immunities secured under the federal constitution. *Breeland v. Hide-A-Way Lake, Inc.*, 585 F.2d 716 (5th Cir. 1978), on reh'g, 593 F.2d 22 (5th Cir. 1979).

A Mississippi court had jurisdiction under § 13-3-57 in a breach of contract action involving the sale of a tractor by a non-resident seller to a resident purchaser where the contract was made by phone, payment was sent from Mississippi to the non-resident seller, and the seller delivered the tractor through its agent to the purchaser in Mississippi. *Miller v. Glendale Equip. & Supply, Inc.*, 344 So. 2d 736 (Miss. 1977).

A foreign corporation which made advances by way of loans to a Mississippi corporation which were used by the latter corporation in its Mississippi operation was not doing business in Mississippi within the meaning of this section [Code 1972, § 13-3-57]. *Riley v. Communications Consultants, Inc.*, 385 F. Supp. 296 (N.D. Miss. 1974).

It is no longer necessary, in a products liability claim, to determine whether the manufacturer is "doing business", as interpreted by earlier Mississippi decisions, to render the nonresident manufacturer subject to suit and jurisdiction under the state's "long-arm" statute. *Breedlove v. Beech Aircraft Corp.*, 334 F. Supp. 1361 (N.D. Miss. 1971).

A nonresident manufacturer, which had no representatives or any personal ties within the state, but which placed its manufactured heating unit in interstate commerce for distribution and sale to consumers, was subject to in personam jurisdiction within the state for purposes of a products liability action, when one of its heating units overheated and resulted in a fire which destroyed the plaintiffs' home because of an alleged defect. *Smith v. Temco, Inc.*, 252 So. 2d 212 (Miss. 1971).

A New Orleans television broadcasting station whose programs were regularly heard by thousands of residents of the Mississippi Gulf coast area, which regularly reported news events in that area, solicited advertising there, and carried advertising by New Orleans stores directed especially toward Gulf coast residents, had sufficient minimum contacts in

Mississippi to be amenable to process under this section [Code 1942, § 1437]. *Casano v. WDSU-TV, Inc.*, 313 F. Supp. 1130 (S.D. Miss. 1970), aff'd, 464 F.2d 3 (5th Cir. 1972).

An action initiated in a Virginia federal district court by railroad companies against, among others, two car leasing companies for damages sustained as a result of a derailment occurring in Mississippi, would be transferred to a Mississippi federal court, where one of the companies leased cars with 6% of its lease revenue attributable to miles traveled over Mississippi tracks, and the other leasing company systematically solicited and did business within Mississippi and filed annual sales tax returns in Mississippi, and where, in both instances, such contacts were directly involved with the alleged cause of action; the contacts being sufficient to make the defendant leasing companies amenable, constitutionally, to service of process under the Mississippi "long arm" statute. *Alabama G.S.R.R. v. Allied Chem. Corp.*, 312 F. Supp. 3 (E.D. Va. 1970).

Where a Wisconsin corporate manufacturer had 10 distributors in Mississippi, made substantial sales to its distributors, sent an average of 17 employees into the state each year to give assistance to its distributors, had several pieces of equipment operating within the state, extended and secured credit within the state and made contracts with its distributors, giving it considerable control over their activities, the corporation was "doing business" in Mississippi within the "long-arm" and "doing business" statutes. *Hyde Constr. Co. v. Koehring Co.*, 321 F. Supp. 1193 (S.D. Miss. 1969).

Neither the fact that a manufacturer of equipment sold its products to Mississippi distributors or wholesalers, nor the fact that the manufacturer had employees on an average of 17 or 18 per year visiting within Mississippi to give assistance to the distributors in the sale of equipment manufactured by it and to help repair and adjust such equipment, standing alone, would compel a finding that the manufacturer is or was "doing business" within the state of Mississippi under the provisions of Code 1942, § 1437 or Code 1942,



§ 5345. Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193 (S.D. Miss. 1969).

Where a Wisconsin corporation had ten distributors within Mississippi, making substantial sales, had equipment in the state, and was a creditor secured by security instruments in the state, and where its employees frequently visited the state, the corporation had sufficient contacts within Mississippi to satisfy due process for the exercise of in personam jurisdiction. Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193 (S.D. Miss. 1969).

Where the contract between a nonresident distributor of foreign automobiles and a Mississippi dealer gave the distributor almost absolute control over the method and manner of doing business by the dealer, the distributor was doing business in Mississippi within the purview of this section [Code 1942, § 1437]. Easterling v. Volkswagen of Am., Inc., 308 F. Supp. 966 (S.D. Miss. 1969).

The importer of foreign automobiles located in another state which did not enter into any contract with anyone to perform any services or do any work within Mississippi, did no business and performed no acts within that state which would constitute its doing business there, did not deliver any automobiles to anyone within the state, entered into no contract with anyone therein, maintained no corporate records or corporate office, had no telephone listing, no agents or employees of any kind and no "minimum contact" with anyone was not amenable to process under this section [Code 1942, § 1437]. Easterling v. Volkswagen of Am., Inc., 308 F. Supp. 966 (S.D. Miss. 1969).

A nonresident individual who sold a portable elevator to a resident of Mississippi, and, through his agents and in his own truck, delivered it to the purchaser in Mississippi, had prior to sale assembled the elevator at his premises in Tennessee, and who over a period of 10 or 15 years made 15 percent of his total gross sales to residents of Mississippi, and who, in connection with these sales, it was his common practice to go to the customer's home within the state to appraise property offered as trade-in on new equipment and delivered the merchandise within that state, was amenable to process under this

section [Code 1942, § 1437]. Smith v. Barker, 306 F. Supp. 1173 (N.D. Miss. 1968).

A nonresident individual whose agents, trucks, and other property were brought into Mississippi in the ordinary course of his business, had contacts within that state which were purposeful, continuous, and systematic activities, and rendered him amenable to process, despite the fact that he maintained no telephone listing, bank account, office, warehouse, or storage facilities there. Smith v. Barker, 306 F. Supp. 1173 (N.D. Miss. 1968).

An elevator manufacturing company which markets its products through various distributors in the United States, but has never had any dealers or salesmen residing in Mississippi, has never solicited through salesmen any orders within the state, has never had a warehouse or inventory of any kind located there, never maintained an office, telephone listing, bank account, or agent for the service of process, made no sales to its customers directly in the state, has made no shipments into the state except an inconsequential amount of truck hoists and parts and, even in that case, the items delivered were sold to manufacturers' representatives, none of whom resided in the state, and were transported into the state by common carrier and not in its own trucks, was not amenable to process under the provisions of this section [Code 1942, § 1437]. Smith v. Barker, 306 F. Supp. 1173 (N.D. Miss. 1968).

A nonresident defendant who entered into a contract to perform work in Mississippi and performed the work within the state is subject to suit in the courts of Mississippi under the provisions of this section [Code 1942, § 1437]. C.H. Leavell & Co. v. Doster, 211 So. 2d 813 (Miss. 1968).

A nonresident employed by a crime commission of another state who, pursuant to invitation, and without remuneration or payment of expenses or without knowledge of his employers, came into Mississippi and delivered a speech before a religious group in which he allegedly slandered certain Mississippi residents was not amenable to the process and jurisdiction of a Mississippi court.



Mladinich v. Kohn, 250 Miss. 138, 164 So. 2d 785 (1964).

Whether one is doing business within the state within the contemplation of this section [Code 1942, § 1437] must be determined from the facts of each case. Hazell Mach. Co. v. Shahan, 249 Miss. 301, 161 So. 2d 618 (1964).

A foreign corporation entering into a distributorship agreement, held to be doing business within the state within the meaning of this section [Code 1942, § 1437]. Hazell Mach. Co. v. Shahan, 249 Miss. 301, 161 So. 2d 618 (1964).

A press association organized as a mutual cooperative and nonprofit organization, formed to gather, collect, and interchange with its members news and intelligence which, under the terms of its charter, it could neither sell nor traffic in, but distributed only to its members who apportioned costs of the services among themselves in the form of assessments, and which only employed five persons within the state to collect and disseminate news and repair equipment, is not an organization doing business within the state and therefore is not amenable to process under the provisions of this section [Code 1942, § 1437]. Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

A single isolated and incidental activity does not constitute doing business in the state within the meaning of this statute. Mississippi Chem. Corp. v. Vulcan-Cincinnati, Inc., 224 F. Supp. 11 (S.D. Miss. 1963), aff'd, 338 F.2d 662 (5th Cir. 1964).

A foreign corporation which has appointed a franchise dealer within the state, indoctrinated him in the conduct of the business, and having the right under the franchise agreement to supervise it, is doing business in the state so as to be subject to service of process through the secretary of state. Century Brick Corp. of Am. v. Carroll, 247 Miss. 514, 153 So. 2d 683 (1963).

Mere incidental inspection by a foreign corporation of a plant constructed by another in Mississippi, pursuant to an agreement made in another state to furnish the design and any necessary scientific and engineering advice does not constitute doing business in the state within the meaning of this provision. Mississippi

Chem. Corp. v. Vulcan-Cincinnati, Inc., 224 F. Supp. 11 (S.D. Miss. 1963), aff'd, 338 F.2d 662 (5th Cir. 1964).

Gathering and relaying of news in Mississippi by the Associated Press, held not to constitute doing business in the state so as to be subject to service of process there. Walker v. Savell, 218 F. Supp. 348 (N.D. Miss. 1963), aff'd, 335 F.2d 536 (5th Cir. 1964).

Isolated acts, not amounting to a continuity, do not warrant substituted service of process under this section [Code 1942, § 1437]. Hudgins v. Tug Kevin Moran, 206 F. Supp. 339 (S.D. Miss. 1962).

Although it conducted occasional demonstrations of its products and sent complaint investigators into the state, a foreign corporation which had salesmen in the state doing promotional and sales work but who had no authority to close sales, and maintained no plant or sales office within the state, was not doing business in the state so as to subject it to the jurisdiction of the state court. Livestock Servs., Inc. v. American Cyanamid Co., 244 Miss. 531, 142 So. 2d 210 (1962).

In determining whether a corporation is doing business in the state, each case must be decided upon its peculiar facts. Jarrard Motors, Inc. v. Jackson Auto & Supply Co., 237 Miss. 660, 115 So. 2d 309 (1959).

Fact that under contract nonresident automotive distributors possessed almost absolute control over the method and manner of doing business by resident dealer, together with the failure of the nonresident distributors to comply with Code 1942, §§ 8072 and 8073, established that nonresident distributors were doing business within the state. Jarrard Motors, Inc. v. Jackson Auto & Supply Co., 237 Miss. 660, 115 So. 2d 309 (1959).

Under this section [Code 1942, § 1437] authorizing substituted service of process on foreign corporations doing business within state without having qualified therefor, jurisdiction is not conferred on a single act or acts, but a series of acts amounting to a continuity is required. Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233 (5th Cir. 1953).

Whether a corporation is doing business in a state in the sense required for a

process statute is a question dependent primarily upon the facts and circumstances of each particular case. *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

A less strict interpretation of the phrase doing business, is applied where there is an issue of whether a state board has jurisdiction, than is applied where the statute involved is one stating that a corporation must qualify before doing business in order to have access to the courts of state. *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

Where a corporation has entered the state through its agent and is engaged in carrying on and transacting through them a substantial part of its ordinary business on the regular basis, it is doing business within the state so as to be subject to process. *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

Where a lumber company, a Louisiana corporation, executed in this state a contract for the manufacture of lumber and the contract was wholly performed in this state and also the contract involved continuous substantial series of transactions covering a period of two years during which the lumber company sent its trucks into the state several times each week to pick up the timber, the lumber company was doing business within the statute providing for service against nonresident corporation doing business in the state. *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

Nonresident engaging in business of termite eradication and control in this state under license from state plant board authorizing him to conduct such business is subject to action for damages in this state for breach of contract entered into and to be performed in this state and may be brought into court by service of process upon secretary of state in manner provided by Code 1942, § 1438. *Condon v. Snipes*, 205 Miss. 306, 38 So. 2d 752 (1949).

To constitute a foreign corporation doing business in a particular jurisdiction, the business must be of such nature and character as to warrant the inference that

the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state where the service of process is attempted. *Lee v. Memphis Pub. Co.*, 195 Miss. 264, 14 So. 2d 351, 152 A.L.R. 1428 (1943).

Maintenance by a foreign newspaper corporation of a news-gathering office in the state, the employment of a resident contract man to recommend suitable persons to become local distributors in the state, and a contract with a truck operator to transport its papers into the state for sale and distribution by local distributor, did not constitute "doing business" in the state so as to make such corporation amenable to service of process in the state. *Lee v. Memphis Pub. Co.*, 195 Miss. 264, 14 So. 2d 351, 152 A.L.R. 1428 (1943).

#### **4. Non-resident heirs of alleged tortfeasor.**

Mississippi's long-arm statute did not apply to nonresident individual heirs of deceased alleged tortfeasor as service could only be made upon nonresident executor, administrator, receiver, trustee or any other selected or appointed representative. *Sealy v. Goddard*, 910 So. 2d 502 (Miss. 2005).

#### **5. Illustrative cases.**

As neither a hotel management company nor its president were doing business in Mississippi for purposes of the long-arm statute, Miss. Code Ann. § 13-3-57, or had any reason to anticipate being haled into court there, dismissal of an action arising out of injuries a minor sustained at a Louisiana hotel for lack of personal jurisdiction was proper. *Wilson v. Highpointe Hospitality, Inc.*, 62 So. 3d 999 (Miss. Ct. App. 2011).

In a medical-malpractice action, the circuit court did not err in finding that traditional notions of fair play and substantial justice were not offended in exercising personal jurisdiction over the doctor because nothing in the record suggested that the trial court was an inefficient method of resolving the dispute or that it imposed an undue burden to have the doctor defend the suit in Mississippi. *Dunn v. Yager*, 58 So. 3d 1171 (Miss. 2011).



In a medical-malpractice action, the circuit court did not err in finding that the long-arm statute, Miss. Code Ann. § 13-3-57, applied to the doctor because the patient's actual injury, not the mere consequences thereof, occurred in Mississippi. She filled the prescription in Mississippi, consumed the prescription drugs in Mississippi, and the effects of her injury were suffered in Mississippi. *Dunn v. Yager*, 58 So. 3d 1171 (Miss. 2011).

Louisiana resident's emails, phone calls, and text messages to a Mississippi resident were sufficient "minimum contacts" with Mississippi for the purposes of personal-jurisdiction analysis. *Knight v. Woodfield*, 50 So. 3d 995 (Miss. 2011).

In a negligence case, the requirements for subject matter jurisdiction were met under Miss. Code Ann. § 13-3-57 because a car wreck and alleged negligence occurred in Mississippi. *Courtney v. McCluggage*, 991 So. 2d 642 (Miss. Ct. App. 2008).

Physician, who was licensed and occasionally practiced medicine in Mississippi, and a medical clinic, which had an office and rented timeshare office space in Mississippi, subjected themselves to suit under the clear terms of the long-arm statute, Miss. Code Ann. § 13-3-57, by doing business in the state. Considering the interests of Mississippi in providing a forum for legal redress for residents who were negligently injured by out-of-state physicians, the court found that the circuit court's assumption of personal jurisdiction over the physician comported with traditional notions of fair play and substantial justice and did not offend U.S. Const. amend. XIV. *Estate of Jones v. Phillips*, 992 So. 2d 1131 (Miss. 2008).

Trial court erred in dismissing the homeowners' claims alleging that the original owners knew of a home's defects at the time they sold it to the subsequent owners because the assertion that the original owners committed a Mississippi tort sustained personal jurisdiction under Miss. Code Ann. § 13-3-57, regardless of whether it was a tort against the homeowners or the subsequent owners. *Estes v. Bradley*, 954 So. 2d 455 (Miss. Ct. App. 2006).

Miss. Code Ann. § 13-3-57 permitted a district court in Mississippi to exercise

personal jurisdiction over a helicopter lessor, which was a California corporation, and a platform designer, who was a Tennessee domiciliary, in an estate representative's suit to recover damages for a decedent's fall from a helicopter work platform because the fall occurred in Mississippi. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266 (5th Cir. 2006).

Mississippi attorney's breach of contract suit, filed in a Mississippi federal district court against Louisiana and Pennsylvania attorneys seeking payment for litigation services, was transferred under the Fifth Circuit's first-to-file rule to a Louisiana federal district court in which defendants had previously filed a declaratory judgment action raising similar issues, even though Mississippi was a proper venue under 28 U.S.C.S. § 1391(a) because some of the acts sued upon took place there, the court had long-arm personal jurisdiction over defendants under Miss. Code Ann. § 13-3-57, and Mississippi was a convenient forum under 28 U.S.C.S. § 1404(a). *Street v. Smith*, 456 F. Supp. 2d 761 (S.D. Miss. 2006).

Where rental and financial services companies alleged that an affiliate of a rental services company tortiously interfered with a non-compete contract involving a Mississippi resident, the companies met the tort requirement of the long arm statute, Miss. Code Ann. § 13-3-57, and also met the minimum contracts requirement of due process. *U-Save Auto Rental of Am., Inc. v. Moses*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 5284 (S.D. Miss. Jan. 27, 2006).

Under Miss. Code Ann. § 13-3-57, a district court in Mississippi had personal jurisdiction over a distributor in employees' suit to recover funds for medical monitoring due to their exposure to beryllium-containing products sold by the distributor to their employer; although the distributor did not do business in Mississippi and sold the products to the employer in California, the injuries took place in Mississippi, and further, there was evidence that the distributor knew its products would be used only at the employer's Mississippi facility. *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809 (5th Cir. 2006).



In a products liability action, the injured worker's motion for summary judgment was denied; it was premature in that he failed to allege any facts supporting the exercise of personal jurisdiction over the foreign manufacturer under Miss. Code Ann. § 13-3-57, other than that the subject incident and his injuries occurred in Mississippi. *Sims v. A & A Saw & Mach. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34351 (S.D. Miss. Sept. 7, 2005).

Where the tort and its resultant injuries occurred within Mississippi, the court's exercise of personal jurisdiction over defendants was comfortably within the contours of the "tort prong" of Miss. Code Ann. § 13-3-57; the allegedly defective pipe collapsing completed the tort (damage requirement) and created numerous economic effects (costs associated with the collapsing pipe and subsequent redrilling of the oil well). *Tellus Operating Group, L.L.C. v. R & D Pipe Co.*, 377 F. Supp. 2d 604 (S.D. Miss. July 19, 2005).

In a fraud suit brought by investors against defendants, a Pennsylvania attorney and his law firm, it was appropriate to exercise personal jurisdiction over defendants under the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, because the investors alleged that the actual invasion of their legal rights occurred in Mississippi when they were induced to invest in a trust in reliance on an opinion letter directed by defendants to them in Mississippi. *Vig v. Indianapolis Life Ins. Co.*, 384 F. Supp. 2d 975 (S.D. Miss. 2005), remanded by 336 B.R. 279, 2005 U.S. Dist. LEXIS 38987, 97 A.F.T.R.2d (RIA) 644, 37 Employee Benefits Cas. (BNA) 1884 (S.D. Miss. 2005).

Court denied defendants' motion to dismiss a physician's breach of contract action for lack of personal jurisdiction because the fact that defendants sent an agent into Mississippi to help execute an additional portion of the contract was sufficient to satisfy the contract prong of the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, and perhaps even the doing business prong. *Durham v. Katzman*, 375 F. Supp. 2d 495 (S.D. Miss. June 9, 2005).

Application of the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57 (Rev.

2002), was inappropriate in an action filed in Mississippi against an Illinois resident based on the fact that the Illinois resident struck a vehicle filled with Mississippi residents. Illinois was the place where the tort was completed. *Yatham v. Young*, 912 So. 2d 467 (Miss. 2005).

Employees claimed that the court could assert personal jurisdiction over the manufacturer, a foreign corporation with no contacts in the forum state, because it was insufficiently separate from its subsidiary, which did have contacts in the forum state; however, the manufacturer's vice-president stated that the manufacturer was a holding company incorporated under the laws of Ohio, and the subsidiary was separately and adequately capitalized and the manufacturer did not pay the subsidiary's expenses. Thus, the contacts between the manufacturer and its subsidiary were insufficient to satisfy Mississippi's long arm statute, Miss. Code Ann. § 13-3-57. *Paz v. Brush Engineered Materials, Inc.*, 351 F. Supp. 2d 580 (S.D. Miss. 2005), reversed in part by 445 F.3d 809, 2006 U.S. App. LEXIS 8509 (5th Cir. Miss. 2006), affirmed by 483 F.3d 383, 2007 U.S. App. LEXIS 7398 (5th Cir. Miss. 2007).

Where the employees attached a one-page sheet from the manufacturer's website, which showed the name of the fabricator, among others, the document clearly did not provide evidence of contacts between the fabricator and the forum state sufficient for the exercise of personal jurisdiction under Miss. Code Ann. § 13-3-57. *Paz v. Brush Engineered Materials, Inc.*, 351 F. Supp. 2d 580 (S.D. Miss. 2005), reversed in part by 445 F.3d 809, 2006 U.S. App. LEXIS 8509 (5th Cir. Miss. 2006), affirmed by 483 F.3d 383, 2007 U.S. App. LEXIS 7398 (5th Cir. Miss. 2007).

As a company's business contacts with the state were not systematic and continuous, and the personal injury lawsuit filed by an individual did not arise from the company's contacts in the state, the company's motion to dismiss for lack of personal jurisdiction was affirmed. *Williams v. Bud Wilson's Mobile Home Serv.*, 887 So. 2d 830 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

In a negligence action by property owners in Mississippi regarding flooding, Mis-

Mississippi had a strong interest in adjudicating the dispute because Mississippi residents were injured, Mississippi property was destroyed, and the City of Mobile, Alabama, and the Board of Water & Sewer Commissioners of the City of Mobile continued to release water from the subject reservoir. Also, the interest of the hundreds of other Mississippi property owners in obtaining convenient and effective relief was furthered by keeping the suit in Mississippi because their property was located in the county where the suit was filed; maintenance of the suit did not offend "traditional notions of fair play and substantial justice," and application of the "long-arm" statute in the case did not violate the United States Constitution. *Horne v. Mobile Area Water & Sewer Sys.*, 897 So. 2d 972 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1652, 161 L. Ed. 2d 479 (2005), cert. denied, — U.S. —, 125 S. Ct. 1662, 161 L. Ed. 2d 480 (2005).

In a bad faith denial of insurance benefits suit filed by Florida residents, the district court in Mississippi lacked personal jurisdiction over an Iowa health management company that processed medical claims outside the forum. *Walker v. World Ins. Co.*, 289 F. Supp. 2d 786 (S.D. Miss. 2003).

Where Louisiana auto dealer's radio ads reached into Mississippi, it sold autos to Mississippi residents,<sup>8</sup> and it contracted with plaintiff bank in Mississippi, its minimum contacts with Mississippi allowed that state to exercise personal jurisdiction over the dealer; moreover, since the dealer's facilities were not far from the forum, it was not unfair to force it to defend in Mississippi. *BankPlus v. Toyota of New Orleans*, 851 So. 2d 439 (Miss. Ct. App. 2003).

In a Jones Act case, the trial court had jurisdiction over a non-resident defendant that had numerous employees from Mississippi and recruited employees from Mississippi by advertising in that state; further, the fact that the defendant had entered into a contract with the plaintiff in Mississippi was alone sufficient to subject the defendant to the personal jurisdiction of the Mississippi courts. *Diamond Offshore Mgmt. Co. v. Marks*, — So. 2d —, 2003 Miss. LEXIS 88 (Miss. Feb. 27,

2003), opinion withdrawn by, remanded by 2007 Miss. LEXIS 237 (Miss. Apr. 26, 2007).

Court had personal jurisdiction over a Taiwanese manufacturer in a suit brought by two distributors for breach of contract and tortious interference with contractual and business relations; the manufacturer sent invoices to and received payment from the distributors' Mississippi address and allegedly interfered with the distributors' contracts and business relations in Mississippi. *Madami Int'l, LLC v. Dinli Metal Indus. Co.*, 276 F. Supp. 2d 586 (S.D. Miss. 2002).

In an action arising from the purchase from the defendant by the plaintiff of tubing that was to be regularly used as production tubing for down-hole use in oil wells and saltwater disposal wells, two defendants who previously purchased and resold the tubing at issue were not subject to personal jurisdiction in Mississippi where both were foreign corporations, neither had any dealings with the plaintiff in Mississippi or elsewhere, and the transactions in which they sold the tubing occurred outside Mississippi. *Willow Creek Exploration Ltd. v. Tadlock Pipe & Equip. Inc.*, 186 F. Supp. 2d 675 (S.D. Miss. 2002).

The defendant nonresident corporation was entitled to dismissal of the complaint because the court had no basis for asserting personal jurisdiction over it, notwithstanding that the alleged tort was committed partly in Mississippi where the plaintiff was residing when he discovered an allegedly erroneous credit report by the defendant, since the defendant did not have minimum contacts with Mississippi and did not purposely avail itself of the benefits and privileges of the state. *Shaw v. Excelon Corp.*, 167 F. Supp. 2d 917 (S.D. Miss. 2001).

The defendant foreign corporation was not subject to long arm jurisdiction where the contract between the defendant and the plaintiff Mississippi corporation was entered into in Tennessee and was to be performed in Tennessee. *McCain Bldrs., Inc. v. Rescue Rooter, LLC*, 797 So. 2d 952 (Miss. 2001).

The defendant was "doing business" within the contemplation of the long-arm statute where she allegedly transmitted



an email to a recipient or recipients in Mississippi as an attempt to solicit business for a particular website. *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773 (S.D. Miss. 2001).

The Mississippi long-arm statute did not allow a federal district court sitting in Mississippi to take jurisdiction over the defendant because the plaintiff, as a non-resident of Mississippi, could not take advantage of the contract portion of the Mississippi long-arm statute and any tort committed by the defendant was committed solely in Mexico. *Submersible Sys. v. Perforadora Cent.*, 249 F.3d 413 (5th Cir. 2001), cert. denied, 534 U.S. 1055, 122 S. Ct. 646, 151 L. Ed. 2d 564 (2001).

In an action arising from the plaintiff's purchase of an airplane engine from an Arkansas corporation, the Arkansas cor-

poration was not subject to jurisdiction in Mississippi since (1) no part of the contract between the parties was performed in whole or in part by either party in Mississippi, (2) no element of the alleged tortious conduct took place in Mississippi, (3) the defendants did not have a presence in Mississippi which was continuing and substantial in nature, (4) the defendants did not have sufficient minimum contacts with Mississippi such that maintaining the action would not offend traditional notions of fair play and substantial justice, and (5) the defendants did not have continuous and systematic contacts with Mississippi such that due process was satisfied. *Thrash Aviation, Inc. v. Kelner Turbine, Inc.*, 72 F. Supp. 2d 709 (S.D. Miss. 1999).

### ATTORNEY GENERAL OPINIONS

The statute does not conflict with Rule 2.04 of the Uniform Rules of Procedure for Justice Court and, therefore, it may be used to serve out-of-state defendants with

process of the justice courts by a private process server. *Aldridge*, July 17, 1998, A.G. Op. #98-0377.

### RESEARCH REFERENCES

**ALR.** What constitutes doing business within the state by a foreign newspaper corporation. 38 A.L.R.2d 747.

Venue of action against nonresident motorist served constructively under statute in that regard. 38 A.L.R.2d 1198.

Place or type of motor vehicle accident as affecting applicability of statute providing for constructive or substituted service upon nonresident. 73 A.L.R.2d 1351.

Holding directors', officers', stockholders', or sales meetings or conventions in a state by foreign corporation as doing business or otherwise subjecting it to service of process and suit. 84 A.L.R.2d 412.

Manner of service of process upon foreign corporation which has withdrawn from state. 86 A.L.R.2d 1000.

Statutory service on nonresident motorists: return receipts. 95 A.L.R.2d 1033.

Applicability, to actions not based on products liability, of state statutes or rules of court predicated in personam jurisdiction over foreign manufacturers or dis-

tributors upon use of their goods within state. 20 A.L.R.3d 957.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes. 100 A.L.R.3d 1108.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property. 4 A.L.R.4th 955.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 A.L.R.4th 707.

Products liability: personal jurisdiction over nonresident manufacturer of component incorporated in another product. 69 A.L.R.4th 14.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state. 83 A.L.R.4th 1006.

Execution, outside of forum, of guaranty of obligation under contract to be performed within forum state as conferring jurisdiction over nonresident guarantors



under "long arm statute" or rule of forum. 28 A.L.R.5th 664.

Service of Process Via Computer or Fax. 30 A.L.R.6th 413.

**Am Jur.** 20 Am. Jur. 2d (Rev), Courts §§ 71, 72, 98 et seq.

59A Am. Jur. 2d, Partnership §§ 468-487.

62 Am. Jur. 2d, Process §§ 159, 160, 162, 164, 165, 167.

12 Am. Jur. Pl & Pr Forms (Rev), Foreign Corporations, Form 18.1 (Motion — To dismiss for lack of jurisdiction).

12 Am. Jur. Pl & Pr Forms (Rev), Foreign Corporations, Form 19.1 (Affidavit-In support of motion to dismiss complaint-Lack of jurisdiction over foreign corporation — Corporation not doing business in state — By president of corporation).

Service of process on foreign corporations, 20 Am. Jur. Pl & Pr Forms (Rev), Process, Forms 261 et seq.

Substituted Service, 16 Am. Jur. Pl & Pr Forms, Process, Form 16:297.

4 Am. Jur. Proof of Facts, Doing Business, Proof No. 1 (doing business).

**CJS.** 72 C.J.S., Process §§ 70-72 et seq.

**Lawyers' Edition.** State regulation of judicial proceedings as violating commerce clause (Art I, § 8, cl 3) of Federal Constitution — Supreme Court cases. 100 L. Ed. 2d 1049.

**Law Reviews.** Note, Jurisdictional Analysis in Commercial Litigation — The Single Contract Case, 7 Miss. C. L. Rev. 87, Fall, 1986.

Haft, Toward the Multistate Practice of Law Through Admission by Reciprocity. 53 Miss. L. J. 1, March 1983.

Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties — Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March 1982.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

## §§ 13-3-59 through 13-3-61. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-59. [Codes, 1942, § 1439; Laws, 1940, ch. 246]

§ 13-3-61. [Codes, 1942, § 1440; Laws, 1940, ch. 246]

**Editor's Note** — Former § 13-3-59 authorized the court to order such continuances as necessary to afford a nonresident reasonable opportunity to defend the action, provided that no action was triable until after thirty (30) days from date of service of process upon the secretary of state, provided that the fee required to be paid to the sheriff of Hinds County shall be taxed as other costs, and required the secretary of state to keep a record of all process served upon him.

Former § 13-3-61 provided for service when the defendant was a nonresident doing business in state, and provided that certain corporations were exempt.

## § 13-3-63. Service when defendant is nonresident motorist; appointment of secretary of state as agent.

The acceptance by a nonresident of the rights and privileges conferred by the provisions of this section, as evidenced by his operating, either in person or by agent or employee, a motor vehicle upon any public street, road or highway of this state, or elsewhere in this state, or the operation by a nonresident of a motor vehicle on any public street, road or highway of this state, or elsewhere in this state, other than under this section, shall be deemed equivalent to an appointment by such nonresident of the Secretary of State of the State of Mississippi to be his true and lawful attorney, upon whom may be served all lawful processes or summonses in any action or proceeding against him,

growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle on such street, road or highway, or elsewhere in this state, and said acceptance or operation shall be a signification of his agreement that any such process or summons against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process or summons shall be made by the sheriff of Hinds County, upon prepayment of the fees to which he is entitled by law, by serving two (2) copies of the process or summons for each nonresident defendant, with a fee of Fifteen Dollars (\$15.00) for each such defendant on the Secretary of State or by leaving two (2) copies of said process or summons with the fee in the office of the Secretary of State, and such service shall be service upon said nonresident defendant with the same force and effect as if such nonresident had been personally served with such process or summons within the State of Mississippi. One (1) of the copies of such process or summons shall be preserved by the Secretary of State as a record of his office. Notice of such service, together with a copy of the process or summons, shall be mailed forthwith as certified or registered mail, restricted for delivery to addressee only and with postage prepaid, by the Secretary of State to each such nonresident defendant at his last known address, which address shall be written on the process or summons upon the issuance thereof by the clerk of the court wherein the action is pending, or notice of such service and copy of process or summons actually shall be delivered to the said defendant. The defendant's return receipt or evidence of defendant's refusal to accept delivery of such certified or registered mail, in case such notice and copy of process or summons are sent by certified or registered mail, or affidavit of the person delivering such notice and copy of process or summons, in case such notice and copy of process or summons actually are delivered, shall be filed in the court wherein such action is pending before judgment can be entered against such nonresident defendant. The Secretary of State, upon receipt of such return receipt or evidence of the refusal of such defendant to accept delivery of such certified or registered mail, shall promptly return same to the clerk of the court wherein such action is pending, and the said clerk of the court shall promptly file and preserve same among the records of such action or proceeding. The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

Any cause of action arising out of such accident or collision against any such nonresident, in case of the death of such nonresident, shall survive against his administrator, executor or other personal representative of his estate, and service of all necessary and lawful process or summons, when had or obtained upon any such nonresident owner, nonresident operator or agent or employee, or upon the executor, administrator or other legal representative of the estate of such nonresident owner or nonresident operator, in the manner as hereinbefore provided, for the service of all lawful processes or summonses, herein, shall be deemed sufficient service of process or summons to give any court of this state, in which such action may be filed in accordance with the statutes of the State of Mississippi, jurisdiction over the cause of action and



over the nonresident owner, nonresident operator or agent or employee, or the nonresident executor, or administrator of such nonresident owner or nonresident operator, defendant or defendants, and shall warrant and authorize personal judgment against such nonresident owner, nonresident operator, agent, employee, executor or administrator or other legal representative of the estate of such nonresident owner or nonresident operator, defendant or defendants, in the event the plaintiff in such cause of action shall prevail.

The agency or relationship created under the provisions of this section by and between the nonresident owner or nonresident operator of a motor vehicle operating upon the public road, street or highway of this state, or elsewhere in this state, as hereinbefore set forth, in the event of the death of such nonresident owner or nonresident operator of such motor vehicle, shall survive and continue and extend to his executor, administrator or other legal representative of his estate, and the Secretary of State of the State of Mississippi shall be in the same position and relationship with respect to the executor, administrator or other legal representative of the estate of such nonresident owner or nonresident operator of such motor vehicle, as he was in or would have been in with the nonresident owner or nonresident operator of said motor vehicle, had such nonresident owner or nonresident operator survived, and in any action arising or growing out of such accident or collision in which such nonresident owner or nonresident operator of a motor vehicle may be involved while operating a motor vehicle on such street, road or highway or elsewhere in this state, where the nonresident owner or nonresident operator of such motor vehicle has died prior to the commencement of an action against him because of or growing out of such accident or collision, service of process or summons may be had or made upon the nonresident executor, administrator or other legal representative of the estate of such nonresident owner or operator of the motor vehicle involved in such accident or collision, in the same manner and upon the same notice as hereinbefore provided in the case of process or summons upon the nonresident owner or nonresident operator of such motor vehicle. When such process or summons is served, made or had against the nonresident executor or administrator or such nonresident owner or such nonresident operator of such motor vehicle involved in such accident or collision, it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi, jurisdiction over the cause of action and over such nonresident executor or administrator of such nonresident owner or operator of such motor vehicle insofar as such cause of action is involved.

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him, even though said person was a resident at the time any action or proceeding accrued against him.

**SOURCES:** Codes, 1942, § 9352-61; Laws, 1938, chs. 148, 345; Laws, 1946, ch. 266, § 61; Laws, 1952, ch. 265, § 1; Laws, 1954, ch. 299, §§ 1, 2; Laws, 1958, ch.



262; Laws, 1964, ch. 376, §§ 1-4; Laws, 1978, ch. 378, § 2; Laws, 1991, ch. 443, § 1, eff from and after July 1, 1991.

**Cross References** — For another section derived from same 1942 code section, see § 11-11-13.

Service of process on one carrying on business in state by or through a trustee or attorney in fact, see § 13-3-41.

Service of process when defendant is nonresident doing business in the state, see § 13-3-57.

Service of process upon nonresident operating a vessel or motorboat on any of the state's waters, see § 59-21-161.

Service of process on nonresident carnivals, circuses, fairs, and similar exhibitions, see §§ 75-75-1 to 75-75-19.

Service of process upon carnivals, circuses, and fairs doing business in the state but not permanently domiciled therein, see §§ 75-75-1 et seq.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

Circuit court filing and service requirements for pleadings and motions, see Miss. Uniform Rule of Circuit and County Court Practice 2.06.

## JUDICIAL DECISIONS

1. Construction and application, generally.
2. Persons within purview of statute.
3. Giving of notice.
4. Quashal of service.
5. Decisions under former laws.

### 1. Construction and application, generally.

Miss. Code Ann. § 13-3-63 is not the exclusive method by which nonresident motorists have to be served because § 13-3-63 merely provides an alternative method to serve a particular class of out-of-state defendants; even if the statute provided an exclusive method of service, it would conflict with Miss. R. Civ. P. 4. *Bloodgood v. Leatherwood*, 25 So. 3d 1047 (Miss. 2010).

Where plaintiffs delivered copies of a summons and complaint to the Mississippi Secretary of State who in turn sent the documents to a nonresident motorist by certified mail, restricted delivery, but the documents were returned to the Secretary as unclaimed, such service was insufficient to permit entry of a default judgment against the nonresident; despite case law indicating that service was complete upon delivery to the Secretary, Miss. Code Ann. § 13-3-63 clearly stated that judgment could not be entered against the nonresident until the return receipt was

filed with the court, indicating that the nonresident either received or refused delivery of the documents. *Arceneaux v. Davidson*, 325 F. Supp. 2d 742 (S.D. Miss. 2004).

Circuit Court properly ordered examination of judgment debtor and production of documents in county where suit was filed, where judgment debtor had waived its right to argue that it could not be found in that county, and thus statute concerning examination of judgment debtor by judgment creditor was construed consistently with venue already established for trial of action. *H & W Transf. & Cartage Serv., Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1987), mandate amended, 534 So. 2d 216 (Miss. 1988).

The Federal Motor Carrier Act § 221(c), which provides that every motor carrier shall file in each state in which it operates a designation of a person to receive service on its behalf, does not preempt § 13-3-63 and service may be made upon a nonresident motor carrier under either statute. *Trailer Express, Inc. v. Gammill*, 403 So. 2d 1292 (Miss. 1981).

Where the notice of service of a nonresident corporation was delivered to the president of the corporation in accord with statutory requirements, and an interlocutory default judgment was entered upon failure of the defendant to answer, the

default judgment could not be set aside on the grounds that the president of the corporation mislaid the notice due to anxiety over his wife's recent death. *Western Chain Co. v. Brownlee*, 317 So. 2d 418 (Miss. 1975).

The jurisdiction of the court under this statute is not restricted to suits by Mississippi residents, and the circuit court had jurisdiction over a suit arising out of an accident which occurred in Mississippi even though the suit did not involve the interests or rights of any resident of Mississippi. *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975).

Where default judgment in non-resident motorist case was entered on the first day of a scheduled two week return term, and, upon learning of decision, counsel for defendants promptly filed motion to set aside default judgment in which they set forth a meritorious defense, judgment should have been set aside and the case set for trial on its merits either immediately or on a day certain within the remainder of the term. *Martin v. Palmertree*, 312 So. 2d 447 (Miss. 1975).

Under Code 1942, § 1438, providing that service of process made upon the secretary of state shall be made in the same manner and by the same procedure and with the same force and effect as is provided by the nonresident motorist statute as amended and supplemented, service can be made pursuant to a subsequently inserted provision of the nonresident motorist statute, Code 1942, § 9352-61, so as to permit service upon any person who is a nonresident at the time the action is filed, even though at the time of the incident giving rise to the action, such person was a resident of Mississippi. *McKnight v. Dyer*, 331 F. Supp. 343 (N.D. Miss. 1971).

This section [Code 1942, § 9352-61] is strictly construed and the provisions thereof must be followed to give the court jurisdiction over a nonresident. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438 (Miss. 1968).

This section [Code 1942, § 9352-61] reflects the legislature's intent to create a service of process tantamount for all purposes to personal service. *Ellis v. Milner*, 194 So. 2d 232 (Miss. 1967).

This section [Code 1942, § 9352-61] has the purpose of placing a nonresident motorist summoned under it on a parity with a resident in all respects, it requires the nonresident using state highways to consent to service of process upon the secretary of state, it puts nonresidents on the same footing as residents in litigation of accidents growing out of the use of state highways, and they have equal procedural rights with residents once the prescribed service of process has been effected. *Ellis v. Milner*, 194 So. 2d 232 (Miss. 1967).

The term "personal representative" as used in this section [Code 1942, § 9352-61] is the equivalent of "legal representative," and is intended to include persons such as the administrator or executor of a nonresident deceased motorist. *Hill v. James*, 252 Miss. 501, 175 So. 2d 176 (1965).

A Mississippi court does not acquire jurisdiction of the nonresident widow and minor children of a deceased out-of-state motorist sued in their individual capacities under the survival provisions of this section [Code 1942, § 9352-61] which apply only to the administrator, executor, or other legal representative of the decedent. *Hill v. James*, 252 Miss. 501, 175 So. 2d 176 (1965).

This provision, being in derogation of the common law, should be strictly construed. *Nationwide Mut. Ins. Co. v. Tillman*, 249 Miss. 141, 161 So. 2d 604 (1964).

The basic purposes of the statute are to subject to the jurisdiction of the Mississippi court nonresidents concerned in the operation of motor vehicles in Mississippi, in order that its citizens may assert in its courts any proper claims against such persons, and to afford a nonresident defendant the opportunity to adequately defend an accident suit. *Nationwide Mut. Ins. Co. v. Tillman*, 249 Miss. 141, 161 So. 2d 604 (1964).

A garnished liability insurer has the burden of disproving that the person served was the insured. *Nationwide Mut. Ins. Co. v. Tillman*, 249 Miss. 141, 161 So. 2d 604 (1964).

This is a procedural statute, remedial in nature, and as such to be given a liberal construction. *Stroo v. Farmer*, 200 F. Supp. 344 (S.D. Miss. 1961).



Where a truck from another state which had carried a load of hay to a Mississippi destination was, at the time of the accident, standing in a barn on private property while the driver was still in his seat and the engine was running, this section [Code 1942, § 9352-61] applied regardless of whether the wheels of the truck were turning or not. *Stroo v. Farmer*, 200 F. Supp. 344 (S.D. Miss. 1961).

The purpose of this section [Code 1942, § 9352-61] is to subject to the jurisdiction of the Mississippi courts nonresidents concerned in the operation of automobiles within the state within the terms of the statute, so that its citizens may assert as against such persons their claims in local courts. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

The word "operation" includes all means and extent of use of the highways of Mississippi which nonresidents may acquire under the terms of the statute, and also any similar manner of use even though the privilege be not obtained precisely in accordance with the general statutory provisions; and, it, therefore, as a basis of acquiring jurisdiction, brings within its reach a nonresident owner in whose behalf the motor vehicle is driven over the Mississippi highways. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

A distinction is made between "operator" and "driver"; the operator is recognized to be the owner operating the motor vehicle, and while the driver is recognized as also operating, he is the person actually driving at any given time. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

## 2. Persons within purview of statute.

In a matter arising out of a high speed chase, which allegedly resulted in decedents' deaths, neither an Alabama county or that county's sheriff from Alabama entered upon the highways of Mississippi, involving themselves in efforts to stop the fleeing felons, or in any other way subjected themselves to jurisdiction under Miss. Code Ann. § 13-3-63; therefore, the supreme court proceeded with a long-arm analysis to determine if jurisdiction could be conferred upon them under the Mississippi long-arm statute, Miss. Code Ann. § 13-3-57, and the supreme court found no minimum contacts, so the county and

the sheriff were not subject to personal jurisdiction in Mississippi. *City of Cherokee v. Parsons*, 944 So. 2d 886 (Miss. 2006).

City police officer and deputy sheriff from Alabama, who were involved in a high-speed chase in Mississippi that allegedly resulted in the decedents' death, separately subjected themselves to the personal jurisdiction of Mississippi courts for actions arising out of accidents that occurred in Mississippi. *City of Cherokee v. Parsons*, 944 So. 2d 886 (Miss. 2006).

A nonresident owner of an automobile who operates it, or causes it to be operated by another, over the highways of the state of Mississippi, subjects himself, within the terms of the statute, to service of process which is sufficient to require him to defend a suit upon the merits. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

Nonresident seller of automobiles who procured drivers, as purchaser's agent, to deliver cars sold to purchaser residing in another state was neither operator nor driver within this section [Code 1942, § 9352-61]; and, therefore, he was not subject to substituted service of process in death action resulting from an accident involving one of the cars on a Mississippi highway. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

## 3. Giving of notice.

In a tort action arising out of a motor vehicle accident, a nonresident defendant was properly served since (1) the plaintiffs complied with § 13-3-63 by serving process on the secretary of state, providing the address given by the defendant to law enforcement officials on the date of the accident, and (2) the return receipt attached to the defendant's motion to dismiss, showing that the parcel was sent to the motorist from the office of the secretary of state, constituted proof that the secretary of state complied with the mailing requirement. *Wesley v. Mississippi Transp. Comm'n*, 857 F. Supp. 523 (S.D. Miss. 1994).

A nonresident defendant was not entitled to dismissal of an action arising from a motor vehicle accident based on the provision of § 13-3-63 which requires that notice of service of process on the secretary of state actually be delivered to the



nonresident defendant, although he did not concede that he had received a copy of the summons and complaint, where he had actual knowledge of the commencement of the suit, the basis of the suit, and the identity of the other defendants in the action. *Wesley v. Mississippi Transp. Comm'n*, 857 F. Supp. 523 (S.D. Miss. 1994).

Notice to a nonresident motorist by one of the three methods provided by this section [Code 1942, § 9352-61] is essential to confer jurisdiction upon the local courts. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438 (Miss. 1968).

This section [Code 1942, § 9352-61] provides three methods for the service of process upon a nonresident, and it is essential to due process that a nonresident defendant be given notice of the action against him in accordance with the provisions of the section. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438 (Miss. 1968).

Where it appears conclusively that the notice intended for a nonresident motorist was forwarded to an address which did not exist, that there was no return receipt from the defendant, no evidence of refusal of the letter by him, nor any evidence of actual delivery of the process to him, a default judgment entered by the court against such defendant was void. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438 (Miss. 1968).

The general rule is that substituted service of process is complete when made upon the designated state official, and therefore receipt by the nonresident defendant of the specified notice of such service is not the determinative date for completion of process. *Ellis v. Milner*, 194 So. 2d 232 (Miss. 1967).

Where there was a passage of over a month between the date of service on the secretary of state and the rendition of a default judgment against a nonresident defendant, and he had no one file pleadings for him in the court or make any

other representation, the trial court did not abuse its discretion in entering a default judgment. *Ellis v. Milner*, 194 So. 2d 232 (Miss. 1967).

Service under this section [Code 1942, § 9352-61] by mailing a summons to defendant at his correct address is good although another address is stated in the summons, and the name given therein was an alias. *Nationwide Mut. Ins. Co. v. Tillman*, 249 Miss. 141, 161 So. 2d 604 (1964).

#### 4. Quashal of service.

Upon consideration of a motion to quash service of summons in a death action growing out of an automobile accident, the question is whether the allegations of the complaint and the facts of the case as disclosed show that the defendant brought before the court is such a defendant as is subjected by the statute to substituted service of process. *Tanksley v. Dodge*, 181 F.2d 925 (5th Cir. 1950).

#### 5. Decisions under former laws.

Under the Alabama nonresident motorist statute, the Alabama court had jurisdiction where both parties were nonresidents and the judgment is entitled to full faith and credit in Mississippi. *Burns v. Godwin*, 211 Miss. 310, 51 So. 2d 486 (1951).

The constitutionality of this statute is affirmed. *Bouchillon v. Jordan*, 40 F. Supp. 354 (S.D. Miss. 1941).

The fact that no venue is provided in the act itself does not render the act as so unreasonable as to offend any part of the constitution. *Bouchillon v. Jordan*, 40 F. Supp. 354 (S.D. Miss. 1941).

In cases not within the operation of Chapter 246 of the Act of 1940 fixing the venue in the county where the cause of action accrues, the proper venue of an action commenced as provided in this statute is the county where the secretary of state resides. *Bouchillon v. Jordan*, 40 F. Supp. 354 (S.D. Miss. 1941).

### RESEARCH REFERENCES

**ALR.** Constitutionality and construction of statute authorizing constructive or substituted service of process on, and con-

tinuation of pending action against, foreign representative of deceased nonresident driver of motor vehicle, arising out of

accident occurring in state. 18 A.L.R.2d 544.

Venue of action against nonresident motorist served constructively under statute. 38 A.L.R.2d 1198.

What is "motor vehicle" or the like within statute providing for constructive or substituted service of process on nonresident motorists. 48 A.L.R.2d 1283.

Who is subject to constructive or substituted service of process under statutes providing for such service on nonresident motorists. 53 A.L.R.2d 1164.

Who subject to substituted service of process under statutes providing for such service on nonresident motorists. 53 A.L.R.2d 1164.

Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state. 92 A.L.R.3d 797.

**Am Jur.** 8 Am. Jur. 2d (Rev), Automobiles and Highway Traffic §§ 827-856.

**CJS.** 60A C.J.S., Motor Vehicles §§ 989-991 et seq.

## §§ 13-3-65 through 13-3-67. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-65. [Codes, Hutchinson's 1848, ch. 58, art. 1 (43); 1857, ch. 61, art. 73; 1871, § 715; 1880, § 1535; 1892, § 3437; 1906, § 3936; Hemingway's 1917, § 2943; 1930, § 2989; 1942, § 1870]

§ 13-3-67. [Codes, Hutchinson's 1848, ch. 58, art. 1 (95); 1857, ch. 61, art. 69; 1871, § 711; 1880, § 2285; 1892, § 3438; 1906, § 3937; Hemingway's 1917, § 2944; 1930, § 2990; 1942, § 1871]

**Editor's Note** — Former § 13-3-65 provided for issuance, execution, and return of a writ of scire facias.

Former § 13-3-67 stated that any process appearing to be in other respects duly served, shall be good, though not directed to any officer.

## § 13-3-69. Process not void for certain defects.

If any matter required to be inserted in or indorsed on any process be omitted, such process shall not on that account be void, but it may be set aside as irregular, or amended on such terms as the court shall deem proper. The amendment may be made upon an application to set aside or quash the writ.

**SOURCES:** Codes, 1857, ch. 61, art. 70; 1871, § 712; 1880, § 2286; 1892, § 3439; 1906, § 3938; Hemingway's 1917, § 2945; 1930, § 2991; 1942, § 1873.

**Cross References** — Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## JUDICIAL DECISIONS

1. In general.
2. Defects not amendable.

### 1. In general.

A search warrant delivered to the sheriff "to any lawful officer of said county" is not void. Such process is amendable. *Matthews v. State*, 134 Miss. 807, 100 So. 18 (1924).

Where a deputy clerk issues an attachment writ in the name of the clerk, without affixing his own name as deputy, the writ may be amended. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905 (1895).

The failure of the circuit clerk to affix his signature to a venire facias is merely an irregularity amendable by motion and

a motion to quash dispenses with amendment where the writ has already served its purpose. *Hale v. State*, 72 Miss. 140, 16 So. 387 (1894), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

A writ of seizure (under Laws 1876) which commanded a seizure of agricultural products, but named no defendant and contained no personal summons, was not void. *Dogan v. Bloodworth*, 56 Miss. 419 (1879).

Where the name of a defendant is changed both in the declaration and writ by the plaintiff, the writ will not for that reason be quashed. *Maxey v. Strong*, 53 Miss. 280 (1876).

Where the process is made returnable to the wrong term of the court, the defect may be amended on motion and the appearance of the party to the motion obviates the necessity of the amendment. *Harrison v. Agricultural Bank*, 10 Miss. (2 S. & M.) 307 (1844).

## 2. Defects not amendable.

Search warrant issued in connection with a prosecution for violation of intoxicating liquor laws with no return day

named therein is void and cannot be amended. *Buxton v. State*, 205 Miss. 692, 39 So. 2d 310 (1949).

A search warrant dated only "this the 12th day of Johnson, 194-" was void and not subject to amendment by permission of the court. *Johnson v. State*, 202 Miss. 233, 31 So. 2d 127 (1947).

An execution issued to the sheriff of another county by the clerk of a circuit court on a duly enrolled judgment of a justice of the peace of his county, returnable before such a justice, is void and not amendable under this section [Code 1942, § 1873]. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

A summons issued during a term of court returnable instantan is a nullity and therefore is not amendable under this section [Code 1942, § 1873]. *Joiner v. Delta Bank*, 71 Miss. 382, 14 So. 464 (1893).

## RESEARCH REFERENCES

**ALR.** Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like. 6 A.L.R.3d 1179.

**Am Jur.** 62 Am. Jur. 2d (Rev), Process §§ 63, 64, 298 et seq.

Amendment of process, 20 Am. Jur. Pl & Pr Forms (Rev), Process, Forms 21-53.

**CJS.** 72 C.J.S., Process §§ 123 et seq., 136-140 et seq.

## § 13-3-71. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1942, § 1872; Laws, 1936, ch. 244; Laws, 1956, ch. 238; Laws, 1966, ch. 355, § 1; Laws 1981, ch. 358, § 1]

**Editor's Note** — Former § 13-3-71 authorized a defendant to waive process and enter an appearance without pleading.

## § 13-3-73. Plaintiff's options when sheriff kept off by force.

When the sheriff shall return, on any process, that he has been kept off by force, the plaintiff may issue an alias or pluries, as the case may be, or he may proceed in the action against the defendant as if the process had been returned executed.



**SOURCES:** Codes, Hutchinson's 1848, ch. 58, art. 1 (41); 1857, ch. 61, art. 71; 1871, § 713; 1880, § 2287; 1892, § 3440; Laws, 1906, § 3939; Hemingway's 1917, § 2946; Laws, 1930, § 2992; Laws, 1942, § 1874.

**Cross References** — Duty of the sheriff to execute and return process, see § 19-25-37.

Criminal offense of resisting authorized person attempting to serve or execute process, see § 97-9-75.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d, Process §§ 54, 58.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

### § 13-3-75. Return of alias where first writ served.

If any process be executed, and for want of a return thereof other process be issued, the sheriff or other officer shall not execute the subsequent process, but shall return the first process by him executed, if it be in his possession, and, if it be not in his possession, he shall return the subsequent process, with an indorsement of the execution of the first process, and how it was executed, on which there shall be the same proceedings as if the said first process had been duly returned.

**SOURCES:** Codes, Hutchinson's 1848, ch. 58, art. 1 (42); 1857, ch. 61, art. 72; 1871, § 714; 1880, § 2288; 1892, § 3441; 1906, § 3940; Hemingway's 1917, § 2947; 1930, § 2993; 1942, § 1875.

**Cross References** — Suing out of an alias when the defendant shall not be found, see § 13-3-15.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions §§ 115-118.

62 Am. Jur. 2d, Process §§ 278, 282 et seq.

**CJS.** 72 C.J.S., Process §§ 105, 106 et seq.

### § 13-3-77. Process may be executed by an officer out of his county.

The sheriff or other proper officer of a county may execute process out of his county, in case the person to be served or property to be seized was in the officer's county when the writ was received, but had removed or been carried into another county before its execution. In such case the officer shall state the

facts in his return, and the writ and return shall have the same effect as if the process had been returned not executed and a testatum or duplicate writ had been issued to and executed and returned by an officer of the county where served.

**SOURCES:** Codes, 1892, § 3500; 1906, § 3998; Hemingway's 1917, § 3005; 1930, § 3051; 1942, § 1939.

**Cross References** — Duty of the sheriff to execute and return process, see § 19-25-37.

Rule governing the service of summons, summons by publication, return of process, and the like, see Miss. R. Civ. P. 4.

### RESEARCH REFERENCES

**ALR.** Sheriff's deed as prima facie evidence of return. 36 A.L.R. 1001, 108 A.L.R. 672.

### § 13-3-79. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.  
[Codes, 1880, § 2291; 1892, § 3443; 1906, § 3942; Hemingway's 1917, § 2949; 1930, § 2995; 1942, § 1877; Laws, 1986, ch. 459, § 26]

**Editor's Note** — Former § 13-3-79 specified when persons other than sheriff or coroner could be appointed by a judge to execute process.

### § 13-3-81. When justice court judge may execute process.

If there be no sheriff in any county, or if good cause of exception exists against him, by reason of his being a party to or interested in the suit, or otherwise, the process may be directed to any justice court judge of the county, who shall be bound to execute the same, and to do all things which the sheriff would be bound to do if no exception existed against him. In case of any neglect or breach of such duty, the justice court judge shall be liable to the same penalties and subject to the same actions and remedies as sheriffs are subject to in like cases.

**SOURCES:** Codes, 1857, ch. 61, art. 75; 1871, § 699; 1880, § 2290; 1892, § 3445; 1906, § 3944; Hemingway's 1917, § 2951; 1930, § 2997; 1942, § 1879; Laws, 1986, ch. 459, § 27, eff from and after July 1, 1986.

**Cross References** — Execution of process issued by the justice of the peace, see § 11-9-107.

Power of the justice of the peace to appoint person to execute process when an authorized person cannot be had in time, see § 11-9-109.

Authority of the justice of the peace to issue a warrant for the arrest of an offender coming into the county, see § 99-3-21.

## JUDICIAL DECISIONS

### 1. In general.

Process can only be served by an officer authorized by statute. This statute, authorizing the service of process in certain cases by justices of the peace, does not empower a justice of the peace to serve a summons issued by himself. *McDugle v. Filmer*, 79 Miss. 53, 29 So. 996, 89 Am. St. R. 582 (1901).

Neither an interested sheriff nor his deputy, whether general or special, can serve the writ. *Dyson v. Baker*, 54 Miss. 24 (1876).

Process addressed to an officer interested in the case will be quashed on timely application. *McLeod v. Harper*, 43 Miss. 42 (1870).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process §§ 124, 125, 129-131, 267.

**CJS.** 72 C.J.S., Process §§ 33-38.

### § 13-3-83. Service of notices, summonses, subpoenas, orders, pleadings, motions, etc.

All notices provided for by law appertaining to actions, suits or proceedings of any kind in any court shall be served and returned by the sheriff or any constable of the county, or the marshal of any city, town or village therein in which such notices are to be served, to whom such notices may be delivered for that purpose. However, service of summonses and subpoenas in all courts except justice court shall be governed by the Mississippi Rules of Civil Procedure and in every instance, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served and filed in accordance with the provisions of the Mississippi Rules of Civil Procedure.

**SOURCES:** Codes, 1880, § 2289; 1892, § 3442; 1906, § 3941; *Hemingway's* 1917, § 2948; 1930, § 2994; 1942, § 1876; *Laws*, 1971, ch. 353, § 1; *Laws*, 1991, ch. 573, § 99; *Laws*, 1992, ch. 427 § 2, *eff from and after passage* (approved May 4, 1992).

**Cross References** — Notice served on attorney of party being as valid and effectual as if served on party himself, see § 11-49-11.

Duty of the sheriff to execute all orders and decrees of the circuit and chancery courts directed to him to be executed, see § 19-25-35.

## JUDICIAL DECISIONS

### 1. In general.

A bill of complaint was erroneously dismissed for the complainant's failure to

answer interrogatories within 30 days after service thereof, where the complainant had not been served with notice of the



filing of the interrogatories by a sheriff or other legal officer. *Robinson v. Hemphill*, 229 So. 2d 827 (Miss. 1969).

List of special venire and copy of the indictment need not be served on accused by sheriff. *Ivey v. State*, 154 Miss. 60, 119 So. 507 (1928).

Service under this section [Code 1942, § 1876] must be made by the sheriff or other lawful officer. *Merchants' Grocery Co. v. Merchants' Trust & Banking Co.*, 119 Miss. 99, 80 So. 494 (1919).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process § 267.

**CJS.** 72 C.J.S., Process §§ 47-52.

### § 13-3-85. Notice by summons of motions against officers for neglect of duty.

In all cases where motions are made against officers, or officers and their sureties, for neglect of official duty under any law, five days' notice shall be given by summons, to be served as in other cases, and this shall apply to motions against the personal representative of a deceased officer.

**SOURCES:** Codes, 1892, § 3444; 1906, § 3943; *Hemingway's* 1917, § 2950; 1930, § 2996; 1942, § 1878.

**Cross References** — Power of circuit court to hear and determine motions against officers for money collected but not paid on demand to party entitled thereto, see § 9-7-89.

Summary proceeding on motion by client against attorney for failing to pay over money received on client's behalf, see § 11-49-3.

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d, Process §§ 107, 110.

**CJS.** 72 C.J.S., Process § 107.

### § 13-3-87. Return of officer may be questioned by parties.

The return of the officer serving any process may, in the same action, be shown to be untrue by either of the parties, but the officer himself shall not be permitted to question its truth.

**SOURCES:** Codes, 1857, ch. 61, art. 65; 1871, § 707; 1880, § 1533; 1892, § 3446; 1906, § 3945; *Hemingway's* 1917, § 2952; 1930, § 2998; 1942, § 1880.

## JUDICIAL DECISIONS

### 1. In general.

No reversible error was found in trial judge excluding testimony directed toward identity of person who actually served summons; one acting generally as deputy sheriff, under written appoint-

ment from sheriff, although not having qualified according to law, is de facto officer and between third parties his actions are valid; and, in absence of proof to contrary, it is presumed that person whose name was appended to return on writ as

special deputy was duly authorized as such. *Pointer v. Huffman*, 509 So. 2d 870 (Miss. 1987).

A motion by plaintiff to permit an amendment to the return of service of process to show that the person served was defendant's designated agent for accepting service of process was improperly denied where the testimony of deputy sheriff who executed the summons was competent to amend his return for such purposes and where such an amendment would be a ministerial act permitted by this section. *Taylor v. F. & C. Contracting Co.*, 362 So. 2d 625 (Miss. 1978).

Where a judgment by default has been rendered at the return term upon a return of personal service of a summons appar-

ently regular such judgment may, at a subsequent term, be vacated by a motion showing that the return was false and that the summons had only been served four days before its return day, and the court will direct an issue of fact to try the truth of the return. If the motion be sustained, the suit will be a pending one. *Meyer Bros. v. Whitehead*, 62 Miss. 387 (1884).

The statute clearly contemplates that the party objecting to the return in a pending action should plead the facts in the nature of a plea in abatement. A mere motion to set aside should be overruled and testimony thereon refused. *Mayfield v. Barnard*, 43 Miss. 270 (1870).

### RESEARCH REFERENCES

**ALR.** Sufficiency of jurat or certificate to affidavit for publication. 1 A.L.R. 1573, 116 A.L.R. 589.

**Am Jur.** 62 Am. Jur. 2d, Process §§ 292 et seq.

**CJS.** 72 C.J.S., Process §§ 121, 122.

### § 13-3-89. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 3447; 1906, § 3946; Hemingway's 1917, § 2953; 1930, § 2999; 1942, § 1881]

**Editor's Note** — Former § 13-3-89 provided that when a summons or citation was quashed on motion of defendant, the case could be continued for the term, but that the defendant was deemed to have entered his appearance.

### § 13-3-91. Reversal, on appeal by defendant, for want of service or defective service as an appearance.

Where a judgment or decree is reversed on appeal taken by defendant for the want of service, or because of defective service of process, a new summons or citation need not be issued or served, but the defendant shall, without such process or service, be presumed to have entered his appearance to the cause in the court from which the appeal was taken when the mandate shall be filed therein.

**SOURCES:** Codes, 1892, § 3448; 1906, § 3947; Hemingway's 1917, § 2954; 1930, § 3000; 1942, § 1882.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

**1. Validity.**

Similar legislation in Texas, forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, has been held not to deprive him of liberty or property within the prohibition of the Fourteenth Amendment to the Federal Constitution. *York v. Texas*, 137 U.S. 15, 11 S. Ct. 9, 34 L. Ed. 604 (1890); *Kauffman v. Wootters*, 138 U.S. 285, 11 S. Ct. 298, 34 L. Ed. 962 (1891).

**2. Construction and application.**

Following a successful appeal from an order overruling a motion to set aside a

final decree because of defective process, the defendant is presumed to have entered her appearance and no new process is necessary. *High v. High*, 186 So. 2d 196 (Miss. 1966).

Defendant's appeal from justice court and appearance in circuit court and motion to quash process and dismiss for want of jurisdiction constituted appearance and waiver of absence of process. *Turner v. Williams*, 162 Miss. 258, 139 So. 606 (1932).

An appeal of a case from the justice of the peace court to the circuit court gives the circuit court jurisdiction of the defendant. *Illinois Cent. R.R. v. Swanson*, 92 Miss. 485, 46 So. 83 (1908).

## RESEARCH REFERENCES

**ALR.** Reciprocal rights, duties, and liabilities where driver of motor vehicle attempts to pass on right of other motor vehicle proceeding in same direction. 38 A.L.R.2d 114.

**Am Jur.** 4 Am. Jur. 2d, Appearance §§ 2-4.

2 Am. Jur. Pl & Pr Forms (Rev), Appearance, Forms 6, 7, 9, 11, 12, 14.

**CJS.** 6 C.J.S., Appearances § 12.

**§ 13-3-93. Subpoenas for witnesses.**

The first process, in all civil actions, and in all courts, to compel the attendance of a witness, shall be a subpoena, the procedural aspects of which shall be governed by the Mississippi Rules of Civil Procedure.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 60, art. 1 (102); 1857, ch. 61, art. 194; 1871, § 761; 1880, § 1586; 1892, § 3449; 1906, § 3948; *Hemingway's* 1917, § 2955; 1930, § 3001; 1942, § 1883; Laws, 1991, ch. 573, § 100, eff from and after July 1, 1991.

**Cross References** — Power of the chancery court to issue subpoenas for the attendance of witnesses, see § 9-5-85.

Power of the justice of the peace to issue subpoenas for the attendance of witnesses, see § 11-9-115.

Power of arbitrators in certain arbitration proceedings to subpoena witnesses, see § 11-15-117.

Issuance of subpoenas in habeas corpus proceedings, see § 11-43-39.

Summons generally, see § 13-3-5.

Power of the foreman of a grand jury to issue subpoenas for attendance of witnesses, see § 13-5-63.

Amounts of witness fees, see § 25-7-47.

Summoning witnesses to appear before courts-martial, see § 33-13-321.

Power of banking examiners and commissioner of banking and consumer finance to subpoena witnesses, see § 81-1-85.



For another section derived from same 1942 code section, see § 99-9-11.

Power of a conservator of the peace, in examinations had before him for offenses, to issue subpoenas, see § 99-15-9.

Right to subpoena witnesses under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

For the rule governing subpoenas, see Miss. R. Civ. P. 45.

Procedural requirements for requests for subpoenas in circuit courts, see Miss. Uniform Rule of Circuit and County Court Practice 2.01.

## JUDICIAL DECISIONS

### 1. In general.

A witness attending court cannot claim attendance from the opposite party who

loses the suit unless he has been subpoenaed. *Yazoo & Miss. V. Ry. v. Richardson*, 104 Miss. 575, 61 So. 649 (1913).

## RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d, Witnesses §§ 7 et seq.

**CJS.** 98 C.J.S., Witnesses §§ 20-66.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 11:1.

## §§ 13-3-95 through 13-3-101. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 13-3-95. [Codes, Hutchinson's 1848, ch. 60, art. 1 (119); 1857, ch. 61, art. 195; 1871, § 762; 1880, §§ 1587, 1616; 1892, § 3450; 1906, § 3949; Hemingway's 1917, § 2956; 1930, § 3002; 1942, § 1884.]

§ 13-3-97. [Codes, 1857, ch. 61, art. 195; 1871, § 763; 1880, § 1587; 1892, § 3451; 1906, § 3950; Hemingway's 1917, § 2957; 1930, § 3003; 1942, § 1885.]

§ 13-3-99. [Codes, 1880, § 1594; 1892, § 3452; 1906, § 3951; Hemingway's 1917, § 2958; 1930, § 3004; 1942, § 1886; Laws, 1936, ch. 250.]

§ 13-3-101. [Codes, 1857, ch. 61, art. 196; 1871, § 764; 1880, § 1588; 1892, § 3453; 1906, § 3952; Hemingway's 1917, § 2959; 1930, § 3005; 1942, § 1887.]

**Editor's Note** — Former § 13-3-95 related to issuance of subpoena requiring attendance before master, commissioner, referee, or surveyor.

Former § 13-3-97 related to issuance of subpoena for witness to give dispositions for use in other states.

Former § 13-3-99 related to process to compel attendance of witness in certain counties during term.

Former § 13-3-101 related to service of subpoena.

## § 13-3-103. Attachment for non-appearing subpoenaed witness.

If any person subpoenaed as a witness shall fail to appear and attend as required, an attachment shall be issued by order of the court or other authority before which he was subpoenaed to appear, returnable at such time as the court or authority may appoint. The court or authority shall, on ordering the

attachment, direct whether the witness shall enter into bond for his appearance, and in what sum, and whether with or without sureties, which bond the sheriff, or other officer by whom the attachment is executed, is authorized to take, payable to the state. In case the witness shall appear in answer to the attachment, the court may discharge him therefrom, on good cause shown, or may require him to enter into recognizance or bond for his appearance until discharged, to testify in the cause. In case the witness shall not appear, in pursuance of his recognizance or bond, the same proceedings shall be had as upon the forfeiture of a recognizance in a criminal case.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1 (121); 1857, ch. 61, art. 197; 1871, § 765; 1880, § 1589; 1892, § 3454; 1906, § 3935; Hemingway's 1917, § 2960; 1930, § 3006; 1942, § 1888.

**Cross References** — Form of an attachment for a witness issued by a justice of the peace, see § 11-9-121.

Witness not obeying a subpoena served on him in a habeas corpus proceeding, see § 11-43-49.

For another section derived from same 1942 code section, see § 99-9-19.

### RESEARCH REFERENCES

**Am Jur.** 81 Am. Jur. 2d (Rev), Witnesses §§ 6 et seq.

Attachment of witness for failure to obey subpoena, 25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 96, 97.

Attachment of witness for failure to obey subpoena, 21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:738.

**CJS.** 98 C.J.S., Witnesses §§ 92, 108-115, 132-141, 143.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 11:1.

### § 13-3-105. Subpoenaed witness to attend until discharged; scire facias for defaulters.

Every witness subpoenaed in any case, civil or criminal, shall attend, from day to day, and from term to term without further notice, until discharged by the court or by the party at whose instance he was subpoenaed, and in default thereof he shall be fined by the court not more than Five Hundred Dollars (\$500.00), and a scire facias shall issue thereon, requiring him to appear at the next term of the court, to show cause why the fine should not be made absolute. If cause be not then shown, the fine shall be made final. In criminal cases, the court may cause the witnesses on either side to be bound by bond or recognizance to appear and testify until discharged.

**SOURCES:** Codes, Hutchinson's 1848, ch. 60, art. 1 (103, 105); 1857, ch. 61, arts. 196, 198; 1871, § 766; 1880, §§ 1590, 1591, 1592; 1892, § 3455; 1906, § 3954; Hemingway's 1917, § 2961; 1930, § 3007; 1942, § 1889.

**Cross References** — For another section derived from same 1942 code section, see § 99-9-21.

## JUDICIAL DECISIONS

### 1. In general.

After the state rested its case in a prosecution for assault and battery with an intent to kill, the district attorney had

authority to release a witness subpoenaed by the state, who had not been subpoenaed by the defendant. *Nicholson v. State*, 230 Miss. 267, 92 So. 2d 654 (1957).

## RESEARCH REFERENCES

**ALR.** Uniform Act to secure attendance of witnesses from without the state in criminal proceedings. 44 A.L.R.2d 732.

**Am Jur.** Scire facias on judgment against witness failing to obey subpoena,

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Form 93.

Writ of scire facias against defaulting witness, 18 Am. Jur. Pl & Pr Forms, Scire Facias, Forms 18:181, 18:182.

### § 13-3-107. Settlement of certain civil suits; notice to be given to subpoenaed witnesses and effect of failure to do so.

If a civil suit shall be settled in vacation, notice thereof shall be given to the witnesses subpoenaed to appear. If such notice is not given, they shall be entitled to the same compensation for their subsequent attendance in pursuance of the subpoena as if the suit had not been settled.

**SOURCES:** Codes, 1857, ch. 61, art. 196; 1871, § 764; 1880, § 1588; 1892, § 3453; 1906, § 3952; Hemingway's 1917, § 2959; 1930, § 3005; 1942, § 1887.

**Cross References** — For another section derived from same 1942 code section, see § 99-9-17.

### § 13-3-109. Issuance of process by supreme court and its return.

The Clerk of the Supreme Court shall issue all process which may be ordered to issue by the court or any judge thereof. All process issuing from said court or on the order of any judge thereof, or which may be returnable therein, shall be under the seal of the court, and be signed by the clerk thereof, and may be directed to the sheriff or other proper officer of any county, who shall execute and return the same according to the command thereof. Whenever any such process shall not be executed or not returned, an alias may be issued by the clerk on the application of the person who sued out the former process.

**SOURCES:** Codes, 1857, ch. 63, art. 28; 1871, § 430; 1880, § 1448; 1892, § 3458; 1906, § 3957; Hemingway's 1917, § 2964; 1930, § 3010; 1942, § 1898; Laws, 1991, ch. 573, § 101, eff from and after July 1, 1991.

**Cross References** — Filing and service, see Miss. R. App. P. 25.  
Substitution of parties, see Miss. R. App. P. 43.



## JUDICIAL DECISIONS

**1. In general.**

Where the landowners, the trustee, and the mortgagee in a deed of trust on property sought to be acquired by eminent domain proceedings were not summoned to appear in the supreme court, that court cannot proceed until they have been prop-

erly made parties on appeal. *Mississippi State Hwy. Comm'n v. Nixon*, 253 Miss. 636, 170 So. 2d 631 (1965).

The appellee must have notice of an appeal to the supreme court. *Beasley v. Cottrell*, 94 Miss. 253, 47 So. 662 (1908).

## RESEARCH REFERENCES

**Am Jur.** 62 Am. Jur. 2d (Rev), Process §§ 8, 9.

**CJS.** 72 C.J.S., Process §§ 6-11.

**§ 13-3-111. Time when executions shall be issued.**

The clerks of all courts of law or equity, after the adjournment of the court for the term shall, at the request and cost of the owner of the judgment or decree or his attorney, issue executions on all judgments and decrees rendered therein, and place the same in the hands of the sheriff of the county. The sheriff shall effectuate any execution on a judgment. If requested by such owner, they shall issue executions directed to the sheriff of any other county, and shall deliver the same to the owner or his attorney.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 59, art. 9 (4); 1857, ch. 61, art. 265; 1871, § 837; 1880, § 1742; 1892, § 3459; 1906, § 3958; *Hemingway's* 1917, § 2965; 1930, § 3011; 1942, § 1899; *Laws*, 1976, ch. 331; *Laws*, 1990, ch. 408, § 1, eff from and after July 1, 1990.

**Cross References** — Duty of attorney general to direct the issuing of process necessary to carry into execution judgment in any cause represented by him, see § 7-5-33.

Power of the circuit court to award executions, see § 9-7-91.

Execution on judgment or decree appealed from not being issued when a bond for stay of execution is given, see § 11-51-59.

Power of court clerks to make out executions for unpaid costs, see § 11-53-73.

Execution against collateral to enforce security interest, see § 75-9-501.

Duties of clerks and sheriffs with respect to executions issued on judgments rendered in suits on promissory notes and bills of exchange, see § 75-13-7.

Provisions to effect that procedure on execution shall be as provided by statute, see *Miss. R. Civ. P.* 69.

## JUDICIAL DECISIONS

**1. In general.**

Bank executed on a summary judgment that was granted against corporation, and two other related actions were still pending; the pending lawsuits were choses in action and subject to a writ of execution, and the procedure selected by the bank, which was the initiation of a sheriff's

execution sale against the plaintiffs' choses in action, was entirely appropriate. *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006).

Prevailing party held not entitled to recover witness fees where certificate of allowance was not issued by clerk or demanded by witness during term of court or

within five days thereafter, although witness made proper affidavit before clerk. *Woodruff v. Bright*, 175 Miss. 109, 166 So. 390 (1936).

A justice of the peace cannot purchase property at an execution sale on an execution issued from his court. *E.E. Forbes Piano Co. v. Hennington*, 98 Miss. 51, 53 So. 777, Am. Ann. Cas. 1913A,1216 (1910).

An execution issued to the sheriff of another county by the clerk of a circuit court, on a duly enrolled judgment of a

justice of the peace of his county, returnable before such justice, is not authorized by this section (Code 1892, § 3459), but is void. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

And such writ is not amendable under Code 1892, § 3439 (Code 1942, § 1873), and it is immaterial that the objection thereto was not made prior to a motion for new trial because the failure to object cannot vitalize a void writ. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

## RESEARCH REFERENCES

**ALR.** Formal entry or docketing, of judgment as prerequisite to issuance of execution. 65 A.L.R.2d 1162.

Insury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from wrongful execution against business property. 55 A.L.R.3d 911.

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions §§ 77 et seq.

General executions, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 31-33.

Special executions, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 41-46.

**CJS.** 33 C.J.S., Executions §§ 69, 85-88.

## § 13-3-113. Issuance, execution, and return of executions.

Writs of execution shall bear date and be issued in the same manner as original process, and shall be made returnable on the first day of the next term of the court in which the judgment or decree was rendered, if there be fifteen days between the issuance and return thereof, and, if not, on the first day of the term next thereafter. Such execution may be directed to the sheriff or other proper officer of any county, who shall serve and execute the same, and make return thereof to the court in which the judgment or decree was rendered.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 62, art. 1 (7); 1857, ch. 61, art. 267; 1871, § 839; 1880, § 1743; 1892, § 3460; 1906, § 3959; *Hemingway's* 1917, § 2966; 1930, § 3012; 1942, § 1900.

**Cross References** — Time within which execution shall not be issued on judgment of a justice of the peace, see § 11-9-131.

Form of an execution issued on a judgment of a justice of the peace, see § 11-9-133.

Selection by a defendant of exempt personal property where an officer is about to levy an execution or attachment on personal property, see § 85-3-3.

Judgment for personal injury not exceeding \$10,000 being exempt from execution, see § 85-3-17.

Issuance of a special writ of execution for the sale of a house, building, structure, or fixture and land, see § 85-7-153.

Executions on judgments rendered against a principal and surety, see § 87-5-13.

Criminal offense of resisting authorized person attempting to serve process, see § 97-9-75.

Provisions to effect that procedure on execution shall be as provided by statute, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

**1. In general.**

The return of an officer showing the sale of land to a designated person does not transfer a title, it only gives the purchaser the right to demand a deed conveying title. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

An execution issued to the sheriff of another county by the clerk of a circuit court on a duly enrolled judgment of a justice of the peace of his county is unauthorized. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

A person is not disqualified to act as deputy sheriff in levying an execution because he is agent for the plaintiff in collecting the judgment and is to receive a commission on the collection. It is error to quash a levy because of such fact. *Badley v. Ladd*, 70 Miss. 688, 12 So. 832 (1893).

An execution issued seventeen days before the return term, and received by the sheriff ten days after issuance, is not void. *Skinner v. Wilson*, 61 Miss. 90 (1883); *Williamson v. Williamson*, 52 Miss. 725 (1876).

An execution issued within five days of a term and made returnable thereto is void. *Harris v. West*, 25 Miss. 156 (1852).

A sale of land made under an execution after its return day does not pass title. *Lehr v. Doe*, 11 Miss. (3 S. & M.) 468 (1844).

If an execution issued more than fifteen days before a term be made returnable to a later term, it will be void. *Lehr v. Rogers*, 11 Miss. (3 S. & M.) 468 (1844).

## ATTORNEY GENERAL OPINIONS

With respect to execution sales of mobile homes for unpaid ad valorem taxes and any excess funds over which the officer conducting the sale is entitled to retain after payment of judgment liens in order of priority, there is both a statutory

method (Section 13-3-181) and a remedy by rule (M.R.C.P.) for distribution of funds when there are conflicting claims thereto. *Blaker, II*, January 30, 1998, A.G. Op. #98-0023. *Williamson v. Williamson*, 52 Miss. 725 (1876).

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions §§ 92 et seq.

Complaint, petition, or declaration against sheriff for failure to return execution, 22 Am. Jur. Pl & Pr Forms (Rev) Sheriffs, Police, and Constables, Form 91.

Complaint, petition, or declaration against sheriff for false return of execution, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Forms 93, 94.

Complaint, petition, or declaration against sheriff for neglect of deputy in failing to levy execution, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 32.

Complaint, petition, or declaration against surety to recover unsatisfied judgment against defaulting sheriff and deputy, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 21.

9A Am. Jur. Pl & Pr Forms (Rev), Executions, Form 21.1 (Affidavit — For issuance of execution).

Directions to execution officer, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 71-76.

Return to writ of execution, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 171-181.

Complaint against sheriff for failure to levy or return execution, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Forms 18:558-18:560, 18:562.

Complaint against sheriff for false return of execution, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Form 18:564.

Complaint on sheriff's bond for failure to levy execution, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Form 18:592.



CJS. 33 C.J.S., Executions §§ 93 et seq.

**§ 13-3-115. Issuance of subsequent execution.**

If a first writ of execution shall not have been returned and shall not have been executed, the clerk may issue another execution at the cost of any party in whose favor the execution was issued, if such party shall desire to take out another execution.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; 1906, § 3960; Hemingway's 1917, § 2967; 1930, § 3013; 1942, § 1901.

**Cross References** — For other sections derived from same 1942 code section, see §§ 13-3-117, 13-3-119.

Issuance, execution, and return of execution, see Miss. Rule Civil Proc. 69.

**RESEARCH REFERENCES**

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions §§ 115-118.

**CJS.** 33 C.J.S., Executions §§ 119-130.

**§ 13-3-117. Issuance of execution against several defendants.**

When one judgment has been recovered against several defendants, execution shall issue thereon against all the defendants, and not otherwise.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1(3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; 1906, § 3960; Hemingway's 1917, § 2967; 1930, § 3013; 1942, § 1901.

**Cross References** — For other sections derived from same 1942 code section, see §§ 13-3-115, 13-3-119.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

**ATTORNEY GENERAL OPINIONS**

Under Section 13-3-117, the court should issue a writ of execution against all defendants who have had a judgment rendered against them. The sheriff has no duty under Section 13-3-117, except to serve the writs of execution which are issued by the court. Hooks, April 5, 1996, A.G. Op. #96-0163.

A taking, under Section 13-3-117, may be constructive rather than actual, so long as the officer assumes dominion and control over the property. Hooks, April 5, 1996, A.G. Op. #96-0163.

**RESEARCH REFERENCES**

**Am Jur.** Executions against multiple debtors, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 51-53.

### § 13-3-119. Effect of death of one or more of several defendants before issuance of execution.

If one or more of several defendants have died before the issuance of a writ of execution, and a revivor shall not have been had, the fact of the death shall be noted on the writ, and the property of the survivors only shall be liable to the execution in such case.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (3); 1857, ch. 61, art. 269; 1871, § 840; 1880, § 1774; 1892, § 3461; 1906, § 3960; Hemingway's 1917, § 2967; 1930, § 3013; 1942, § 1901.

**Cross References** — For other sections derived from same 1942 code section, see §§ 13-3-115, 13-3-117.

For the rule governing substitution upon the death of a party, see Miss. R. Civ. P. 25. Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Where before the issuance of execution one of several judgment defendants dies, a sale of his property thereunder without previous revivor against the heirs is void. *Faison v. Johnson*, 70 Miss. 214, 12 So. 152 (1892).

The plaintiff may have execution against survivors though it must issue

against all by name, with suggestion of death noted on the writ. *Bowen v. Bonner*, 45 Miss. 10 (1871).

The failure to note the death of one will not vitiate the execution as to the other defendants. *Wade v. Watt, Nobel & Mobley*, 41 Miss. 248 (1866).

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions § 52.

Proceedings where judgment debtor is

deceased, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 401-411.

**CJS.** 33 C.J.S., Executions §§ 80-84.

### § 13-3-121. Execution for costs of Supreme Court.

In cases decided in the Supreme Court, or dismissed or otherwise disposed of, the clerk of the court may issue executions for costs accrued in the Supreme Court, in excess of the filing fee, in the same manner that the clerks of the circuit courts are authorized to issue executions against any party liable therefor. Such executions may be directed to the sheriff of any county, and shall be returned in the same manner and under like penalties as in case of executions returnable to the circuit court.

**SOURCES:** Codes, 1857, ch. 63, art. 31; 1871, § 433; 1880, § 1449; 1892, § 3462; 1906, § 3961; Hemingway's 1917, § 2968; 1930, § 3014; 1942, § 1902; Laws, 1978, ch. 335, § 34, eff from and after July 1, 1978.

**Cross References** — Power of court clerks to make out executions for unpaid costs, see § 11-53-73.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Clerk of supreme court is not authorized to issue writs of garnishment on judgments by supreme court for costs incurred on appeal thereto. *State v. Keeton*, 176 Miss. 590, 169 So. 760 (1936).

A case determining the application of costs collected on appeal without superseas. *Boyd v. Applewhite*, 123 Miss. 185, 85 So. 87 (1920).

## RESEARCH REFERENCES

**Am Jur.** 20 Am. Jur. 2d, Costs §§ 98-101.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

### § 13-3-123. Levy of writs of execution and attachments—on land.

In case of a levy of an attachment on real estate in the occupancy of any person, the officer shall go to the house or upon the land of the defendant, and there declare that he attaches the same at the suit of the plaintiff, but if the land be unoccupied, or if the process be an execution, he may attach or levy upon the same by returning that he has attached or levied upon the land, describing it by numbers or otherwise properly, and, if the process be an attachment, stating that the land is unoccupied; and in all cases the return of the officer shall be conclusive of the facts stated therein, except on timely motion to quash.

**SOURCES:** Codes, 1892, § 3464; 1906, § 3963; Hemingway's 1917, § 2970; 1930, § 3016; 1942, § 1904.

**Cross References** — Service of a writ of attachment generally, see § 11-33-23.

Duty of officer levying upon real estate by virtue of any process other than an execution upon a judgment to file notice with the chancery court clerk, see § 11-47-5.

Limitation period applicable to executions on domestic judgments, see § 15-1-43.

Domestic judgment not being a lien on a defendant's property for longer than 7 years unless an action be brought thereon before the expiration of such time, see § 15-1-47.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

In attachment suit in chancery against land of nonresident, no lien is created until mandatory provisions of Code 1942, §§ 756, 2731, and this section [Code 1942, § 1904] are complied with by issuance and levy of writ of attachment and filing of notice of levy, and mere filing of lis pendens notice is insufficient to create lien.

*Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

In attachment suit in chancery against nonresident, alleged to own land in this state, for damages arising out of breach of warranty in sale of automobile, person claiming lis pendens notice filed in suit creates cloud upon his superior interest in the land may become party to suit on



motion for purpose of protecting his interest and by his appearance in suit intervenor does not waive necessity of issuance and levy of writ of attachment. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

A sheriff holding an attachment writ against a corporation may refuse the demand of the plaintiff to levy it on the property of the individuals who compose it and manage its affairs, and by such refusal he does not incur liability to the plaintiff. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

His liability cannot be affected by showing that if the levy had been made the property might thereafter have been subjected in a chancery proceeding to the demand of the plaintiff. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

A service or levy of an attachment by an interested party is void. *Dyson v. Baker*, 54 Miss. 24 (1876).

The directions of the statute as to the manner of levying an attachment must be complied with. *Tucker v. Byars*, 46 Miss. 549 (1872).

It is not necessary to the validity of the return that it should state that the property belonged to the defendant; that fact will be intended. *Saunders v. Columbus Life & Gen. Ins. Co.*, 43 Miss. 583 (1870).

If the return show a substantial compliance with the statute, the levy will be valid. The return need not follow the exact language used in the statute. *Saunders v. Columbus Life & Gen. Ins. Co.*, 43 Miss. 583 (1870).

## ATTORNEY GENERAL OPINIONS

The sheriff is not required to search the title to land to determine ownership or the identity of mortgagees before levying execution. The act of levying execution would

entail going on the land and posting notice of the service of the writ. See Section 13-3-123. *Richardson*, September 13, 1995, A.G. Op. #95-0229.

## RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 73, 307-311.

30 Am. Jur. 2d, Executions §§ 195 et seq.

9A Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 31 et seq. (writs of execution).

**CJS.** 7 C.J.S., Attachment §§ 100-103, 311-321.

33 C.J.S., Executions §§ 40, 143, 144.

## § 13-3-125. Levy of writs of execution and attachments — on personalty.

If the levy be upon personal property the officer shall take the same into his possession and dispose of it according to law.

**SOURCES:** Codes, 1892, § 3465; 1906, § 3964; Hemingway's 1917, § 2971; 1930, § 3017; 1942, § 1905.

**Cross References** — Delivery of property seized in execution of process by one appointed by a justice of the peace to execute it, see § 11-9-111.

Service of a writ of attachment generally, see § 11-33-23.

Selection of exempt personal property where an officer is about to levy an execution or attachment on personal property, see § 85-3-3.

Indemnity bond to be furnished officer levying an execution or attachment on personal property claimed to be exempt, see § 85-3-5.

Liability of sheriff seizing personal property exempt from execution, see § 85-3-5.

Replevy by defendant whose exempt personal property is seized pursuant to an execution or attachment, see § 85-3-9.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Where the sheriff left the automobiles upon which he levied execution in the possession of the judgment debtor but took the serial numbers of the vehicles and advised the debtor not to dispose of them in any manner, he took constructive possession of them and the levy was valid. *Murdock Acceptance Corp. v. Woodham*, 208 So. 2d 56 (Miss. 1968).

The seizure may be constructive. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

A valid levy may be made by taking down serial or model numbers of appliances and leaving them in the debtor's store under an agreement that they were not to be sold. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

An instance of an unsuccessful effort to levy on a warrant in chancery clerk's cus-

tody. *Mulford v. Roberts*, 112 Miss. 573, 73 So. 609 (1917).

A sheriff holding an attachment writ against a corporation may refuse the demand of the plaintiff to levy it on the property of the individuals who compose it and manage its affairs, and by such refusal he does not incur liability to the plaintiff. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

His liability cannot be affected by showing that if the levy had been made the property might thereafter have been subjected to the demand of the plaintiff. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

It is essential to the validity of the levy of an attachment on personalty that the officer take the possession of the same. *Gates & Pleasants v. Flint*, 39 Miss. 365 (1860).

## RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 74, 293 et seq.

30 Am. Jur. 2d, Executions § 200.

**CJS.** 7 C.J.S., Attachment §§ 65-72, 76, 396-400.

33 C.J.S., Executions §§ 28, 146-153, 156-159.

### § 13-3-127. Levy of writs of execution and attachments — on choses in action.

In case an attachment be levied on rights, credits, and choses in action, the officer shall take into his possession the books of accounts and other evidences of debt belonging to the defendant, and if the plaintiff so direct, he shall summon all persons appearing to be indebted to the defendant, or to have effects of his in their hands, as garnishees, in the manner prescribed by law.

**SOURCES:** Codes, 1892, § 3466; 1906, § 3965; Hemingway's 1917, § 2972; 1930, § 3018; 1942, § 1906.

**Cross References** — Sale or assignment of any chose in action after suit thereon has been filed, see § 11-7-7.

Service of a writ of attachment generally, see § 11-33-23.

Liability to levy of money, banknotes, judgments and the like, see § 13-3-133.

Purchaser's title to chose in action of defendant sold under execution or attachment, see § 13-3-135.

Duties of clerks and sheriffs with respect to executions issued on judgments rendered in suits on promissory notes and bills of exchange, see § 75-13-7.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Nothing in Miss. Code Ann. § 13-3-127, which was limited to attachments, supported the argument that a chose in action was not subject to a writ of execution. *Maranatha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004 (Miss. 2004).

A suggestion in the writ that a certain person is indebted to the defendant makes it the duty of the officer to summon that

person as garnishee, even though the writ contains no direct command that he do so. *Semmes v. Patterson*, 65 Miss. 6, 3 So. 35 (1887).

The officer is not required to summon as garnishees all persons shown by the books of account to be indebted to defendant, but only such as may be alleged so to be. *Boone v. McIntosh*, 62 Miss. 744 (1885).

## RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d (Rev), Attachment and Garnishment §§ 83 et seq., 304.  
30 Am. Jur. 2d, Executions §§ 142 et seq.

General Executions, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Form 51.

**CJS.** 7 C.J.S., Attachment § 73.  
33 C.J.S., Executions §§ 35-37, 154, 534.

## § 13-3-129. Levy of writs of execution and attachments — on corporate stock and the like.

In case of the levy of an execution or attachment on the stock, shares, or interest of the defendant in any corporation or joint stock company, the officer shall go to the office or principal place of business of the corporation or company, and there declare that he attaches or levies upon the stock, shares, or interest of the defendant therein at the suit of the plaintiff. The officer shall demand of any officer, agent, or clerk of such corporation or company there present, and who is not the defendant, a statement in writing, under oath, of the amount of the defendant's stock, the number of his shares, or extent of his interest in such corporation or company, and shall leave with the officer, agent, or clerk, a copy of the writ. If no such officer, agent, or clerk be present, the officer shall post conspicuously at such office or place of business a copy of the writ, with a statement therewith that he has attached or levied upon the stock, shares, or interest of the defendant at the suit of the plaintiff, and that he demands of the corporation or company the statement, under oath, of the defendant's stock, share, or interest therein. The stock, shares, and interest of the defendant in the corporation or company, including all dividends that may accrue after such levy, shall be bound by the lien of the execution or attachment. The corporation or company shall, within a reasonable time, not longer than ten days after the levy, deliver to the officer a statement in writing, under oath, of the particulars demanded by the officer, and of the value of the



defendant's stock, shares, or interest, and in case the corporation or company shall neglect or refuse to do so, or shall wilfully make any false statement thereof, such corporation or company shall be liable to the plaintiff for the full amount of the judgment or decree, or of such judgment as the plaintiff shall recover if the process be an attachment. The failure of the corporation or company to make such statement shall not affect the right of the officer to sell the stock, shares, or interest of the defendant.

**SOURCES:** Codes, 1892, § 3467; 1906, § 3966; Hemingway's 1917, § 2973; 1930, § 3019; 1942, § 1907.

**Cross References** — Service of a writ of attachment generally, see § 11-33-23.

Seizure and sale of corporate property and franchise when a judgment is returned against a corporation, see § 79-1-13.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### JUDICIAL DECISIONS

#### 1. In general.

A certificate of shares of corporate stock issued to the judgment debtor, found in the custody of his agent or trustee, was held to be a proper subject of levy and sale under a similar provision contained in Code 1871, § 849. *Yazoo & Miss. V. Ry. v.*

*City of Clarksdale*, 257 U.S. 10, 42 S. Ct. 27, 66 L. Ed. 104 (1921).

Legislature may fix situs of stock of domestic corporation at its domicile for purposes of execution and attachment. *Grenada Bank v. Glass*, 150 Miss. 164, 116 So. 740 (1928).

### RESEARCH REFERENCES

**ALR.** Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares. 42 A.L.R.2d 920.

**Am Jur.** 6 Am. Jur. 2d (Rev), Attachment and Garnishment §§ 89, 305.

30 Am. Jur. 2d (Rev), Executions §§ 150, 201.

**CJS.** 7 C.J.S., Attachment §§ 74, 231, 232.

33 C.J.S., Executions §§ 39-159.

### § 13-3-131. Levy of writs of execution and attachments — on interest of partners or co-owners.

When a defendant in execution shall own or be entitled to an undivided interest in any property not exclusively in his own possession, such interest may be levied on and sold by the sheriff without taking the property into actual possession, and such sale shall vest in the purchaser all the interest of the defendant in such property.

**SOURCES:** Codes, 1892, § 3468; 1906, § 3967; Hemingway's 1917, § 2974; 1930, § 3020; 1942, § 1908.

**Cross References** — Service of a writ of attachment generally, see § 11-33-23.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

**1. In general.**

A voluntary partition of land between co-tenants by agreement will not affect the right of a judgment creditor having a

lien upon the interest of one tenant. *Simmons v. Gordon*, 98 Miss. 316, 53 So. 623, Am. Ann. Cas. 1913A,1143 (1910).

## RESEARCH REFERENCES

**ALR.** Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy. 51 A.L.R.4th 906.

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 152, 153.

59A Am. Jur. 2d, Partnership §§ 500 et seq.

**CJS.** 7 C.J.S., Attachment §§ 323-325.  
33 C.J.S., Executions § 45.

**§ 13-3-133. Money, banknotes, judgments and the like may be levied on; endorsement and negotiation of seized instruments; proceeds to be applied against judgment debtor's obligations.**

(1) Money, banknotes, bills, evidences of debt circulating as money, and any judgment or decree belonging to the defendant, may be taken under an execution or attachment and sold or disposed of according to law, or applied to the payment of the execution or in satisfaction of the judgment in attachment.

(2) The officer serving a writ may endorse all warrants, checks or drafts seized under execution or attachment. The officer serving the writ shall endorse on the warrant, check or draft the day and date it was received, shall take into possession, as they shall become due to the judgment debtor, monies, checks, drafts, warrants, vouchers or other evidences of indebtedness, and shall issue a receipt to the paying, disbursing or auditing officer therefor, and shall endorse, in the name of the judgment debtor, any and all checks, drafts, warrants, vouchers or other evidences of indebtedness delivered under the writ. The seized instruments may be negotiated and the proceeds thereof, or so much thereof as necessary, shall be applied to the payment of the execution or in satisfaction of the judgment in attachment in order of priority.

**SOURCES:** Codes, 1857, ch. 61, art. 285; 1871, § 849; 1880, § 1765; 1892, § 3470; 1906, § 3968; Hemingway's 1917, § 2975; 1930, § 3021; 1942, § 1909; Laws, 2008, ch. 324, § 1, eff from and after July 1, 2008.

**Cross References** — Levy of writs of execution and attachment on choses in action, see § 13-3-127.

Service of a writ of attachment generally, see § 99-23-7.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

**1. In general.**

A certificate of shares of corporate stock issued to the judgment debtor, found in the custody of his agent or trustee, was held to be a proper subject of levy and sale under a similar provision contained in Code 1871, § 849. *Yazoo & Miss. V. Ry. v. City of Clarksdale*, 257 U.S. 10, 42 S. Ct. 27, 66 L. Ed. 104 (1921).

Although Miss. Code Ann. § 93-11-71(3) provides an expedited execution process for judgments for child support arrearages, if the judgment is not executed, it creates no legal right or interest superior to competing claims or interests in funds forfeited by the government under 21 USCS § 853(n); thus, defendant's former wife and a department of human services had no claim to the forfeited bank accounts of defendant because they had no legal interest to the funds superior to defendant at the time of the commission of his drug crimes which gave rise to the government's forfeiture; even if the judgment lien had been enrolled, it did not attach to intangible property, such as the

bank accounts, as defined under Miss. Code Ann. § 13-3-133. *United States v. Butera*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 65729 (S.D. Miss. Sept. 13, 2006).

Where it appeared that judgment on which appealing execution creditor relied had been levied on and transferred to appellee, appeal held dismissed. *McInnis v. Simmons*, 162 Miss. 606, 139 So. 872 (1932).

One whose sole property in this state is money on deposit subjects himself to attachment by going out of the state and taking the money with him, although he expects to return. *Philadelphia Inv. Co. v. Bowling*, 72 Miss. 565, 17 So. 231 (1895).

A constable having money collected by him under execution, which is payable to the plaintiff therein, is subject to garnishment. *Burleson v. Milan*, 56 Miss. 399 (1879).

A judgment debtor of a debtor may be garnisheed. *Gray v. Henby*, 9 Miss. (1 S. & M.) 598 (1844); *O'Brien v. Liddell*, 18 Miss. (10 S. & M.) 371 (1848).

## ATTORNEY GENERAL OPINIONS

Under Sections 11-9-127 and 13-3-133, to enforce the final judgment of the court it is legal to specify money on defendant's person and/or money in cash drawer of a business on the same execution. However,

the sheriff may not conduct a search of a person or premises without a warrant from a court, but may seize any property that is in plain view. *Aldridge*, May 2, 1995, A.G. Op. #95-0156.

## RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d (Rev), Attachment and Garnishment §§ 76, 99-106, 120-130, 268.

30 Am. Jur. 2d (Rev), Executions §§ 139, 145, 146, 203.

**CJS.** 7 C.J.S., Attachment § 64.

33 C.J.S., Executions §§ 31, 36, 38, 534.

## § 13-3-135. Purchaser's title to certain interests of defendant sold under execution or attachment.

The purchaser of any chose in action, stock, share, interest, judgment, or decree of the defendant, sold under execution or attachment, shall become the owner thereof, in the same manner as if it had been regularly assigned to him by the defendant.



**SOURCES:** Codes, 1857, ch. 61, art. 285; 1880, § 1765; 1892, § 3471; 1906, § 3969; Hemingway's 1917, § 2976; 1930, § 3022; 1942, § 1910.

**Cross References** — Levy of writs of execution and attachment on choses in action, see § 13-3-127.

Property purchased at an execution sale being discharged of all liens of judgments, see § 13-3-185.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

When bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits; as such, it became the owner of the lawsuits, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. *Citizens Nat'l Bank v. Dixie-land Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006).

As Miss. Code Ann. § 13-3-135 addresses the rights of a purchaser of a chose of action sold under an execution, the Supreme Court of Mississippi holds that implicit in a reading of § 13-3-135 is the that a chose of action may be sold under execution. *Maranatha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004 (Miss. 2004).

## RESEARCH REFERENCES

**ALR.** Power of equity court to reach or to sequester, for seizure and sale, benefi-

cial equitable interests in corporate stock shares. 42 A.L.R.2d 920.

### § 13-3-137. Growing crop shall not be levied upon.

An execution shall nor be levied upon a growing crop, nor shall the same be seized under an attachment.

**SOURCES:** Codes, 1880, § 1764; 1892, § 3472; 1906, § 3970; Hemingway's 1917, § 2977; 1930, § 3023; 1942, § 1911.

**Cross References** — Growing crop not being subject to a judgment lien, see § 11-7-199.

Right of purchaser or mortgagor to cultivate and gather crops in cases of forfeiture under contract of purchaser or foreclosure of deeds in trust or mortgages, see § 11-25-25.

Chancery court decrees for the sale of a crop growing at the time of death of a deceased, see § 91-7-169.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Statute prohibiting sale of growing crops under execution must be strictly construed. *Harris v. Harris*, 150 Miss. 729, 116 So. 731 (1928).

Where crop had matured and was ready for harvest, lien of levy attached. *Harris v. Harris*, 150 Miss. 729, 116 So. 731 (1928).

Trust deed, executed after levy by sheriff under execution upon matured

ungathered crop of cotton, cannot prevail as against judgment creditor. *Harris v. Harris*, 150 Miss. 729, 116 So. 731 (1928).

### RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 79, 80.  
30 Am. Jur. 2d, Executions § 140.

**CJS.** 7 C.J.S., Attachment §§ 72, 76.  
33 C.J.S., Executions § 29.

### § 13-3-139. Lien of executions, and priority thereof.

Writs of executions, where there is no judgment lien, shall bind the property of defendant only from the time of the levy thereof. If two or more writs shall be delivered to the officer for execution against the same person, that which was first delivered shall be the first levied and satisfied. It shall be the duty of the sheriff or other officer, on receipt of an execution, to indorse thereon the day of the month and the year and the hour when he received the same. For a failure to make such indorsement, the sheriff or other officer shall be liable to a penalty of One Hundred Dollars (\$100.00), to the use of the plaintiff, recoverable by motion before the court from which the execution issued, and the sheriff or other officer shall, moreover, be liable for all damages sustained by any party aggrieved.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (8); 1857, ch. 61, art. 270; 1871, § 841; 1892, § 3473; 1906, § 3971; Hemingway's 1917, § 2978; 1930, § 3024; 1942, § 1912.

**Cross References** — Lien created by and priority of judgment of circuit court entered on the judgment roll, see § 11-7-191.

Forfeiture of priority of judgment of circuit court entered on judgment roll, see § 11-7-193.

Criminal offenses of removal out of state of personal property subject to liens, see §§ 97-17-73 through 97-17-77.

Obstructing justice by removing property levied on by virtue of any legal process, see § 97-9-69.

Criminal offense of disposing property on which there exists a lien by law without notifying purchaser of said lien, see § 97-19-51.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 177 et seq.

**CJS.** 33 C.J.S., Executions §§ 203-208, 210, 219 et seq.

### § 13-3-141. Officer to care for property and allowed expenses.

When a sheriff or other officer shall levy an execution on livestock, he shall provide for its sustenance until sold or otherwise legally discharged from the execution. Upon the return of the execution, the court, in cases where the compensation is not fixed by law, shall settle and adjust what the officer shall

be allowed for his expenses incurred by providing for the stock, and also reasonable expenses of keeping personal property levied on by him, and the same shall be taxed as costs. The officer may retain the same out of the money arising from the sale of the property.

**SOURCES:** Codes, 1857, ch. 61, art. 274; 1871, § 843; 1880, § 1746; 1892, § 3474; 1906, § 3972; Hemingway's 1917, § 2979; 1930, § 3025; 1942, § 1913.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### ATTORNEY GENERAL OPINIONS

The expenses incurred under Section 13-3-141, if not fixed by law, shall be settled by the court on return of the execution and taxed as costs. The sheriff can retain these costs out of the proceeds from the sale of the property. Richardson, September 13, 1995, A.G. Op. #95-0229.

If necessary to provide for the "sustenance" of the livestock levied under Section 13-3-141, the sheriff may hire someone to move and/or keep and feed the cattle and submit the expense to the court to be taxed as costs. Richardson, September 13, 1995, A.G. Op. #95-0229.

### RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d(Rev), Executions §§ 177 et seq.

**CJS.** 33 C.J.S., Executions §§ 183, 191.

### § 13-3-143. Manner by which personal representative or successor thereof of plaintiff may have execution.

When the executor or administrator of a plaintiff who dies before satisfaction of his judgment shall file with the clerk a copy of his letters testamentary or of administration, duly certified, execution may be issued on the judgment as if such death had not occurred, and the clerk shall indorse on the execution the fact of the death of the plaintiff, and that the execution is at the instance of his executor or administrator, stating the name of the executor or administrator. When an administrator, guardian, trustee, or other person acting in a fiduciary or official capacity, who recovered a judgment, shall die, resign, or be removed without having obtained satisfaction thereof, his successor may have execution of the judgment in the same manner, without revival of the judgment by scire facias.

**SOURCES:** Codes, 1880, § 1747; 1892, § 3475; 1906, § 3973; Hemingway's 1917, § 2980; 1930, § 3026; 1942, § 1914.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.



### JUDICIAL DECISIONS

#### 1. In general.

The section [Code 1942, § 1914] does not apply in favor of a foreign administrator who has not complied with the statu-

tory requirements authorizing such administrator to act in this state. *Jackson v. Scanland*, 65 Miss. 481, 4 So. 552 (1888).

### RESEARCH REFERENCES

**Am Jur.** 30 *Am. Jur.* 2d, Executions § 51.

**CJS.** 33 *C.J.S.*, Executions §§ 80-84.

### § 13-3-145. Effect of death of one or more of several plaintiffs before issuance of execution.

The death of one or more of several plaintiffs in a judgment shall not prevent the issuance of execution in favor of the survivors.

**SOURCES:** Codes, 1880, § 1748; 1892, § 3476; 1906, § 3974; *Hemingway's* 1917, § 2981; 1930, § 3027; 1942, § 1915.

**Cross References** — For the rule governing substitution upon the death of a party, see *Miss. R. Civ. P.* 25.

Issuance, execution, and return of execution, see *Miss. R. Civ. P.* 69.

### RESEARCH REFERENCES

**CJS.** 33 *C.J.S.*, Executions §§ 80-84.

### § 13-3-147. Assignee of a judgment may have execution.

The assignee of a judgment, where the plaintiff has died, may have execution thereof for his use as if such death had not occurred, upon filing with the clerk his affidavit of the death of the plaintiff and the assignment, and, where the plaintiff has not died, the assignee of a judgment may have an execution for his use in the same manner.

**SOURCES:** Codes, 1880, § 1749; 1892, § 3477; 1906, § 3975; *Hemingway's* 1917, § 2982; 1930, § 3028; 1942, § 1916.

**Cross References** — Sale or assignment of any chose in action after suit thereon has been filed, see § 11-7-7.

Assignment of negotiable instruments, see § 75-13-1.

For the rule governing substitution upon the death of a party, see *Miss. R. Civ. P.* 25.

Issuance, execution, and return of execution, see *Miss. R. Civ. P.* 69.

### JUDICIAL DECISIONS

#### 1. In general.

This section [Code 1942, § 1916] recognizes the validity of an assignment of a

judgment, and a municipality has the power to make an assignment of a judgment in its favor, it being shown that it

received the full amount of the judgment rendered. *Wilkinson v. Hutto*, 157 Miss. 358, 128 So. 93 (1930).

City may assign judgment recovered on

bail bond to sheriff who negligently fails to execute it. *Wilkinson v. Hutto*, 157 Miss. 358, 128 So. 93 (1930).

### RESEARCH REFERENCES

**Am Jur.** 30 *Am. Jur.* 2d (Rev), Executions §§ 51, 68.

**CJS.** 33 *C.J.S.*, Executions §§ 80-83, 132, 133.

## § 13-3-149. Effect of death of party after execution issued.

The death of any plaintiff or defendant after the issuance or the levy of an execution on personal or real estate, shall not affect the duty of the officer making the levy to proceed and sell as if such death had not occurred.

**SOURCES:** *Codes*, 1880, § 1750; 1892, § 3478; 1906, § 3976; *Hemingway's* 1917, § 2983; 1930, § 3029; 1942, § 1917.

**Cross References** — Judgment surviving where one or more of several defendants against whom judgment has been entered die, see § 11-7-29.

For the rule governing substitution upon the death of a party, see *Miss. R. Civ. P.* 25. Issuance, execution, and return of execution, see *Miss. R. Civ. P.* 69.

### RESEARCH REFERENCES

**Am Jur.** 30 *Am. Jur.* 2d, Executions §§ 51, 52, 68.

deceased, 9 *Am. Jur.* Pl & pr Forms (Rev), Executions, Forms 401-411.

Proceedings where judgment debtor is

**CJS.** 33 *C.J.S.*, Executions § 80-84.

## § 13-3-151. Execution issued against dead defendant.

After one year from the death of any defendant in a judgment for money, execution thereof may be had by leave of the court rendering the judgment, or of the judge thereof in vacation, upon cause shown, against any property on which such judgment was a lien at the time of the death of the defendant, and a sale of such property may be made in the same manner and with the same effect as if the defendant were living. In case of the death of the defendant in a judgment for the recovery of real or personal property, execution may be had without revival, in the same manner as if the defendant had not died.

**SOURCES:** *Codes*, 1880, § 1751; 1892, § 3479; 1906, § 3977; *Hemingway's* 1917, § 2984; 1930, § 3030; 1942, § 1918.

**Cross References** — Judgment surviving where one or more of several defendants against whom judgment has been entered die, see § 11-7-29.

Issuance, execution, and return of execution, see *Miss. R. Civ. P.* 69.

For the rule governing substitution upon the death of a party, see *Miss. R. Civ. P.* 25.

## JUDICIAL DECISIONS

### 1. In general.

Execution under the statute must be obtained from the court or from the judge in vacation, on cause shown, on motion or petition, and formal notice or process is not required. The "cause shown" relates only to the judge in vacation. *Alsop v. Cowan*, 66 Miss. 451, 6 So. 208 (1889).

The petition is insufficient if it fail to show that the judgment was a lien at the time of defendant's death and a demurrer thereto should be sustained. *Alsop v. Cowan*, 66 Miss. 451, 6 So. 208 (1889).

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions § 52.  
Proceedings where judgment debtor is

deceased, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 401-411.  
**CJS.** 33 C.J.S., Executions §§ 80-84.

### § 13-3-153. Motion to revive judgment.

Those provisions of the Mississippi Code of 1972 relating to the execution of judgments without revival shall not prevent a revival in any case by a motion to revive judgment.

**SOURCES:** Codes, 1880, § 1752; 1892, § 3480; 1906, § 3978; *Hemingway's* 1917, § 2985; 1930, § 3031; 1942, § 1919; Laws, 1991, ch. 573, § 102, eff from and after July 1, 1991.

**Cross References** — Necessity of revival of judgment by scire facias where no execution issued within year and day after its rendition, see § 11-7-201.

Issuance of scire facias in criminal case where defendant, prosecutor, or witness fails to comply with terms of bail bond or recognizance, see § 99-5-25.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

Applicability of the Mississippi Rules of Civil Procedure, see Miss. R. Civ. P. 81.

## RESEARCH REFERENCES

**Am Jur.** Petition or application for scire facias to revive judgment, 15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Forms 153.

Scire facias to revive judgment-writ and citation, 15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 168.

Writ of scire facias to revive pending action, 18 Am. Jur. Pl & Pr Forms, Scire Facias, Forms 18:201-18:211.

Writ of scire facias to revive judgment, 18 Am. Jur. Pl & Pr Forms, Scire Facias, Forms, 18:221-18:244.

### § 13-3-155. Execution and garnishment on certain judgments and decrees of other courts may be issued by clerk.

The clerk of the circuit court in whose office any judgment or decree shall be enrolled, may issue execution and writs of garnishment thereon, directed to the sheriff of his county, returnable before the court which rendered the judgment or decree.



**SOURCES:** Codes, 1880, § 1738; 1892, § 3481; 1906, § 3979; Hemingway's 1917, § 2986; 1930, § 3032; 1942, § 1920; Laws, 1890, p. 66; Laws, 1990, ch. 408, § 2, eff from and after July 1, 1990.

**Cross References** — Lien created by and priority of judgment of circuit court entered on the judgment roll, see § 11-7-191.

Forfeiture of priority of judgment of circuit court entered on judgment roll, see § 11-7-193.

Issuance of a writ of garnishment on suggestion of plaintiff in judgment or decree, see § 11-35-1.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

1. In general.
2. Circuit court lacked enforcement authority.

### 1. In general.

Clerk of trial court held without authority to issue writ of garnishment for collection of costs incurred on appeal to supreme court. *State v. Keeton*, 176 Miss. 590, 169 So. 760 (1936).

The plaintiff in a judgment obtained in a justice's court may, under this section [Code 1942, § 1920], have it enrolled in the manner specified in any other county where property of the debtor may be situated, and have execution issued by the circuit clerk of such county to an officer of that county, returnable to the court of the justice who rendered the judgment. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

### 2. Circuit court lacked enforcement authority.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; it was plain that Miss. Code Ann. § 13-3-155, while imposing certain duties upon the circuit clerk once a judgment was enrolled did not grant to that circuit court any authority in the handling of an execution or garnishment issued by the clerk under the authority of § 13-3-155. *Buckley v. Pers. Support Sys.*, 852 So. 2d 648 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003).

## RESEARCH REFERENCES

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 382 et seq.

30 Am. Jur. 2d (Rev), Executions §§ 69, 84 et seq.

**CJS.** 33 C.J.S., Executions §§ 61, 62 et seq.

## § 13-3-157. When a bond of indemnity shall be required.

If the sheriff shall levy an execution, attachment, or writ of seizure for the purchase-money on any personal property, and a doubt shall arise whether the right to the property be in the defendant or not, the sheriff may demand of the plaintiff a bond with sufficient sureties, payable to the officer, in a penalty equal to double the value of the property, conditioned that the obligors therein will indemnify and save harmless the officer against all damages which he may sustain in consequence of the seizure or sale of the property, and will pay to and satisfy any person claiming title to the property all damages which such person may sustain in consequence of the seizure or sale. If such bond be not

given on or before the day of the sale or the return day of the attachment, the sheriff shall be justified in releasing the levy and delivering the property to the party from whose possession it was taken; but the plaintiff or his agent or attorney shall have reasonable notice, in writing, before the day of sale or return day of the writ, that the bond is required.

However, in instances where a warrant is issued by the Chairman of the State Tax Commission, as the commissioner, under the authority of any statute by which such commissioner is authorized to issue such warrants, and where the officer to whom such warrant is directed shall demand of the commissioner an indemnifying bond under the circumstances and conditions hereinbefore provided, the commissioner is hereby authorized to execute such indemnifying bond demanded and pay all obligations which may accrue by reason of the execution of such bond out of the funds appropriated by the Legislature to defray the expenses of the State Tax Commission.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (12); 1857, ch. 61, art. 275; 1871, § 844; 1880, § 1754; 1892, § 3482; 1906, § 3980; Hemingway's 1917, § 2987; 1930, § 3033; 1942, § 1921; Laws, 1952, ch. 404; Laws, 1956, ch. 409; Laws, 1990, ch. 408, § 3, eff from and after July 1, 1990.

**Editor's Note** — Section 27-3-4 provides that the terms "Mississippi State Tax Commission," "State Tax Commission," "Tax Commission" and "commission" appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

Section 27-3-4 provides that the terms "Chairman of the Mississippi State Tax Commission," "Chairman of the State Tax Commission," "Chairman of the Tax Commission" and "chairman" appearing in the laws of this state in connection with the performance of the duties and functions by the Chairman of the Mississippi State Tax Commission, the Chairman of the State Tax Commission or the Chairman of the Tax Commission shall mean the Commissioner of Revenue of the Department of Revenue."

**Cross References** — Interposition of a claim by a person not a party to an execution who alleges to be the owner or to have a lien on the personal property levied upon, see § 11-23-7.

Selection by a defendant of exempt personal property where an officer is about to levy an execution or attachment on personal property, see § 85-3-3.

Indemnity bond to be furnished officer about to levy execution or attachment on personal property claimed to be exempt, see § 85-3-5.

Exemption from execution of property when the purchase-money thereof forms the debt on which the judgment is founded, see § 85-3-47.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

1. In general.
2. Right of action on bond.
3. Time for giving bond.
4. —Reasonable notice.
5. Liability.
6. Defenses.
7. Damages recoverable.

### 1. In general.

Where sheriff had no right to demand indemnity bond, because the property in question was part of the realty, bond taken by him was not valid. *Chenault v. W.T. Adams Mach. Co.*, 98 Miss. 326, 53 So. 629 (1910).

Where an officer takes a bond conditioned under this section [Code 1942, § 1921] by mistake for one conditioned under Code 1906, § 2143, it will in a suit thereon be treated as properly conditioned by reason of Code 1942, § 1022. *Bank of Gulfport v. O'Neal*, 86 Miss. 45, 38 So. 630 (1905).

The section [Code 1942, § 1921] does not apply to an attachment for rent. *Gibson v. Lock & Smith*, 58 Miss. 298 (1880).

## 2. Right of action on bond.

The statute does not confer a right of action on the bond upon one who could not at common law have maintained an action against the officer. *Moore v. Allen*, 25 Miss. 363 (1852); *Marshall v. Stewart*, 67 Miss. 494, 7 So. 284 (1889).

## 3. Time for giving bond.

The statute only provides for an indemnifying bond after levy, though a bond taken before a levy is a good common-law obligation. *Forniquet v. Tegarden*, 24 Miss. 96 (1852).

## 4. —Reasonable notice.

Where the sheriff wrote to a judgment creditor in Illinois two weeks before the first day of the court, demanding a bond to indemnify him against liability for levying an execution and advising such creditor that the execution would be held unexecuted until such bond was furnished, and the creditor failed to answer, two weeks was not an unreasonable time for the sheriff to wait for the creditor to furnish the bond so as to charge the sheriff with liability for failure to return the execution

on the return day thereof. *W.T. Rawleigh Co. v. Foxworth*, 194 Miss. 205, 11 So. 2d 919 (1943).

## 5. Liability.

Only liability of attaching creditors and sureties on attachment bond was for wrongful suing out of attachment and alone to defendant therein. *Jamison v. Wilson*, 152 Miss. 382, 119 So. 800 (1928).

## 6. Defenses.

Whatever would have been a defense to the sheriff, if bond had not been taken, will be a defense to a suit on the bond. *Moore v. Allen*, 25 Miss. 363 (1852).

## 7. Damages recoverable.

Attorney's fees and other expenses incurred sustaining a claimant's issue for property seized under attachment are not recoverable in a suit on an indemnifying bond required by this section [Code 1942, § 1921]. *Moore v. Lowrey*, 74 Miss. 413, 21 So. 237 (1897).

The sureties on an indemnifying bond are not liable for damages resulting from the negligent failure of the officer to safely keep the property. *Smokey v. Peters & Calhoun Co.*, 66 Miss. 471, 5 So. 632, 14 Am. St. R. 575 (1889).

The obligors in an indemnifying bond are bound to pay such damages as result from the seizure, and not attorney's fees or other expenses incurred in defending the title to the property. *Brinker v. Leinkauff*, 64 Miss. 236, 1 So. 170 (1887).

The obligators in the bond are only liable for such damages as the sheriff would be liable for had bond not been taken. *Moore v. Allen*, 25 Miss. 363 (1852).

# ATTORNEY GENERAL OPINIONS

While Section 13-3-157 only provides for a bond after levy, the Supreme Court of Mississippi has held that a bond taken before levy is not illegal and void; such a

bond given before a levy is valid. See *Forniquet v. Tegarden*, 24 Miss 96 (1850). *Hooks*, April 5, 1996, A.G. Op. #96-0163.

# RESEARCH REFERENCES

**ALR.** Judgment avoiding indemnity or liability policy for fraud as barring recovery from insurer by or on behalf of third person. 18 A.L.R.2d 891.

Amendment of attachment or garnishment bond. 47 A.L.R.2d 971.

Posting of redelivery bond as waiver of damages for wrongful attachment. 57 A.L.R.2d 1376.

Injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from wrongful execu-



tion against business property. 55 A.L.R.3d 911.

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 492, 495 et seq.

Bond to indemnify sheriff before levy on personal property, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 111.

Bond to indemnify officer before levy of execution on personal property, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Form 18:645.

**CJS.** 7 C.J.S., Attachment § 419.

## § 13-3-159. Remedy on bond of indemnity.

If the bond and security required under Section 13-3-157 be given, it shall be returned with the writ, and the person claiming the property levied on may prosecute a suit upon the bond, with the name of the payee or his representatives, for the use of the claimant, and recover such damages as he may sustain by the seizure or sale of the property or levy of process; and the claimant shall, after the due execution of the bond, be barred of any action against the officer levying the process, unless the obligors in the bond shall be or become insolvent, or the bond be otherwise invalid.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (12); 1857, ch. 61, art. 276; 1871, § 845; 1880, § 1755; 1892, § 3483; 1906, § 3981; Hemingway's 1917, § 2988; 1930, § 3034; 1942, § 1922.

**Cross References** — Actions on indemnity bond furnished officer about to levy an execution or attachment on personal property claimed to be exempt, see § 85-3-7.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## RESEARCH REFERENCES

**ALR.** Judgment avoiding indemnity or liability policy for fraud as barring recovery from insurer by or on behalf of third person. 18 A.L.R.2d 891.

Amendment of attachment or garnishment bond. 47 A.L.R.2d 971.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

**Am Jur.** 6 Am. Jur. 2d, Attachment and Garnishment §§ 517-520.

30 Am. Jur. 2d, Executions § 645.

Complaint, petition, or declaration by sheriff for indemnity against sureties on bond indemnifying officer against liability for execution, levy, and sale, 22 Am. Jur.

Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 114.

Complaint, petition, or declaration by sheriff for indemnity against execution creditor causing sheriff to levy on goods of person other than execution debtor, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 113.

Complaint by sheriff against execution creditor causing sheriff to levy upon goods of third person, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Form 18:643.

**CJS.** 33 C.J.S., Executions §§ 640, 641.

## § 13-3-161. Where sales under execution or other process are to be made.

All sales by any sheriff by virtue of an execution or other process, when not issued by a justice court, shall be made at the courthouse of the county. The sheriff shall effectuate any execution on a judgment. However, personal

property too cumbersome to be removed, may be sold at the place where the same may be, or at any convenient place. Cattle, sheep, or stock, other than horses and mules, may be sold at any public place in the neighborhood of the defendant's residence.

Sales of personal property under execution or other process from a justice court may be made at any convenient point in the county where it is found, or at the courthouse of the county. The sheriff shall effectuate any execution on a judgment. The sale of lands under executions or other process from such courts shall be made as under execution from the circuit courts.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, §§ 846, 1345; 1880, §§ 1757, 2208; 1892, §§ 3484, 3485; 1906, §§ 3982, 3983; Hemingway's 1917, §§ 2989, 2990; 1930, §§ 3035, 3036; 1942, §§ 1923, 1924; Laws, 1981, ch. 471, § 42; Laws, 1982, ch. 423, § 28; Laws, 1990, ch. 408, § 4; brought forward without change, Laws, 2011, ch. 418, § 5, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

This section was brought forward without change by Laws of 2011, ch. 418, effective July 1, 2011.

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Sales of real estate ordered by decree of the chancery court, see § 11-5-93.

Sales of house, building, structure, or fixture and land, pursuant to a special writ of execution, see § 85-7-155.

Sales after condition broken where deed of trust or mortgage, with a power of sale, is silent as to the place and terms of sale, see § 89-1-57.

Provision for suspension of inconsistent laws regarding foreclosure of mortgaged property in certain emergency situations, see § 89-1-319.

Sales of perishable property in estate proceedings, see § 91-7-175.

Power of the chancery court to authorize executor or administrator to sell personal property at private sale, see § 91-7-177.

Authority of an executor or administrator to sell, at public or private sale, perishable goods or chattels or livestock of the decedent, see § 91-7-179.

Authority of an executor or administrator to sell the interest of the decedent in watercraft or other property which cannot be produced, see § 91-7-181.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

1. Sales under process issued other than by justice of the peace.
2. — Personal property.
3. —Application to federal marshals.
4. Sales under process issued by justice of the peace.

**1. Sales under process issued other than by justice of the peace.**

Statutes fixing the place for the sale of lands under execution are mandatory, and a sale made contrary to such a statute is void. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

**2. — Personal property.**

When bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits, and as such, it became the owner of the lawsuit; no one disputed that the sheriff's sale was properly conducted, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006).

An execution sale of gas ranges, refrigerators, and television sets may permissibly be held at the debtor's place of business. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

A tax sale of personal property at the courthouse is illegal where it was not feasible to have it all present there. *State ex rel. Stevens Enters., Inc. v. McDonnell*, 236 Miss. 841, 111 So. 2d 662 (1959).

**3. —Application to federal marshals.**

The requirement, under a former enactment of this provision (Code 1871, § 846),

that execution sales be made at the county courthouse was not made applicable by the Conformity Act to execution of sales of personal property by a United States marshal and an execution sale may therefore be made at the courthouse of the United States where the judgment was rendered and the execution issued. *Yazoo & Miss. V. Ry. v. City of Clarksdale*, 257 U.S. 10, 42 S. Ct. 27, 66 L. Ed. 104 (1921).

As a general rule United States marshals in making sales of land under execution are required (U. S. Rev. Stat., § 914, 28 USC § 724) to conform to the laws of the state governing the subject of such sales and they must be made at the place provided by the law of the state for sheriff's sales of land under execution. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

The word "place" in a statute (Act of Congress Feb. 16, 1838), authorizing marshal's sales of land under execution in Mississippi to be made upon written request of defendant "at the place where the United States court for the district is holden" does not mean any place in the town or city where the court was held, but a particular place in which the court held its sittings. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

**4. Sales under process issued by justice of the peace.**

Execution sale, although advertised once each week for three weeks pursuant to statute, held void where less than three weeks elapsed between first publication and sale. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

## ATTORNEY GENERAL OPINIONS

With respect to sale of property deeded to state as result of civil prosecution pursuant to Racketeer Influenced and Corrupt Organizations Act, public auction at County courthouse should be conducted as

set out in Sections 13-3-161, et seq., except that Secretary of State rather than Sheriff should conduct sale. Nelson, March 23, 1994, A.G. Op. #94-0059.



## RESEARCH REFERENCES

**ALR.** Rights and remedies of purchaser at judicial or execution sale where there was misrepresentation or mistake as to acreage or boundaries. 69 A.L.R.2d 254.

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions § 403.

**CJS.** 33 C.J.S., Executions § 357.

### § 13-3-163. When sales of land may be made; advertising of sale.

(1) Sales of land may be made on any day except Sunday and any legal holiday as defined by Section 3-3-7, Mississippi Code of 1972, and shall be advertised by the plaintiff in a newspaper published in the county, once in each week for three (3) successive weeks, or, if no newspaper is so published, in some newspaper having a general circulation therein once in each week for three (3) successive weeks.

(2) In addition to effectuating the advertisement, any expense or cost incurred by advertising and providing notice for the sale of land pursuant to subsection (1) of this section in justice court shall be paid by the plaintiff, and said expenses shall be taxed as costs.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3486; 1906, § 3984; Hemingway's 1917, § 2991; 1930, § 3037; 1942, § 1925; Laws, 1960, ch. 239; Laws, 1978, ch. 398, § 1; Laws, 1989, ch. 405, § 1, eff from and after July 1, 1989.

**Cross References** — Execution of warrant by sheriff or special agent; fees, see § 27-65-63.

Preference in sales of property when decedent's estate consists of both real and personal property and it is necessary to sell a portion thereof, see § 91-7-187.

Sales of the real estate of decedent where the personal property will not suffice to pay debts and expenses, see § 91-7-191.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

#### 1. In general.

In a partition action, the chancellor's award of attorney's fees payable by the appealing parties, and assessed against the sale proceeds, was error, as there was no evidence that said fees were reasonable and there was no bad faith shown. Further, as to notice of the sale, Miss. Code Ann. § 13-3-163 did not apply where the chancellor gave specific instruction for terms of the sale pursuant to Miss. Code Ann. §§ 11-5-93 and 11-5-95, and while the sale price was low, the chancellor did not abuse his discretion in refusing to set aside the sale. *Necaise v. Ladner*, 910 So. 2d 699 (Miss. Ct. App. 2005).

A deed of trust which provides that in case of default the trustee shall take possession without notice, and after duly advertising, sell for cash, at public auction at the courthouse door, a sufficiency of the property to make payment, is not silent as to the place and terms of sale and mode of advertising within the meaning of Code 1942, § 891. *Gardner v. State*, 235 Miss. 119, 108 So. 2d 592 (1959).

Where sale of land under execution was advertised one day a week for three successive weeks, lapse of two weeks between time of last advertisement and time of sale held not to invalidate sale advertisement not being required for three succes-

sive weeks next preceding day of sale. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717 (1934).

Statute requiring advertisement of execution sales once each week for three weeks should be construed with statute defining meaning of requirements for three weeks' publication. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

Execution sale advertised once each week for three weeks, held void where less

than three weeks elapsed between first publication and sale. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

As to sales under deeds of trust, see *Davis v. O'Connell*, 92 Miss. 348, 47 So. 672 (1908); *Melsheimer v. McKnight*, 92 Miss. 386, 46 So. 827 (1908); *Lynchburg Shoe Co. v. Castleman*, 116 Miss. 188, 76 So. 878 (1917).

### ATTORNEY GENERAL OPINIONS

Sections 13-3-163 and 13-3-165 provide that the costs of advertising and providing notice of the sale shall be paid by the plaintiff and the expense then taxed as costs. *Richardson*, September 13, 1995, A.G. Op. #95-0229.

The Legislature amended Sections 13-3-163 and 13-3-165 to provide that any expense or cost incurred by advertising

and providing notice for legal sales shall be paid by the plaintiff. The amendments did not relieve the sheriff from liability for ensuring that proper notice is given prior to a legal sale. A sheriff may provide for the advertisement of such sales and then charge the cost of such advertisement to the plaintiff. *Hooks*, April 5, 1996, A.G. Op. #96-0163.

### RESEARCH REFERENCES

**ALR.** Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale. 2 A.L.R.2d 6.

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 391 et seq., 399.

Notice of execution sale, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Form 121.

8 Am. Jur. Proof of Facts, Newspapers, Proof No. 1 (establishing newspaper as one of general circulation).

**CJS.** 33 C.J.S., Executions §§ 357, 370-375.

### § 13-3-165. When sales of personalty may be made; advertising of sale.

(1) Sales of personalty may be made on any day except Sunday and any legal holiday as defined by Section 3-3-7, Mississippi Code of 1972, and shall be advertised by the plaintiff ten (10) days before the day of sale by posting notices of the time, terms and place of sale in three (3) public places in the county, one (1) of which shall be at the courthouse.

(2) In addition to effectuating the advertisement, any expense or cost incurred by advertising and providing notice for the sale of personalty pursuant to subsection (1) of this section in justice court shall be paid by the plaintiff, and said expenses shall be taxed as costs.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3487; 1906, § 3984; *Hemingway's* 1917,

§ 2992; 1930, § 3038; 1942, § 1926; Laws, 1978, ch. 398, § 2; Laws, 1989, ch. 405, § 2; brought forward without change, Laws, 2011, ch. 418, § 6, eff from and after July 1, 2011.

**Editor's Note** — This section was brought forward without change by Laws of 2011, ch. 418, effective July 1, 2011.

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Execution of warrant by sheriff or special agent; fees, see § 27-65-63.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

1. Generally.
2. Liability of sheriff.
3. —Defenses.
4. Passage of title.

### 1. Generally.

When bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits, and as such, it became the owner of the lawsuit; no one disputed that the sheriff's sale was properly conducted, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006).

A sheriff's sale was in compliance with the ten day advertisement requirements of Code 1972 § 13-3-165, where the first notice was posted on November 14, 1975, and the sale occurred on November 24, 1975; the provisions of Code 1972 § 1-3-67 prescribe the applicable formula for computing such ten day period, in that the first day is to be excluded and the last included. *Combs v. Adams*, 350 So. 2d 41 (Miss. 1977).

Posted notices of the time and place of public sale of a repossessed automobile which comply with the provisions of this section [Code 1942, § 1926] are the only form of notice the seller is required to give the buyer, and notice to the buyer of the time and place of sale by means of a letter is not necessary. *Ward v. McPhail Oldsmobile, Inc.*, 203 So. 2d 491 (Miss. 1967).

Where the retained title contract provided that the seller could purchase an automobile at public sale, the sale at which the seller purchased the repos-

sessed vehicle was valid. *Ward v. McPhail Oldsmobile, Inc.*, 203 So. 2d 491 (Miss. 1967).

The seller of an automobile, under the terms of a retained title contract, has a right to sell the repossessed automobile at public sale, either in the county where the contract was made and where the automobile was returned to the seller by the finance company, or in the county of the residence of the purchaser. *Ward v. McPhail Oldsmobile, Inc.*, 203 So. 2d 491 (Miss. 1967).

The requirement that the sale be made to the highest bidder does not preclude a sale where there is only one bidder. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

### 2. Liability of sheriff.

Fact that sheriff gave only eight days' notice of sale of merchandise for failure to pay sales tax and not the ten days' notice as required by statute constituted such misconduct that the sheriff was no longer entitled to protection of the writ, and, if sued in trespass, his defense could not rest upon the process nor could it be used in diminution of damages. *Rigby v. Whitten*, 196 Miss. 661, 18 So. 2d 152 (1944).

A sheriff, liable to property owner for the sale of his goods and the collection of sales taxes as provided under sales tax statutes because the sale was not advertised for ten days as provided hereunder, was guilty of conversion, the measure of damages for which, in the absence of special circumstances, is the value of the property, market value if such it has, at the time and place of its conversion with interest thereon. *Rigby v. Stone*, 194 Miss. 775, 13 So. 2d 230 (1943).



### 3. —Defenses.

Owner of merchandise sold by sheriff for failure to pay sales tax at sale which was invalid because the required ten days' notice had not been given, who acquiesced in the sale, gave no notice to the purchaser, and delivered the property to the purchaser, was not entitled as against the sheriff to demand more than the latter received from the purchaser at the sale, and the sheriff was protected to the extent of the amount remitted to the state tax commission as directed by warrant, but the owner was entitled to the amount retained by the sheriff as costs since the sheriff did not act as the warrant directed. *Rigby v. Whitten*, 196 Miss. 661, 18 So. 2d 152 (1944).

### 4. Passage of title.

Where owner of personalty which has been sold under a void warrant of sale, or at an improper time, of which the owner then knows, voluntarily delivers the property to the purchaser or takes active steps to that end without giving any warning or notice whatever at any time or in any manner to purchaser and the latter pays his money without notice, title passes to the purchaser on such delivery and the owner cannot thereafter disturb him. *Rigby v. Whitten*, 196 Miss. 661, 18 So. 2d 152 (1944).

## ATTORNEY GENERAL OPINIONS

Sections 13-3-163 and 13-3-165 provide that the costs of advertising and providing notice of the sale shall be paid by the plaintiff and the expense then taxed as costs. *Richardson*, September 13, 1995, A.G. Op. #95-0229.

The Legislature amended Sections 13-3-163 and 13-3-165 to provide that any expense or cost incurred by advertising

and providing notice for legal sales shall be paid by the plaintiff. The amendments did not relieve the sheriff from liability for ensuring that proper notice is given prior to a legal sale. A sheriff may provide for the advertisement of such sales and then charge the cost of such advertisement to the plaintiff. *Hooks*, April 5, 1996, A.G. Op. #96-0163.

## RESEARCH REFERENCES

**ALR.** Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale. 2 A.L.R.2d 6.

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 391 et seq., 399.

Notice of execution sale, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Form 121.

**CJS.** 33 C.J.S., Executions §§ 357, 370-375.

### § 13-3-167. Sale of perishable goods.

When goods and chattels are levied on, which by their nature are perishable and in danger of immediate waste or decay, the officer levying shall sell them at such time, and on such notice, and at such place as a sound discretion may warrant.

**SOURCES:** Codes, 1871, §§ 1466-1469; 1880, § 1758; 1892, § 3488; 1906, § 3986; Hemingway's 1917, § 2993; 1930, § 3039; 1942, § 1927; brought forward without change, Laws, 2011, ch. 418, § 7, eff from and after July 1, 2011.

**Editor's Note** — This section was brought forward without change by Laws of 2011, ch. 418, effective July 1, 2011.

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Attaching, replevying, sequestering, or seizing perishable commodities passing through the ports of entry in the state, see §§ 11-1-43 through 11-1-49.

Execution of warrant by sheriff or special agent; fees, see § 27-65-63.

Warehouseman's options with regard to perishable goods, see § 75-7-206.

Sales of perishable property in estate proceedings, see § 91-7-175.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

Railroad crossties, though liable to be burned, are not "in danger of immediate

waste or decay." *Goodman v. Moss*, 64 Miss. 303, 1 So. 241 (1887).

## ATTORNEY GENERAL OPINIONS

With respect to execution sales of mobile homes for unpaid ad valorem taxes and any excess funds over which the officer conducting the sale is entitled to retain after payment of judgment liens in order of priority, there is both a statutory

method (Section 13-3-181) and a remedy by rule (M.R.C.P.) for distribution of funds when there are conflicting claims thereto. *Blaker, II*, January 30, 1998, A.G. Op. #98-0023.

## RESEARCH REFERENCES

**ALR.** Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation. 3 A.L.R.3d 593.

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions § 397.

**CJS.** 33 C.J.S., Executions §§ 357-359, 370-375.

## § 13-3-169. Hours and mode of sale.

(1) Except as otherwise provided in this section, sales under execution shall not commence sooner than eleven o'clock in the forenoon, nor continue later than four o'clock in the afternoon. All such sales shall be by auction, to the highest bidder for cash, and only so much of the property levied on shall be sold as will satisfy the execution and costs.

(2) Sales under execution conducted by a special agent of the State Tax Commission pursuant to a warrant, jeopardy warrant or alias warrant issued by the Chairman of the State Tax Commission, shall commence and be conducted at the times specified by the Chairman of the State Tax Commission or his duly authorized agent. All such sales shall be by auction to the highest bidder for cash or for cash equivalent deemed acceptable by the Chairman of the State Tax Commission. Only so much of the property levied on shall be sold as will satisfy the execution and costs.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 277; 1871, § 846; 1880, § 1759; 1892, § 3489; 1906, § 3987; Hemingway's 1917, § 2994; 1930, § 3040; 1942, § 1928; Laws, 2005, ch. 382, § 1; brought forward without change, Laws, 2011, ch. 418, § 8, eff from and after July 1, 2011.

**Editor's Note** — Section 27-3-4 provides that the terms "Mississippi State Tax Commission," "State Tax Commission," "Tax Commission" and "commission" appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

Section 27-3-4 provides that the terms "Chairman of the Mississippi State Tax Commission," "Chairman of the State Tax Commission," "Chairman of the Tax Commission" and "chairman" appearing in the laws of this state in connection with the performance of the duties and functions by the Chairman of the Mississippi State Tax Commission, the Chairman of the State Tax Commission or the Chairman of the Tax Commission shall mean the Commissioner of Revenue of the Department of Revenue."

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

When bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits, and as such, it became the owner of the lawsuit; no one disputed that the sheriff's sale was properly conducted, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006).

The commissioner appointed by the trial court to conduct a partition sale of real estate violated neither the court order nor § 13-3-169 when he accepted a cashier's check in lieu of cash for the bid, since the commissioner cashed the check and invested the funds pending confirmation of the sale by the court and no preju-

dice resulted. *McCormick v. McCormick*, 449 So. 2d 1209 (Miss. 1984).

The requirement that the sale be made to the highest bidder does not preclude a sale where there is only one bidder. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

Resale under deed of trust at 3 p. m. held invalid notwithstanding sale was advertised for about noon, and resale if successful bidder defaulted was announced before bidders dispersed. *Gray v. Sullivan*, 162 Miss. 610, 139 So. 855 (1932).

Announcement of resale, if successful bidder defaulted, would not authorize resale even if unconditional notice would authorize it. *Gray v. Sullivan*, 162 Miss. 610, 139 So. 855 (1932).

## RESEARCH REFERENCES

**ALR.** Propriety of setting minimum or "upset price" for sale of property at judicial foreclosure. 4 A.L.R.5th 693.

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 399, 404 et seq.

**CJS.** 33 C.J.S., Executions §§ 358, 359, 376, 377.



### § 13-3-171. Lands to be sold to be offered in subdivisions and as an entirety.

All lands comprising a single tract, sold under execution, shall be first offered in subdivisions not exceeding one hundred and sixty (160) acres, or one-quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bids for the same in subdivisions.

**SOURCES:** Codes, 1892, § 3491; 1906, § 3989; Hemingway's 1917, § 2996; 1930, § 3042; 1942, § 1930; brought forward without change, Laws, 2011, ch. 418, § 9, eff from and after July 1, 2011.

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### RESEARCH REFERENCES

**ALR.** Inadequacy of price as basis for setting aside execution or sheriff's sale-modern cases. 5 A.L.R.4th 794. **Am Jur.** 30 Am. Jur. 2d, Executions §§ 408, 409. **CJS.** 33 C.J.S., Executions §§ 361, 362.

### § 13-3-173. Sale may be adjourned or continued from day to day.

Whenever, from a defect of bidders, caused by inclement weather or otherwise, the property shall not be likely to command a reasonable price, the officer may adjourn the sale and readvertise the same for a subsequent day. Whenever a sale advertised for a particular day shall not be completed on that day, the same may be continued from day to day.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (21); 1857, ch. 61, art. 278; 1871, § 847; 1880, § 1760; 1892, § 3490; 1906, § 3988; Hemingway's 1917, § 2995; 1930, § 3041; 1942, § 1929; brought forward without change, Laws, 2011, ch. 418, § 10, eff from and after July 1, 2011.

**Amendment Notes** — The 2011 amendment brought forward the section without change.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### JUDICIAL DECISIONS

#### 1. In general.

Where bids are grossly low, and generally by only one bidder, the sale should be

adjourned and readvertised. *Industries Sales Corp. v. Reliance Mfg. Co.*, 243 Miss. 463, 138 So. 2d 484 (1962).

# ATTORNEY GENERAL OPINIONS

Where a property does not command a reasonable price, or where the bids are of a grossly low character, the sheriff should adjourn the sale and readvertise it for another day, as provided by Section 13-3-173. Richardson, September 13, 1995, A.G. Op. #95-0229.

Section 13-3-173 indicates that it is the duty of the sheriff to re-advertise for a subsequent sale. However, the cost of re-advertising would still lie with the plaintiff. Hooks, April 5, 1996, A.G. Op. #96-0163.

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d (Rev), Executions § 401.

**CJS.** 33 C.J.S., Executions § 360.

Notice of adjournment of execution sale, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Form 122.

## § 13-3-175. Venditioni exponas.

If any property taken in execution shall remain in the hands of the officer unsold, he shall so return on the execution, and thereupon a writ of venditioni exponas shall issue, directed to the officer, upon which the like proceedings shall be had as might and ought to have been had on the first execution. And if property sold on a venditioni exponas shall not bring enough to satisfy the judgment, the officer shall forthwith return the same, and thereupon another proper execution for the balance remaining unpaid may be issued.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (18); 1857, ch. 61, art. 279; 1871, § 848; 1880, § 1761; 1892, § 3492; 1906, § 3990; Hemingway's 1917, § 2997; 1930, § 3043; 1942, § 1931.

**Cross References** — Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

### 1. In general.

A sale of land under an alias execution instead of a venditioni exponas to an in-

nocent purchaser does not render the sale invalid. Baldwin v. Dreyfus, 92 Miss. 94, 45 So. 428 (1908).

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions § 386.

**CJS.** 33 C.J.S., Executions §§ 349, 350.

## § 13-3-177. Venditioni exponas to issue when officer taking property dies.

When the officer taking property under execution shall die before the sale thereof, a writ of venditioni exponas shall issue, directed to the proper officer of the county in which the property was taken, and such officer shall, under the

writ of venditioni exponas, receive the property from the representatives of the former sheriff, or other officer, who are required to deliver the same to the officer having the venditioni exponas, on his producing the same and executing a receipt for the property, and the officer shall proceed to sell the same as in other cases.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (52); 1847, ch. 61, art. 292; 1871, § 856; 1880, § 1771; 1892, § 3493; 1906, § 3991; Hemingway's 1917, § 2998; 1930, § 3044; 1942, § 1932.

**Cross References** — Duty to pay of legal representative of deceased public officer owing public money, see § 25-1-67.

Payment by personal representative of the taxes due on a decedent's estate generally, see § 85-7-181.

Payment by personal representative of the debts due by decedent's estate generally, see § 85-7-261.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

### RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions      **CJS.** 33 C.J.S., Executions §§ 348-350.  
§§ 178 et seq., 386.

### § 13-3-179. Procedure to be followed where property is not delivered by representatives of deceased officer taking property.

If the representatives of the deceased officer shall refuse or neglect to deliver the property on demand, or if there shall not be an executor or administrator of his estate, the officer having the writ of venditioni exponas may seize the property taken by the former officer wherever it may be found, and sell the same as in other cases, or the plaintiff may move in the court from which the execution issued against the representatives of the deceased officer and his sureties, and thereupon a judgment shall be entered against the representatives of the deceased officer and his sureties for the amount of the execution which came to the hands of such deceased officer, with interest and costs.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (52); 1857, ch. 61, art. 293; 1871, § 857; 1880, § 1772; 1892, § 3494; 1906, § 3992; Hemingway's 1917, § 2999; 1930, § 3045; 1942, § 1933.

**Cross References** — Suits on bonds of public officers generally, see § 25-1-17.

Duty to pay of legal representative of public officer owing public money, see § 25-1-67.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.



**§ 13-3-181. Duty of officer to examine judgment-roll; priority of liens.**

After the sale of any property by the sheriff or other officer on execution, before the money is paid over by him, he shall examine the judgment-roll to ascertain if there be any judgment or judgments, decree or decrees, enrolled against the defendant or defendants in execution, having a priority of lien. If there be, he shall apply the proceeds of the sale to the judgment or decree having the priority of lien, and return such application upon the execution. Should there be any dispute as to which judgment or decree has the priority of lien, the officer shall make a statement of the fact of the dispute, and return the same, with the execution and the money raised thereon, into the court to which the same is returnable, and the court shall, on motion and examination of the facts, determine to whom the money so raised on execution shall be paid.

**SOURCES:** Codes, 1880, § 1762; 1892, § 3495; 1906, § 3993; Hemingway's 1917, § 3000; 1930, § 3046; 1942, § 1934.

**Cross References** — Lien created by and priority of judgment of circuit court entered on the judgment roll, see § 11-7-191.

Interposition of claim by a person not a party to execution who alleges to be owner or to have lien on personal property levied upon, see § 11-23-7.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

**JUDICIAL DECISIONS**

1. In general.
2. Application of proceeds.

**1. In general.**

The statute has no application to voluntary payments made by the defendant to the sheriff. *Johnson v. Edde*, 58 Miss. 664 (1881); *Mississippi Cent. R.R. v. Harkness*, 32 Miss. 203 (1856).

**2. Application of proceeds.**

Where judgments are recovered by different holders of several promissory notes given for land and secured by express lien, each judgment is in equity entitled to share in the proceeds of the land without reference to the time of their enrollment, the debtor being insolvent. *Aaron & Lindenmayer v. Warner*, 62 Miss. 370 (1884).

When two judgments against different defendants are liens upon the same property and it is sold under the judgment with the junior lien, the senior judgment lien is unimpaired by the sale, and the purchaser takes subject to the maxim,

"caveat emptor." *Hall v. Meridian Sav. Inst.*, 56 Miss. 674 (1879).

The lien created by the levy of an execution can only be defeated by a lien existing anterior to the levy, hence the enrollment of a judgment after the levy of an execution does not create a superior lien to that created by the levy. *S. Botters & Co. v. Edrington*, 30 Miss. 580 (1856).

The money should be appropriated to the oldest lien, whether the judgment having the prior lien be rendered in a state or a United States court. *Bonaffee v. Fisk*, 21 Miss. (13 S. & M.) 682 (1850).

Where, on motion of the sheriff in the court below to appropriate money made on several executions, that court awards the sum to a particular one, from which only one of the excluded parties appeals, the supreme court, in reversing the judgment, will order the money to be paid to that creditor entitled to it, without regard to his not having made objection to the decision below. *Heizer v. Fisher*, 21 Miss. (13 S. & M.) 672 (1850).

## ATTORNEY GENERAL OPINIONS

The levying officer is required under Section 13-3-181 to examine the judgment roll in the county to determine if there are prior judgment liens against the defendant or defendants in execution. If there are prior judgment liens, then the proceeds of the execution sale shall be first applied to the prior liens until they are satisfied. Richardson, September 13, 1995, A.G. Op. #95-0229.

Under Section 13-3-181, if there is a dispute as to the priority of judgment liens, then the officer shall make a statement of this fact and return the execution and the money raised thereon into the proper court, which shall decide the issue. Richardson, September 13, 1995, A.G. Op. #95-0229.

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 514, 517.

Complaint, petition, or declaration against sheriff and his surety for failure to pay judgment creditor moneys collected on execution sale, 22 Am. Jur. Pl & Pr Forms (Rev), Sheriffs, Police, and Constables, Form 81.

Complaint on sheriff's bond for failure to pay over money received on execution, 18 Am. Jur. Pl & Pr Forms, Sheriffs, Police, and Constables, Forms 18:597-18:599.

**CJS.** 33 C.J.S., Executions §§ 426-429.

### § 13-3-183. Officer to restore money on injunction of execution.

When an officer shall receive under execution the whole or any part of the money for which the same was issued, and the defendant, before payment thereof to the plaintiff, obtain an injunction against the execution, the officer shall pay over to the defendant the money received, or such part thereof as may be enjoined. If an officer shall, when required, fail to pay over the money so received and enjoined to the person having a right to demand the same, such officer and his sureties shall be liable to the same remedies as are given by law to the plaintiff for the nonpayment of money levied on execution.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (16); 1857, ch. 61, art. 286; 1871, § 850; 1880, § 1766; 1892, § 3496; 1906, § 3994; Hemingway's 1917, § 3001; 1930, § 3047; 1942, § 1935.

**Cross References** — Bond required to stay proceedings at law, see § 11-13-3. Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## RESEARCH REFERENCES

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 273, 274.

**§ 13-3-185. How purchaser takes property sold at execution sale.**

The purchaser of any property sold at execution sale by the sheriff or other officer shall take the same discharge of all liens of judgments and decrees, whether the same be sold under an execution issued upon the elder or junior judgment or decree.

**SOURCES:** Codes, 1880, § 1763, 1892, § 3497; 1906, § 3995; Hemingway's 1917, § 3002; 1930, § 3048; 1942, § 1936.

**Cross References** — Sales of real estate ordered by decrees of the chancery court generally, see § 11-5-93.

Purchaser's title to certain interests of defendant sold under execution or attachment, see § 13-3-135.

Sales of lands under mortgages and deeds of trust generally, see § 89-1-55.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

**JUDICIAL DECISIONS**

**1. In general.**

The statute only applies where the judgments are against the same person. *Hall v. Meridian Sav. Inst.*, 56 Miss. 674 (1879).

**RESEARCH REFERENCES**

**Am Jur.** 30 *Am. Jur.* 2d, Executions §§ 489 et seq.

**CJS.** 33 *C.J.S.*, Executions §§ 464 et seq.

**§ 13-3-187. Conveyance of land sold under execution or other process.**

When lands are sold by virtue of any writ of execution or other process, the officer making the sale shall, on payment of the purchase-money, execute to the purchaser a conveyance which shall vest in the purchaser all the right, title and interest which the defendant had in and to such lands, and which, by law, could be sold under such execution or other process.

**SOURCES:** Codes, Hutchinson's 1848, ch. 62, art. 1 (55); 1857, ch. 61, art. 290; 1871, § 854; 1880, § 1769; 1892, § 3498; 1906, § 3996; Hemingway's 1917, § 3003; 1930, § 3049; 1942, § 1937.

**Cross References** — Form of conveyance of land sold by a sheriff under execution, see § 89-1-65.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.



## JUDICIAL DECISIONS

**1. In general.**

The return of an officer on an execution showing the sale of land to a designated person does not transfer the title, it only

gives the purchaser the right to demand a deed conveying title. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

## ATTORNEY GENERAL OPINIONS

Consistent with Section 13-3-187, State should execute conveyance of property deeded to state as result of civil prosecution pursuant to Racketeer Influenced and

Corrupt Organizations Act by patent, as authorized by Section 29-1-81, upon payment of purchase money. *Nelson*, March 23, 1994, A.G. Op. #94-0059.

## RESEARCH REFERENCES

**ALR.** Lien of purchaser at judicial or execution sale, where sale is void or is set aside because proceedings are imperfect or irregular. 142 A.L.R. 325.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor. 33 A.L.R.4th 1206.

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 437 et seq.

Certificate of sale, 9 Am. Jur. Pl & Pr Forms (Rev), Executions, Forms 131, 132.

**CJS.** 33 C.J.S., Executions §§ 449, 459 et seq.

**§ 13-3-189. Completion of title under justice's execution.**

The title to land sold under execution issued by a justice of the peace shall not be complete in the purchaser until he shall have obtained from the justice a certified transcript of the proceedings had before him in the suit, including a copy of the execution and the officer's return on it, which shall be filed with the conveyance made by the officer in the chancery clerk's office and recorded with the conveyance. Upon filing such transcript and conveyance for record in the chancery clerk's office of the county where the land lies, the title of the purchaser shall be as full and complete as if the sale had been under a judgment and execution from a circuit court.

**SOURCES:** Codes, 1880, § 2211; 1892, § 3499; 1906, § 3997; Hemingway's 1917, § 3004; 1930, § 3050; 1942, § 1938.

**Editor's Note** — Pursuant to Miss. Const. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

**Cross References** — Time period within which an execution shall not issue on judgment of justice of the peace, see § 11-9-131.

Form of an execution issued on judgment of justice of the peace, see § 11-9-133.

Issuance, execution, and return of execution, see Miss. R. Civ. P. 69.

## JUDICIAL DECISIONS

**1. In general.**

Absence of entries in docket of justice of peace showing that writ of attachment was issued, return of officer thereon, and mailing of notice to defendant in attachment, held not to invalidate proceedings under attachment, where proceedings were in all respects regular, especially where record of deed was accompanied by complete transcript of all proceedings showing every necessary step leading up to judgment and sale under attachment was taken. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717 (1934).

This statute must be strictly complied with in all substantial requirements to

render a sale of land under execution from a justice of the peace valid. *Foote-Patrick Co. v. Merkle*, 116 Miss. 720, 77 So. 661 (1918).

Where sales of land are made under judgment of a justice of the peace, the title is not complete until a certified transcript of the proceedings before the justice is filed with conveyance in the proper chancery clerk's office as provided by this section [Code 1942, § 1938]. *Dunlap v. Fant*, 74 Miss. 197, 20 So. 874 (1896).

The "certified transcript" must include the docket entries, and, if these be correctly kept, need include nothing else. *Hughston v. Cornish*, 59 Miss. 372 (1882).

## RESEARCH REFERENCES

**ALR.** Sheriff's deed as prima facie evidence of return. 36 A.L.R. 1001, 108 A.L.R. 672.

Jurisdiction of justice's court (or similar court) of action to foreclose lien on land. 115 A.L.R. 539.

**Am Jur.** 30 Am. Jur. 2d, Executions §§ 437 et seq.

**CJS.** 33 C.J.S., Executions §§ 449, 459 et seq.

## CHAPTER 5

### Juries

- SEC.
- 13-5-1. Who are competent jurors; determination of literacy.
- 13-5-2. Public policy stated.
- 13-5-3. Repealed.
- 13-5-4. Definitions.
- 13-5-5. Repealed.
- 13-5-6. Jury commission—number, appointment, terms, qualifications, and compensation of members.
- 13-5-7. Repealed.
- 13-5-8. Master list consisting of county voter registration list to be compiled and maintained; exclusion of persons permanently excused from jury service from list; reinstatement of permanently excused persons.
- 13-5-9. Repealed.
- 13-5-10. Jury wheel; selection and deposit of names or identifying numbers of prospective jurors; number required; refilling.
- 13-5-11. Repealed.
- 13-5-12. Jury wheel—selection and deposit of names or identifying numbers of prospective jurors—procedure where less than all names on master list used.
- 13-5-13. Repealed.
- 13-5-14. List of names placed in jury wheel to be delivered to senior circuit judge—minute entry.
- 13-5-15. Repealed.
- 13-5-16. Random drawing of names or identifying numbers of prospective jurors; alphabetical list; prohibition against disclosure of names drawn; use of computer or electronic device for random selection.
- 13-5-17. Repealed.
- 13-5-18. Telephone answering device required; cost of device.
- 13-5-19. Repealed.
- 13-5-21. Jury list in counties with two circuit court districts.
- 13-5-23. Exemptions; length of service of tales and grand jurors.
- 13-5-25. Who is exempt as a personal privilege.
- 13-5-26. Jury box; deposit of names drawn from jury wheel; drawing and assignment of jurors; use of computer or electronic device for random selection.
- 13-5-27. Repealed.
- 13-5-28. Summoning of person drawn for jury duty.
- 13-5-29. Repealed.
- 13-5-30. Summoning of jurors where there is shortage of petit jurors drawn from jury box.
- 13-5-31. Repealed.
- 13-5-32. Names of jurors drawn from jury box to be made public; exception.
- 13-5-33. Juror may postpone jury service one time only; conditions for postponement; extreme emergency exception.
- 13-5-34. Punishment for failure to appear or to complete jury service.
- 13-5-35. Employment protections for jurors.
- 13-5-36. Preservation of records and papers in connection with selection and service of jurors.
- 13-5-37. Repealed.
- 13-5-38. Payment of cost of implementation of law.
- 13-5-39. Terms of grand juries limited.



- 13-5-41. Number of grand jurors.
- 13-5-43. Impaneling as conclusive evidence of competency and qualifications.
- 13-5-45. Foreman to be appointed and all to be sworn.
- 13-5-47. Judge to charge the grand jury.
- 13-5-49. Repealed.
- 13-5-51. Places of absent jurors to be filled.
- 13-5-53. Adjournment of grand jury to a day; pay in such case.
- 13-5-55. Grand jury to inspect jail; sheriff punishable.
- 13-5-57. Grand jury may examine all county offices.
- 13-5-59. Grand jury to examine tax collector's books.
- 13-5-61. Grand jury not to disclose secrets of jury-room.
- 13-5-63. Witnesses before grand jury may be subpoenaed and sworn.
- 13-5-65. Impaneling of petit juries.
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- 13-5-71. Oath of petit jurors.
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- 13-5-77. Special venire facias to issue in certain criminal cases.
- 13-5-79. When opinion as to guilt or innocence will not render one incompetent in a criminal case.
- 13-5-81. Challenge to array; quashing of venire.
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- 13-5-85. Selection of and service on juries in Harrison County.
- 13-5-87. Laws as to listing, drawing, summoning and impaneling of juries are directory.
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- 13-5-93. Nine jurors may return a verdict in civil cases.
- 13-5-95. Separate accommodations and bailiffs for male and female jurors.
- 13-5-97. Certain jury records exempt from public access requirements.

**§ 13-5-1. Who are competent jurors; determination of literacy.**

Every citizen not under the age of twenty-one years, who is either a qualified elector, or a resident freeholder of the county for more than one year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror. No person who is or has been within twelve months the overseer of a public road or road contractor shall, however, be competent to serve as a grand juror. The lack of any such qualifications on the part of one or more jurors shall not, however, vitiate an indictment or verdict. Moreover, no talesman or tales juror shall be qualified who has served as such talesman or tales juror in the last preceding two years, and no juror shall serve on any jury who has served as such for the last preceding two years. No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

In order to determine that prospective jurors can read and write, the presiding judge shall, with the assistance of the clerk, distribute to the jury panel a form to be completed personally by each juror prior to being empaneled as follows:

- “1. Your name \_\_\_\_\_ Last \_\_\_\_\_ First \_\_\_\_\_ Middle initial
2. Your home address \_\_\_\_\_
3. Your occupation \_\_\_\_\_
4. Your age \_\_\_\_\_
5. Your telephone number \_\_\_\_\_ If none, write none
6. If you live outside the county seat, the number of miles you live from the courthouse \_\_\_\_\_ Miles

\_\_\_\_\_  
 Sign your name”

The judge shall personally examine the answers of each juror prior to empaneling the jury and each juror who cannot complete the above form shall be disqualified as a juror and discharged.

A list of any jurors disqualified for jury duty by reason of inability to complete the form shall be kept by the circuit clerk and their names shall not be placed in the jury box thereafter until such person can qualify as above provided.

**SOURCES:** Codes, Hutchinson’s 1848, ch. 61, art. 1 (138); 1857, ch. 61, art. 126; 1871, § 724; 1880, § 1661; 1892, § 2354; 1906, § 2684; Hemingway’s 1917, § 2176; 1930, § 2029; 1942, § 1762; Laws, 1894, ch. 69; Laws, 1914, ch. 208; Laws, 1938, ch. 303; Laws, 1962, ch. 308, § 1; Laws, 1968, ch. 335, § 1; Laws, 1970, ch. 339, § 1, eff from and after passage (approved April 2, 1970).

**Cross References** — Constitutional authority for the legislature to provide for qualifications of grand and petit jurors, see Miss. Const. Art. 14, § 264.

Compensation paid jurors and determination thereof, see §§ 25-7-61, 25-7-63.

## JUDICIAL DECISIONS

1. Validity.
2. Constitutionality. \*
3. Construction and application, generally.
4. Exclusion of women.
5. Exclusion of Afro-Americans.
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13. Want of qualification, effect of.

### 1. Validity.

The statute does not place improper restrictions as to who can serve on a jury and is not unconstitutional. *Milano v. State*, 790 So. 2d 179 (Miss. 2001).

The literacy requirements of this section are constitutional. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

The literacy and age requirements of § 13-5-1 do not violate the constitutional rights of accused persons to be tried by an impartial jury. The literacy requirements of the statute are constitutional, and the statute does not bar persons over 65 years of age from serving on a jury, but merely grants those individuals the privilege to claim an exemption should they desire not to serve. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

Mississippi’s exemption of jurors who are illiterate or under 21 years of age, pursuant to § 13-5-1, or over 65 years of age, pursuant to § 13-5-25, did not violate the defendant’s rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Section 13-5-1 is not unconstitutional because it prevents those between the

ages of 18 and 21 from serving on juries. *Irving v. State*, 498 So. 2d 305 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3200, 96 L. Ed. 2d 687 (1987).

With the variety of cases now in the courts and the multitude of written documents entered into evidence, the requirement that a juror be able to read and write is a reasonable and nondiscriminatory regulation which operates equally against all persons tried by juries, and is as essential to the state's obligation to afford an accused a fair trial as it is to assure a fair trial for the state. *Terrell v. State*, 262 So. 2d 179 (Miss. 1972).

The question of whether this section [Code 1942, § 1762] is unconstitutional due to sex discrimination is now moot, since in its revised form it applies to every citizen without regard to sex. *Willis v. Carson*, 324 F. Supp. 1144 (S.D. Miss. 1971).

Persons alleging discrimination in the jury selection system have the burden of proving it. *Ford v. White*, 299 F. Supp. 772 (S.D. Miss. 1969), remanded, 430 F.2d 951 (5th Cir. 1970).

Code 1942, §§ 1762, 1762-03, and 1766 which deal with the qualifications and selection of jurors are in pari materia and, when considered as a whole, are not void for vagueness. *King v. Cook*, 297 F. Supp. 99 (N.D. Miss. 1969).

## 2. Constitutionality.

In a capital murder case, excusing a juror who responded affirmatively when asked if any jurors could not read or write did not violate defendant's constitutional right to an impartial jury; the requirement of Miss. Code Ann. § 13-5-1 that a juror be able to read and write is a reasonable and nondiscriminatory regulation that operates equally against all persons tried by juries. *Dycus v. State*, 875 So. 2d 140 (Miss. 2004).

The defendant, who was under 21 years old, was not denied his Sixth Amendment fair cross-section right by the fact that a qualified juror is defined, in part, as being over the age of 21. *Williams v. State*, 772 So. 2d 1113 (Miss. Ct. App. 2000).

## 3. Construction and application, generally.

Statute did not violate due process rights of appellant by excluding from jury service persons in his age group, 18 to 20 years; amendment of U.S. Constitution by Twenty-Sixth Amendment did not qualify persons under 21 years of age as jurors under state laws. *Joyce v. State*, 327 So. 2d 255 (Miss. 1976).

Code 1942, §§ 1762, 1762-03, and 1766 which deal with the qualifications and selection of jurors are in pari materia and, when considered as a whole, are not void for vagueness. *King v. Cook*, 297 F. Supp. 99 (N.D. Miss. 1969).

The direction given by Code 1942, § 1766 to the board of supervisors of the respective counties to select and list the names of qualified persons of good intelligence, sound judgment, and fair character is directive and shall be construed with the other sections of the Code relating to the selection of jurors. *Reeves v. Reeves*, 210 So. 2d 780 (Miss. 1968).

Code 1942, §§ 1762, 1762-03, and 1766 with respect to the selection of jurors are in pari materia. *Reed v. State*, 199 So. 2d 803 (Miss. 1967), appeal dismissed, cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273 (1968).

## 4. Exclusion of women.

Rule that exclusion of women from jury service violates state criminal defendant's Sixth and Fourteenth Amendment rights to impartial jury trial held not to apply retroactively. *Daniel v. Louisiana*, 420 U.S. 31, 95 S. Ct. 704, 42 L. Ed. 2d 790 (1975), overruled on other grounds, *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

The requirement that a petit jury be selected from a representative cross section of the community, which is fundamental to the jury trial guaranteed by the Sixth Amendment, is violated by the systematic exclusion of women from jury panels. *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

A state criminal defendant's right to an impartial jury trial under the Sixth and Fourteenth Amendments is violated by the operation of a state's constitutional and statutory provisions which operate to exclude women from jury service. *Taylor v.*



Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

The Fourteenth Amendment is not applicable on the issue as to whether or not women will be required to serve as jurors in a state court, the power to prescribe the qualifications of jurors being in the legislature, which may include or exclude women from jury duty. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

A defendant appealing a conviction of rape did not have standing to raise the issue as to whether failure to include women as qualified jurors was in violation of his rights under the Fourteenth Amendment of the Constitution. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

Where the jury for the term of court at which the defendant was tried was drawn prior to the effective date of the amendment permitting women to serve on juries, a motion to quash the indictment on the ground that women were excluded from the jury by statute was properly overruled. *Gordon v. State*, 222 So. 2d 141 (Miss. 1969).

Limiting jury service to males and excluding women from such service does not constitute a denial to a female defendant of equal protection of the laws. *White v. State*, 214 So. 2d 467 (Miss. 1968).

The exclusion of women from jury service does not constitute an invalid discrimination. *Reed v. State*, 199 So. 2d 803 (Miss. 1967), appeal dismissed, cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273 (1968).

Women are not required to perform jury duty in Mississippi; nor does the federal constitution require women to serve on juries in state courts. *Shinall v. State*, 199 So. 2d 251 (Miss. 1967), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660 (1967), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Unlike classification by race, classification of persons eligible for jury duty on the basis of sex, applicable alike to all races, is not unconstitutional. *Cobb v. City of Greenville*, 187 So. 2d 861 (Miss. 1966), cert. denied, 385 U.S. 1011, 87 S. Ct. 704, 17 L. Ed. 2d 548 (1967).

### 5. Exclusion of Afro-Americans.

The trial court in a narcotics prosecution did not err in overruling defendant's

motion to quash the indictment and petit venire, which motion alleged that the statutory exclusion of persons 18, 19 and 20 years of age to serve on grand and petit juries violated defendant's federal constitutional rights and systematically excluded black persons from grand and petit juries; the fact that such age group has been permitted to register and vote by amendment to the U.S. Constitution did not qualify persons under 21 to serve as jurors under state law. *Fermo v. State*, 370 So. 2d 930 (Miss. 1979).

The contention that there had been a systematic exclusion of Negroes and Indians from grand juries was not supported where, though names of prospective jurors had to be drawn from a list of voters or people owning real estate and it was difficult to get names of people who don't vote or own real property, and though there was a small number of Indians in the county, Indians and Negroes were on the venire from which the grand jury was chosen. *Tubby v. State*, 327 So. 2d 272 (Miss. 1976).

Where county officials charged with grand jury selection knew or had reason to know that the voter registration lists failed to be representative of adult black males, they were under an affirmative duty to utilize a selection method which had the potential for yielding juries which represented a fair cross-section of the qualified citizens of the community, and this duty included a resort to the county land rolls as an additional source of qualified blacks. *Ford v. Hollowell*, 385 F. Supp. 1392 (N.D. Miss. 1974).

Under-registration of Negroes on jury lists because of failure to register to vote does not constitute discrimination. *Ford v. White*, 299 F. Supp. 772 (S.D. Miss. 1969), remanded, 430 F.2d 951 (5th Cir. 1970).

The voter registration rolls of April 1966 of Quitman County were unconstitutionally tainted by the vestiges of a state-sanctioned discriminatory voter registration procedure, the effect of which was to prevent adequate representation of Negroes on the jury lists. *King v. Cook*, 298 F. Supp. 584 (N.D. Miss. 1969).

Jurors are not to be summoned because of their race, but rather summoned without discrimination from all persons qual-

ified as jurors, and where a record does not show a systematic exclusion of Negroes from jury service, the state has met the burden of proof necessary to show that there is no systematic exclusion of Negroes from the jury. *Smith v. State*, 229 So. 2d 551 (Miss. 1969).

Where defendant's proof showed that a disproportion between Negroes and whites on the jury lists had existed over a long period of time, he had made out a prima facie case of the systematic exclusion of Negroes from the jury which indicted him, and it was incumbent upon the state to show that there was no systematic exclusion of Negroes from the grand jury and that defendant's constitutional rights were not infringed by the manner and procedure in which the grand jurors were drawn, and in the absence of such rebuttal testimony on the part of the state the presumption of purposeful prior exclusion stands and the motion to quash the indictment should have been sustained. *Reeves v. Reeves*, 210 So. 2d 780 (Miss. 1968).

Allegations that because of the interrelationship between the racial restrictions of the Mississippi voter qualification laws and requirements with respect to the selection of grand and petit jurors a defendant would be denied his equal civil rights to trial by a jury free from exclusion were insufficient to justify the removal to the federal courts of the trial of a Negro charged with the crime of rape. *Bass v. State*, 381 F.2d 692 (5th Cir. 1967).

In order for the state to sustain the burden of refuting the defendant's prima facie case that Negroes had been systematically excluded from the juries of the county in which he was tried, it must be shown that the board of supervisors had abandoned its former practice of systematic exclusion and that Negroes were currently being selected for jury service as other qualified citizens. *Black v. State*, 187 So. 2d 815 (Miss. 1966).

Where the state did not sustain burden of refuting the prima facie case made by the defendant that Negroes had been systematically excluded from juries of Chickasaw County, the defendant's conviction could not be allowed to stand and the indictment against him was quashed and

the cause remanded to await the action of a qualified grand jury summoned from a proper jury list. *Black v. State*, 187 So. 2d 815 (Miss. 1966).

Issue whether Negroes were systematically excluded from grand and petit juries held waived by failure of competent counsel for Negro defendant to raise it in the trial court. *Gordon v. State*, 160 So. 2d 73 (Miss. 1964).

The complete exclusion from jury service, of Negroes in a county in which they are a majority, violates the constitutional rights of a Negro charged with crime. *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78 (1959), 361 U.S. 850, 80 S. Ct. 109, 4 L. Ed. 2d 89 (1959).

Whether there has been a systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

The board of supervisors is not required to place in a jury box the names of all the Negroes who meet the qualifications for jury service, since they do not now and have never placed in a jury box for any one year the names of all the white men who meet such qualifications. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

In a prosecution of a Negro for the rape of a white woman the conclusion of the trial judge, in passing upon the issue of fact presented by a motion to quash the indictment, that there had been no systematic, intentional, deliberate discrimination on account of race, was not manifestly wrong in view of the evidence. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

The proof by a Negro defendant on a charge for an offense against a white person, that no Negro had served on a grand jury for the past thirty years is very strong evidence of purposeful racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States, which the state has the burden of disproving by showing that the names of Negroes were not placed in the jury box for some other reason than the fact that



they are Negroes. *Seay v. State*, 212 Miss. 712, 55 So. 2d 430 (1951).

In a prosecution of Negro defendant for felonious assault of white person where the evidence failed to disclose any reason for the absence of the names of Negroes in the jury boxes other than the mere fact that supervisors just did not place their names in the box, and no reason was given for the absence of the names of Negroes in the jury boxes, the conviction of the defendant will be reversed. *Seay v. State*, 212 Miss. 712, 55 So. 2d 430 (1951).

Where, in a county the adult population of which is more than 35% Negro, no Negro has served on a grand or petit criminal court jury for 30 years, the inference of systematic exclusion is not sufficiently repelled by showing that a relatively small number of Negroes meet a requirement that a juror must be a qualified elector. *Patton v. State*, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A.L.R.2d 1286 (1947), conformed to, 203 Miss. 265, 33 So. 2d 456 (1948).

Where murder indictment was quashed on ground that Negroes were omitted from jury box from which grand jury was drawn, defendant could not complain of trial court's refusal to quash second indictment on ground that grand jury was drawn from registration books and not from jury box. *Pearson v. State*, 176 Miss. 9, 167 So. 644 (1936).

#### **6. Powers and function of court.**

Error of court in refusing to excuse jurors for cause in criminal case will not be considered on appeal where it appears from record that appellant used only five peremptory challenges and hence his peremptory challenges were not exhausted. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

Opinion of a juror formed on rumor does not disqualify him if he is fair and impartial. The trial judge should resolve all doubts as to juror's fairness, impartiality, and freedom from bias and prejudice in favor of the accused and the judgment of the circuit court as to qualifications of juror is prima facie correct. *Donahue v. State*, 142 Miss. 20, 107 So. 15 (1926).

It is proper for the court to excuse the jailer. *Hale v. State*, 72 Miss. 140, 16 So. 387 (1894), overruled on other grounds,

*Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

#### **7. Examination on voir dire.**

A trial court's discretion in passing upon the extent and propriety of questions addressed to prospective jurors is not unlimited and the Supreme Court will take note of abuse on appeal where prejudice to the accused is present. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

A trial court cannot disparage the defense set up in the case before the jury trying the case. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

#### **8. Qualifications of jurors.**

Defendant's claims of error as to an allegedly illiterate juror were without merit because under Miss. Code Ann. § 13-5-1, a juror's illiteracy would not vitiate the verdict. Also the Mississippi Supreme Court has held that a person who can read and write only a few words is qualified as a juror and the record showed that the juror testified that he could read the Bible, road signs and "anything in Wal-Mart." *Burnside v. State*, 912 So. 2d 1018 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 679 (Miss. 2005).

In a capital murder case, a court properly removed a juror from the panel where she stated that she could only fill out some of the form and she had her sister-in-law actually fill out the form for her. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).



Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Section 13-5-67 is read against the backdrop of the general rule that a party who fails to object to the jury's composition before it is impaneled waives any right to complain thereafter. The word "disqualified" in § 13-5-67 has breadth considerably beyond that of § 13-5-1's initial qualifications for jury service. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

The right to a jury of one's peers does not entitle the defendant in a criminal case to a jury which includes convicted felons or bootleggers. *Shows v. State*, 267 So. 2d 811 (Miss. 1972).

The legislature has a right to impose reasonable qualifications for jurors when such qualifications do not violate the constitutional rights of accused persons to be tried by an impartial jury. *Shows v. State*, 267 So. 2d 811 (Miss. 1972).

A defendant is entitled to be tried in a county where a reasonable proportion of the citizens are qualified for jury service. *Magness v. State*, 103 Miss. 30, 60 So. 8 (1912).

### 9. —Qualified elector.

Juror who had paid one-half of his taxes on or before February 1, remaining half not being due under statute at time of murder trial, held, as respects payment of taxes, qualified juror. *Myers v. State*, 167 Miss. 76, 147 So. 308 (1933).

### 10. —Prior service as juror.

Although defendant argued that the trial court committed reversible error by excusing two potential jurors because

they had served on a jury in the past two years, rather than permitting those jurors the discretion to decide whether or not to serve, procedural bar aside, the error was harmless because defendant did not claim any constitutional violation or that he was in any manner prejudiced by the dismissal of the potential jurors. *Gause v. State*, 65 So. 3d 295 (Miss. 2011).

A member of an indicting grand jury may not serve on the defendant's petit jury. The accuser may not also be the trier of fact since such a practice is inconsistent with the constitutional requirement of an impartial jury. *Hood v. State*, 523 So. 2d 302 (Miss. 1988).

The fact that the foreman of the grand jury which indicted the defendant had also served on a petit jury in the circuit court approximately 6 months before did not vitiate the indictment and make it subject to be quashed, for the prohibition in this section [Code 1942, § 1762] specifically relates to talesmen or tales jurors who are served in the two preceding years and does not prohibit a qualified elector from serving as a grand juror or as foreman of a grand jury. *Russell v. Bailey*, 197 So. 2d 469 (Miss. 1967).

Affidavit and allegation that defendant and his counsel did not know of the situation, is necessary with respect to motion for new trial on ground that trial juror was disqualified as having been member of indicting grand jury. *Ratcliff v. State*, 197 Miss. 289, 20 So. 2d 69 (1944).

Defendant convicted in homicide prosecution, was not entitled to new trial on ground that a trial juror was disqualified as having been a member of the indicting grand jury, where neither defendant nor his counsel made affidavit that they did not know of the situation, and defendant failed to testify at the hearing on the motion, and where counsel's ignorance of the juror's identity persisted past the voir dire examination and escaped the admitted practice of scanning such jury list. *Ratcliff v. State*, 197 Miss. 289, 20 So. 2d 69 (1944).

That portion of the statute relating to the service by a juror in the trial of as many as three cases does not apply to members of the regular panel. *Louisville, N.O. & T. Ry. v. Mask*, 64 Miss. 738, 2 So. 360 (1887).

A member of the grand jury which found the indictment is incompetent as a petit juror on the trial of the accused. *Beason v. State*, 34 Miss. 602 (1857); *House v. State*, 96 Miss. 653, 51 So. 274 (1910).

### 11. —Opinion and prior knowledge.

When a juror, who knew the victim's mother, swore that he would be impartial in defendant's trial for fondling, the trial court did not err in allowing the juror to sit on the jury. *Wright v. State*, 9 So. 3d 447 (Miss. Ct. App. 2009).

There was no ground for a new trial in the fact that one juror was an employee of one of the defendant's witnesses in a suit arising out of an automobile collision, where such witness was an engineer who had no interest whatever in the case but who made a map of the road where the accident occurred, and in testifying, simply identified the map as that made by him and stated nothing as to how or why the accident happened, since a juror is not rendered incompetent to sit in the trial of a case, by virtue of knowledge of incidental or collateral facts or facts about which there is no controversy. *Wells v. Autry*, 235 So. 2d 706 (Miss. 1970).

The exclusion by the court, of its own motion, of a juror who heard part of former trial held not reversible error. *Barnett v. State*, 146 Miss. 893, 112 So. 586 (1927).

Opinion of a juror formed on rumor does not disqualify him if he is fair and impartial, it being for the court to determine his fitness. *Donahue v. State*, 142 Miss. 20, 107 So. 15 (1926).

### 12. —Miscellaneous.

Denial of the inmate's petition for post-conviction relief under Miss. Code Ann. § 13-5-1 was proper where the issue was procedurally barred from being raised for the first time in that petition; further, inmate's contention was without merit because the record indicated that the inmate had affirmed the juror's presence after fully exploring her abilities to read, write, and comprehend English. *Puckett v. State*, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

Persons convicted of infamous crimes are not competent to serve on juries.

*Fleming v. State*, 687 So. 2d 146 (Miss. 1997).

A trial judge in a murder prosecution did not err in refusing to exclude a juror after she had been accepted, even though the juror's daughter had been murdered six years earlier, where the attorneys inadvertently failed to ask the juror during voir dire whether a member of her family had been a victim of a crime, and therefore the juror neither withheld nor misrepresented information. *Spivey v. Mowdy*, 617 So. 2d 999 (Miss. 1992).

Under § 13-5-1, which declares ineligible jurors who have been "convicted of an infamous crime, or the unlawful sale of intoxicating liquor within a period of 5 years," a juror's competency was not corrupted by her husband's prior liquor-related convictions. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

The trial court did not err in refusing to declare a mistrial on the basis that a juror was unable to read and write, where the evidence on such issue was conflicting, thereby creating a factual dispute for resolution by the trial judge. *Johnson v. State*, 416 So. 2d 383 (Miss. 1982), writ denied, 449 So. 2d 1207 (Miss. 1984).

The trial judge did not abuse his discretion in overruling defendant's motion to quash his indictment for breaking and entering with intent to commit rape on grounds that the husband of the prosecutrix and the wife of a first cousin of the husband of the prosecutrix were members of the grand jury which indicted the defendant, where the evidence showed that the husband of the prosecutrix was not present during deliberations concerning the charges against defendant and the other grand juror complained of, though present during the deliberations, did not "open her mouth," nor did she do anything to influence the other grand jurors. *Southward v. State*, 293 So. 2d 343 (Miss. 1974).

Where a juror in a civil case told the trial judge that he did not at that time employ a lawyer but might have to do so if his son were indicted in another case, but that employment of a lawyer would have no effect on his deliberation, and the juror later employed one of the defense counsel in the civil case as his son's attorney, and the judge noted that he knew the juror to



be an honest and upright person, there was no reversible error in the trial judge's failure to notify counsel with reference to what he had been told by the juror. *Loden v. Joslin*, 229 So. 2d 825 (Miss. 1969).

It is only sale of intoxicating liquors within past five years that disqualifies person from jury service under this section [Code 1942, § 1762] and person is not disqualified from jury service by plea of guilty or by conviction of unlawful possession of intoxicating liquor in state courts or by being under bond to await action of federal grand jury for possession of intoxicating liquors on which federal tax had not been paid. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

Indictment in murder prosecution held not void because grand juror allegedly served both as election commissioner and grand juror in finding and presentment of indictment. *Robinson v. State*, 178 Miss. 568, 173 So. 451 (1937).

A drunk man is incompetent. *Guice v. State*, 60 Miss. 714 (1883); *Louisville, N.O. & T. Ry. v. Mask*, 64 Miss. 738, 2 So. 360 (1887).

An employee of one of the parties is incompetent as a juror. *Hubbard v. Rutledge*, 57 Miss. 7 (1879).

### 13. Want of qualification, effect of.

Defendant was not entitled to a new trial when it was determined that one juror was a resident of Memphis, Tennessee, thereby violating the freeholder requirement of Miss. Code. Ann. § 13-5-1 (1972). By its own terms, the statute provides that a lack of qualifications on the part of a juror shall not vitiate a verdict. *Wright v. State*, 805 So. 2d 577 (Miss. Ct. App. 2001).

A defendant's motion for a new trial should have been granted where the parties stipulated that a juror had served in violation of § 13-5-1, which prohibits service of any juror who has a case pending in that court, and neither the state nor the

defense was aware of such. *Brown v. State*, 529 So. 2d 537 (Miss. 1988).

Verdict of jury in prosecution for unlawful possession of intoxicating liquor is not invalid because one of jurors was not qualified elector, was not drawn, but was summoned by mistake, was accepted and served. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

Inability of a juror to read and write does not disqualify him although unknown to defendant, so as to entitle defendant to a new trial. *Huggins v. State*, 103 Miss. 227, 60 So. 209 (1913).

An objection that a juror was an alien and therefore not a qualified elector, cannot be made after verdict. Where it is not shown that the facts upon which an objection to a juror is based were unknown when the juror was accepted, the objection will be unavailing. *Fulcher v. State*, 82 Miss. 630, 35 So. 170 (1903).

Under Const. 1890 § 264, as it formerly read, providing certain qualifications for jurors, but directing that the want thereof shall not vitiate any verdict, which section of the Constitution is substantially embodied in this section [Code 1942, § 1762], it is not cause for reversing a conviction of murder that it was discovered after the verdict that one of the jurors was not a qualified elector and had not been drawn on the venire but had been summoned by mistake in place of a person by the same name who was drawn. Complaint may be made only where that occurs which impugns the fairness of the trial. *Tolbert v. State*, 71 Miss. 179, 14 So. 462, 42 Am. St. R. 454 (1893).

Const. 1890 § 264, as that section formerly read, declaring that "the want of such qualification in any juror shall not vitiate any indictment or verdict," which section of the Constitution is substantially embodied in this section [Code 1942, § 1762], does not apply where the judgment is assailed because of the court's action in overruling an exception seasonably made to a juror. *Nail v. State*, 70 Miss. 32, 11 So. 793 (1892).

## ATTORNEY GENERAL OPINIONS

Only those persons who are registered to vote in state and local elections should be included on the certified list of regis-

tered voters. Those voters who are registered to vote pursuant to the National Voter Registration Act only are not regis-



tered to vote in state and local elections and therefore should not be included on the certified voter registration list certified by the circuit clerk for purposes of

jury selection. See Sections 13-5-8 and 13-5-4(d). Carpenter, January 10, 1996, A.G. Op. #96-0002.

## RESEARCH REFERENCES

**ALR.** Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 A.L.R.2d 1291.

Separation of jury in criminal case. 21 A.L.R.2d 1088.

Mandamus or prohibition as remedy to enforce right to jury trial. 41 A.L.R.2d 780.

Juror's previous knowledge of facts of civil case as disqualification. 73 A.L.R.2d 1312.

Disqualification, as jurors, of resident or taxpayers of litigating political subdivision. 81 A.L.R.2d 708.

Use of intoxicating liquor by jurors: civil cases. 6 A.L.R.3d 934.

Grand jury: Admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction. 37 A.L.R.3d 612.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 A.L.R.3d 1012.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 A.L.R.3d 1052.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 A.L.R.3d 126.

Competency of juror as affected by his membership in co-operative association interested in the case. 69 A.L.R.3d 1296.

Similarity of occupation between proposed juror and alleged victim of crime as affecting juror's competency. 71 A.L.R.3d 974.

Law enforcement officers as qualified jurors in criminal case. 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 958.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof. 78 A.L.R.3d 1147.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 A.L.R.3d 172.

Jury: visual impairment as disqualification. 48 A.L.R.4th 1154.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification. 65 A.L.R.4th 743.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury — post-Batson state cases. 47 A.L.R.5th 259.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction — state cases. 70 A.L.R.5th 587.

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. 75 A.L.R.5th 295.

Prejudicial effect of juror's inability to comprehend English. 117 A.L.R.5th 1.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination. 4 A.L.R. Fed. 449.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 9 et seq.

47 Am. Jur. 2d, Jury §§ 142-156.

**CJS.** 38A C.J.S., Grand Juries §§ 11, 22-35.

50 C.J.S., Juries §§ 262, 263, 268, 278-285, 426.

**Lawyers' Edition.** Prospective juror in capital case whose views on death penalty would prevent or impair performance of duties as juror held subject to exclusion for cause. 80 L. Ed. 2d 841.

**Law Reviews.** 1989 Mississippi Supreme Court Review: Voir Dire. 59 Miss. L. J. 865, Winter, 1989.

### § 13-5-2. Public policy stated.

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

**SOURCES:** Laws, 1974, ch 378, § 1, eff from and after Jan. 1, 1975.

**Editor's Note** — Section 12 of Chapter 378, Laws of 1974, which chapter enacted this section, reads as follows:

"SECTION 12. This act shall take effect and be in force from and after January 1, 1975, except that jurors shall continue to be drawn in accordance with the provisions of present law until implementation of the juror selection procedure herein provided for in April 1975."

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### JUDICIAL DECISIONS

1. In general.
2. Peremptory challenges.
3. Random selection.
4. No systematic exclusion.

#### 1. In general.

Although provisions for jury selection are merely directory, courts must make every reasonable effort to comply with the statutory method of drawing, selecting and serving jurors; the jury system must remain untainted and beyond suspicion. *Avery v. State*, 555 So. 2d 1039 (Miss. 1990), overruled on other grounds, *Mayfield v. State*, 612 So. 2d 1120 (Miss. 1992).

In civil jury trial in Federal District Court, equal protection component of Fifth Amendment due process clause prohibits private litigant from using peremptory challenge to exclude prospective jurors on account of race because such race-based exclusion violates equal protection rights of excluded jurors; opposing litigant has third-party standing to raise excluded jurors' rights in opposing litigant's own behalf; and, while role of litigants in determining jury's composition may provide one reason for wide acceptance of jury system and its verdicts, if race stereotypes are price for acceptance of jury panel, price is too high to meet standard of constitution. *Edmonson v. Leesville Con-*

*crete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), on remand, 943 F.2d 551 (5th Cir. La. 1991), reh'g denied, (5th Cir. Oct. 21, 1991).

"Significant period of time" for purposes of determining federal constitutional violation is not limited to period of time after passage of Miss. Jury Selection Act which was a step forward in eradicating racial discrimination in selection of juries; plaintiff black state prisoner indicted for and convicted of murder who claimed denial of equal protection because for 20 year period up to and including his indictment all 42 grand jury foremen appointed by circuit judges of county he was indicted were white even though population of county was 43% black, established prima facie case of racial discrimination in county, which State failed to rebut inasmuch as its rebuttal testimony merely indicated that judges in county never indicated to circuit clerk that they selected grand jury foremen based on race, and testimony neither denied use of racial criteria nor advanced any other objective non-discriminatory criteria; and conviction would be vacated. *Johnson v. Puckett*, 929 F.2d 1067 (5th Cir. 1991), cert. denied, 502 U.S. 898, 112 S. Ct. 274, 116 L. Ed. 2d 226 (1991).

Although persons over 65 years of age and persons who have served on a jury within 2 years are exempt from jury service under § 13-5-25, neither the circuit court nor the deputy circuit clerk have authority to act unilaterally and strike such persons from the jury list. Such persons are eligible for jury service and have every lawful right and authority to serve if called and selected. When their names are drawn, such persons must be summoned the same as other prospective jurors and no one has authority to exempt any such juror from service unless he or she claims the privilege and asks to be excused. Thus, a judgment of conviction and sentence was reversed where the deputy circuit clerk unilaterally struck from the jury list all persons over 65 years of age and all persons who had served on a jury within the 2 preceding years. *Adams v. State*, 537 So. 2d 891 (Miss. 1989).

A defendant indicted by a county grand jury on various drug-related offenses was not entitled to removal of the indictments to federal court, notwithstanding his contention that the grand juries were illegally constituted in that blacks had not been considered for appointment as forepersons, where state law clearly provided that no one could be excluded from jury service because of race and where there was no equivalent basis for a prediction that defendant could not enforce his federal rights in state court. *Williams v. State*, 608 F.2d 1021 (5th Cir. 1979), appeal dismissed, cert. denied, 449 U.S. 804, 101 S. Ct. 49, 66 L. Ed. 2d 8 (1980).

In a homicide prosecution, the trial judge correctly overruled a defense motion to quash the indictment, venire and panel on the ground that blacks and women were systematically excluded from serving as grand jury foremen, where Mississippi followed the "random" method of jury selection and where the evidence was insufficient to establish a prima facie case of discrimination in the selection of jury foremen by trial judges. *Herring v. State*, 374 So. 2d 784 (Miss. 1979).

## 2. Peremptory challenges.

Mississippi caselaw did not extend the Batson protection to religiously based pe-

remptory strikes of jurors; the only objection offered by defendant was a Batson objection. Because defendant did not object that religiously based peremptory strikes violated Miss. Const. Art. 3, § 18 and Miss. Code Ann. § 13-5-2, the trial judge did not err in accepting the reason offered by the State as a race-neutral reason not prohibited by Batson. *Jackson v. State*, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Peremptory challenges to jurors may not be exercised to exclude a juror on the basis of race, color, religion, sex, national origin, or economic status. *Thorson v. State*, 721 So. 2d 590 (Miss. 1998).

## 3. Random selection.

In a drug case, a trial court did not err by denying a motion to quash the venire due to the fact that less than three percent were minorities; there was no evidence to show that the jury was not selected at random under Miss. Code Ann. § 13-5-2. *Magee v. State*, 951 So. 2d 589 (Miss. Ct. App. 2007).

In defendant's trial for the sale of cocaine, defendant failed to make a prima facie showing that the fair cross-section requirement was violated; defendant also failed to show that there was a systematic exclusion of blacks from the jury pool. *Yarbrough v. State*, 911 So. 2d 951 (Miss. 2005).

Where defendant failed to show that the under-representation of a racial group on his jury was based on a systematic exclusion in selection of the jury venire, defendant was not denied a jury that was a fair cross-section of the community. *Pratt v. State*, 870 So. 2d 1241 (Miss. Ct. App. 2004).

## 4. No systematic exclusion.

Defendant's conviction for the sale of cocaine was appropriate because a single venire wherein a distinctive group was underrepresented did not constitute systematic exclusion of that group from the jury-selection process. *Simmons v. State*, 13 So. 3d 844 (Miss. Ct. App. 2009).



## RESEARCH REFERENCES

**ALR.** Proof as to exclusion or discrimination against eligible class or race in respect to jury in criminal case. 1 A.L.R.2d 1291.

Exclusion of attorneys from jury list in criminal cases. 32 A.L.R.2d 890.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 15.

Propriety of asking prospective female jurors questions on voir dire not asked of prospective male jurors, or vice versa. 39 A.L.R.4th 450.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury — post-Batson state cases. 47 A.L.R.5th 259.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation — post-Batson state cases. 63 A.L.R.5th 375.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction — state cases. 70 A.L.R.5th 587.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination justifying relief in Federal Court. 4 A.L.R. Fed. 449.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 8-10, 19, 21.

9 Am. Jur. Proof of Facts 2d, Discrimination in Jury Selection — Systematic Exclusion or Underrepresentation of Identifiable Group, §§ 19 et seq. (proof of systematic underrepresentation of identifiable group in selection of prospective jurors).

**CJS.** 38A C.J.S., Grand Juries §§ 11, 16-18, 20-35.

50 C.J.S., Juries §§ 263, 278-280, 284-301, 310-322.

## § 13-5-3. Repealed.

Repealed by Laws of 1974, ch 378, § 11, eff from and after Jan. 1, 1975.

[Codes, Hutchinson's 1848, ch. 61, art. 8 (1); 1857, ch. 61, arts. 128, 135; 1871, §§ 726, 736; 1880, § 1681; 1892, § 2358; 1906, § 2688; Hemingway's 1917, § 2180; 1930, § 2033; 1942, § 1766; Laws, 1896, ch. 84; Laws, 1938, ch. 298; Law, 1938, Ex. ch. 84; Laws, 1962, ch. 308, § 2; Laws, 1964, ch. 326; Laws, 1968, ch. 338, § 1]

**Editor's Note** — Former § 13-5-3 specified how the list of jurors was to be procured.

## § 13-5-4. Definitions.

As used in this chapter:

(a) "Court" means the circuit, chancery and county courts of this state and includes, when the context requires, any judge of the court.

(b) "Clerk" and "clerk of the court" means the circuit clerk of the county and any deputy clerk.

(c) "Master list" means the voter registration lists for the county.

(d) "Voter registration lists" means the official records of persons registered to vote in the county.

(e) "Jury wheel" means any physical device or electronic system for the storage of the names or identifying numbers of prospective jurors.

(f) "Jury box" means the jury wheel in which is placed the names or identifying numbers of prospective jurors whose names are drawn at random from the jury wheel and who are not disqualified.

(g) "Senior judge" means the circuit or chancery judge, as the case may be, who has the longest continuous service on the court in a particular judicial district which has more than one (1) such judge, or if the judges are equal in time of service, then the judge who has been engaged for the longest time continuously in the practice of law in this state.

**SOURCES:** Laws, 1974, ch. 378, § 2, eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### ATTORNEY GENERAL OPINIONS

Only those persons who are registered to vote in state and local elections should be included on the certified list of registered voters. Those voters who are registered to vote pursuant to the National Voter Registration Act only are not registered to vote in state and local elections

and therefore should not be included on the certified voter registration list certified by the circuit clerk for purposes of jury selection. See Sections 13-5-1, 13-5-8 and 13-5-4(d). Carpenter, January 10, 1996, A.G. Op. #96-0002.

### RESEARCH REFERENCES

**ALR.** Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 1, 3.

47 Am. Jur. 2d, Jury §§ 1, 40.

**CJS.** 38A C.J.S., Grand Juries §§ 2-5, 9, 90.

50A C.J.S., Juries §§ 1, 2.

### § 13-5-5. Repealed.

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975. [Codes, 1942, § 1762-01; Laws, 1964, ch. 327, § 1]

**Editor's Note** — Former § 13-5-5 provided a procedure by which resident freeholders not qualified as electors could be made competent jurors by court order.

### § 13-5-6. Jury commission—number, appointment, terms, qualifications, and compensation of members.

(1) A jury commission shall be established in each county to manage the jury selection process under the supervision and control of the court. The jury commission shall be composed of three (3) members who will serve a four-year term beginning on January 1, 1975, as follows: One (1) member shall be appointed by the circuit judge of said county; one (1) member shall be appointed by the chancery judge of said county; and one (1) member shall be appointed by the board of supervisors of said county. If there is more than one (1) circuit or chancery judge in a judicial district, then the senior circuit or chancery judge, as the case may be, shall make the said appointment for each county in his district. Any unexpired term shall be filled by the appropriate appointing authority who is in office at the time the vacancy occurs.

(2) A jury commissioner shall have the following qualifications:

(a) He shall be a duly qualified elector at the time of his appointment;

(b) He shall be a resident citizen in the county in which he is to serve;  
and

(c) He shall not be an attorney nor an elected public official.

(3) Each jury commissioner shall receive compensation at a per diem rate as provided in Section 25-3-69.

**SOURCES:** Laws, 1974, ch. 378, § 3; Laws, 1989, ch. 395, § 1, eff from and after January 1, 1990.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### ATTORNEY GENERAL OPINIONS

An individual cannot continue to serve the board of aldermen at the same time.  
as jury commissioner and as a member of Tucker, July 8, 2005, A.G. Op. 05-0335.

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 107-108. 50 C.J.S., Juries §§ 270, 312.

**CJS.** 38A C.J.S., Grand Juries §§ 41, 43.

### § 13-5-7. Repealed.

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, 1942, § 1762-02; Laws, 1964, ch. 327, § 2; Laws, 1968, ch. 336, § 1]

**Editor's Note** — Former § 13-5-7 specified who were competent jurors after entry of a court order provided for in former § 13-5-5.

### § 13-5-8. Master list consisting of county voter registration list to be compiled and maintained; exclusion of persons permanently excused from jury service from list; reinstatement of permanently excused persons.

(1) In April of each year, the jury commission for each county shall compile and maintain a master list consisting of the voter registration list for the county.

(2) The circuit clerk of the county and the registrar of voters shall have the duty to certify to the commission during the month of January of each year under the seal of his office the voter registration list for the county; the list shall exclude any person who has been permanently excused from jury service pursuant to Section 13-5-23(4). Any person who has been excluded from the master list for jury service may be reinstated to the master list after one (1) year by requesting that the circuit clerk reinstate him to the master list.



**SOURCES:** Laws, 1974, ch. 378, § 4; Laws, 2010, ch. 456, § 1, eff from and after July 1, 2010.

**Amendment Notes** — The 2010 amendment rewrote (2).

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### ATTORNEY GENERAL OPINIONS

Only those persons who are registered to vote in state and local elections should be included on the certified list of registered voters. Those voters who are registered to vote pursuant to the National Voter Registration Act only are not registered to vote in state and local elections and therefore should not be included on the certified voter registration list certified by the circuit clerk for purposes of jury selection. See Sections 13-5-1 and 13-5-4(d). Carpenter, January 10, 1996, A.G. Op. #96-0002.

The master voter registration list of persons available for selection on juries should not include the names of persons who are on the National Voter Registration Act "inactive" list. Carpenter, March 6, 1998, A.G. Op. #98-0124.

Maintenance of the master list means that the list is not to include the names of individuals no longer eligible to serve on a jury. Ashley, March 17, 2000, A.G. Op. #2000-0117.

### RESEARCH REFERENCES

**ALR.** Exclusion of attorneys from jury list in criminal cases. 32 A.L.R.2d 890.

Inclusion or exclusion or first and last days in computing time for jury drawing, or furnishing of jury list, which must take place a certain number of days before a known future date. 98 A.L.R.2d 1421.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

**Am Jur.** 38 Am. Jur. 2d(Rev), Grand Jury §§ 8, 10, 19, 21.

47 Am. Jur. 2d, Jury §§ 101-103, 109, 113-115, 147, 148.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selection, drawing, and summoning of jurors).

**CJS.** 38A C.J.S., Grand Juries §§ 38-44.

50 C.J.S., Juries §§ 266-270, 298, 307-310.

### § 13-5-9. Repealed.

Repealed by Laws of 1974, ch. 378, § 2, eff from and after Jan. 1, 1975.

[Codes, 1942, § 1762-03; Laws, 1964, ch. 327, § 3; Am Laws, 1972, ch. 372, § 2]

**Editor's Note** — Former § 13-5-9 provided an alternate procedure by which lists of jurors were to be procured under the alternative procedures of former § 13-5-5.

### § 13-5-10. Jury wheel; selection and deposit of names or identifying numbers of prospective jurors; number required; refilling.

The jury commission for each county shall maintain a jury wheel into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. If the total number of prospec-

tive jurors on the master list is one thousand (1,000) or less, the names or identifying numbers of all of them shall be placed in the jury wheel. In all other cases, the number of prospective jurors to be placed in the jury wheel shall be one thousand (1,000) plus not less than one percent (1%) of the total number of names on the master list. From time to time a larger or additional number may be determined by the jury commission or ordered by the court to be placed in the jury wheel. In April of each year, beginning in 1976, the wheel shall be emptied and refilled as prescribed in this chapter.

**SOURCES:** Laws, 1974, ch. 378, § 5(1), eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 104, 105.

9 Am. Jur. Proof of Facts 2d, Discrimination in Jury Selection — Systematic Exclusion or Underrepresentation of Identifiable Group, §§ 19 et seq. (proof of systematic underrepresentation of identifiable group in selection of prospective jurors).

**CJS.** 50 C.J.S., Juries §§ 308-309.

### § 13-5-11. Repealed.

Repealed by Laws, 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.  
[Codes, 1942, § 1762-04; Laws, 1964, ch. 327, § 4]

**Editor's Note** — Former § 13-5-11 stated when the alternate procedures pertaining to jurors set forth in former §§ 13-5-5, 13-5-7 and 13-5-9 became operative.

### § 13-5-12. Jury wheel—selection and deposit of names or identifying numbers of prospective jurors—procedure where less than all names on master list used.

Unless all the names on the master list are to be placed in the jury wheel pursuant to Section 13-5-10, the names or identifying numbers of prospective jurors to be placed in the jury wheel shall be selected by the jury commission at random from the master list in the following manner: The total number of names on the master list shall be divided by the number of names to be placed in the jury wheel; the whole number nearest the quotient shall be the "key number," except that the key number shall never be less than two (2). A "starting number" for making the selection shall then be determined by a random method from the number from one (1) to the key number, both inclusive. The required number of names shall then be selected from the master list by taking in order the first name on the master list corresponding to the starting number and then successively the names appearing in the master list at intervals equal to the key number, recommencing if necessary at the start of the list until the required number of names has been selected. The name of any person who is under the age of twenty-one (21) years and the name of any person who has been permanently excused from jury service

pursuant to Section 13-5-23(4) shall be passed over without interrupting the sequence of selection. Any person who has been excluded from the master list for jury service may be reinstated to the master list after one (1) year by requesting that the circuit clerk reinstate him to the master list. Upon recommencing at the start of the list, names previously selected from the master list shall be disregarded in selecting the additional names. The jury commission may use an electronic or mechanical system or device in carrying out its duties.

**SOURCES:** Laws, 1974, ch. 378, § 5(2); Laws, 2010, ch. 456, § 2, eff from and after July 1, 2010.

**Amendment Notes** — The 2010 amendment rewrote the fourth sentence; and added the fifth sentence.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### ATTORNEY GENERAL OPINIONS

It is not necessary to maintain physical jury wheel and jury box if clerk is using computer, as long as clerk is capable of printing out physical record of contents of jury wheel and jury box if it becomes necessary to do so. Salazar, Dec. 3, 1992, A.G. Op. #92-0901.

### § 13-5-13. Repealed.

Repealed by Laws, 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, 1880, § 1682; 1892, § 2359; 1906, § 2689; Hemingway's 1917, § 2181; 1930, § 2034; 1942, § 1767]

**Editor's Note** — Former § 13-5-13 specified the number of names to be contained on the jury list.

### § 13-5-14. List of names placed in jury wheel to be delivered to senior circuit judge—minute entry.

At any time the jury commission places names in the jury wheel, the jury commission shall also deliver to the senior circuit judge a list of all names placed on or in the jury wheel, and said circuit judge shall spread upon the minutes of the circuit court all of the names so placed in the jury wheel.

**SOURCES:** Laws, 1974, ch. 378, § 5(3), eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d(Rev), Jury §§ 105, 113, 130, 163, 262, 263, 296.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selection, drawing, and summoning of jurors).

**CJS.** 50 C.J.S., Juries §§ 289, 308, 324, 328, 329, 333, 335, 336, 417.



**§ 13-5-15. Repealed.**

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, Hutchinson's 1848, ch. 61, art. 8 (1); 1857, ch. 61, art. 135; 1871, § 736; 1880, § 1684; 1892, § 2360; 1906, § 2690; Hemingway's 1917, § 2182; 1930, § 2035; 1942, § 1768]

**Editor's Note** — Former § 13-5-15 provided that the jury list be delivered to the clerk of the circuit court, filed, and not thereafter altered.

**§ 13-5-16. Random drawing of names or identifying numbers of prospective jurors; alphabetical list; prohibition against disclosure of names drawn; use of computer or electronic device for random selection.**

(1) Except as otherwise provided by subsection (2) of this section, from time to time and in a manner prescribed by the court, a private citizen who does not have an interest in a case pending trial and who is not a practicing attorney publicly shall draw at random from the jury wheel the names or identifying numbers of as many prospective jurors as the court by order requires. The clerk shall prepare an alphabetical list of the names drawn. Neither the names drawn nor the list shall be disclosed to any person other than pursuant to this chapter or specific order of the court.

(2) The court may order that the drawing of names or identifying numbers pursuant to subsection (1) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court.

**SOURCES:** Laws, 1974, ch. 378, § 5(4); Laws, 1986, ch. 312, § 1, eff from and after July 1, 1986.

**Cross References** — Application of this section to selection of jurors for state grand jury, see § 13-7-15.

Selection and service of jurors, see Miss. R. Civ. P. 47.

**JUDICIAL DECISIONS****1. In general.**

In a homicide prosecution, the trial judge correctly overruled a defense motion to quash the indictment, venire and panel on the ground that blacks and women were systematically excluded from serving as grand jury foremen, where Missis-

sippi followed the "random" method of jury selection and where the evidence was insufficient to establish a prima facie case of discrimination in the selection of jury foremen by trial judges. *Herring v. State*, 374 So. 2d 784 (Miss. 1979).

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 104, 105, 110, 123, 226, 227, 251. **CJS.** 50 C.J.S., Juries §§ 308, 324, 328, 329, 333, 335, 336, 417.  
 15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selection, drawing, and summoning of jurors).

**§ 13-5-17. Repealed.**

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.  
 [Codes, 1857, ch. 61, art. 139; 1871, § 740; 1880, § 1688; 1892, § 2362; 1906, § 2691; Hemingway's 1917, § 2183; 1930, § 2036; 1942, § 1769]

**Editor's Note** — Former § 13-5-17 provided that the slips containing the names of the jurors not serving were to be returned to the box.

**§ 13-5-18. Telephone answering device required; cost of device.**

The clerk of the circuit court in each county shall purchase and install a telephone answering device for the purpose of providing a recorded message after 5:00 p.m. to jurors who have been summoned to jury duty, in order for such jurors to inquire as to whether their presence will be required in court the following day. The cost of purchasing and maintaining said telephone answering device shall be paid by the board of supervisors from the county general fund.

**SOURCES:** Laws, 1989, ch. 395, § 3, eff from and after January 1, 1990.

**§ 13-5-19. Repealed.**

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.  
 [Codes, 1880, § 1690; 1892, § 2364; 1906, § 2693; Hemingway's 1917, § 2185; 1930, § 2038; 1942, § 1771]

**Editor's Note** — Former § 13-5-19 provided for the making and keeping of a list of jurors who did not serve.

**§ 13-5-21. Jury list in counties with two circuit court districts.**

In counties where there are two (2) circuit court districts, the jury commission shall make a list of jurors for each district in the manner directed for a county, and the same shall be treated in all respects as for an entire county. In such counties a juror shall not be required to serve out of his district, except should the court, in its discretion, otherwise direct, and except when drawn on a special venire. In either of such excepted cases, the jury shall be drawn from the two (2) jury boxes if the court so direct, one (1) name for each alternately.

**SOURCES:** Codes, 1871, § 755; 1880, § 1689; 1892, § 2363; 1906, § 2692; Hemingway's 1917, § 2184; 1930, § 2037; 1942, § 1770; Laws, 1904, ch. 151; Laws, 1974, ch. 378, § 8, eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

## JUDICIAL DECISIONS

1. In general.
2. Jury selection.

### 1. In general.

In defendant's trial for wire fraud, the trial court properly ordered the circuit court clerk to draw the jury from both judicial districts within the county in order to expand the jury pool, and to be certain that a fair and impartial jury as nearly as possible, could be impaneled; there was no prejudice to defendant as a result. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Trial court did not abuse its discretion under Miss. Code Ann. § 13-5-21 in empanelling a jury to try defendant for aggravated driving while intoxicated where the jury panel consisted of jurors who resided in different judicial districts within the same county. *Gates v. State*, 829 So. 2d 1283 (Miss. Ct. App. 2002).

Defendant in a murder trial failed to show that a jury selection method of drawing jurors from two judicial districts did not result in a fair cross-section of the community. *Thomas v. State*, 818 So. 2d 335 (Miss. 2002).

Trial court's decision to draw jury venire from both judicial districts, rather than just a jury venire from the district where the burglary victims were likely less well known, was not error as the record did not show that the jury selection process was fraudulent, unfair, or deprived defendant of due process. *Cunningham v. State*, 828 So. 2d 208 (Miss. Ct. App. 2002).

Fact that special venire in transferee county was drawn randomly from county as a whole, rather than alternately from each of county's two judicial districts as required by statute, did not amount to reversible error in murder prosecution, as defendant failed to demonstrate any prejudice resulting from noncompliance with statute and failed to demonstrate that

jury was not chosen from fair cross-section of community. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Statutory method of selecting jurors in criminal prosecution is directory, not mandatory, and unless it is shown that method used was fraudulent or such radical departure from method prescribed by the statute as to be unfair to defendant or to prevent due process of law, appellate court will not reverse. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

A murder defendant did not establish that the trial judge abused his discretion by refusing the defendant's request to draw venire members from both of the county's judicial districts where the defendant did not offer evidence indicating that the jury selected was biased or partial. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Under this section, trial court may require juror to serve out of his district (1) in its discretion and (2) when such juror is drawn on special venire; special venire may be drawn from both districts of county, in discretion of trial judge. *Myers v. State*, 353 So. 2d 1364 (Miss. 1978).

In homicide prosecution, where court ordered special venire from first district of county, refusal to order one from second district held not error, statute being directory. *Taylor v. State*, 148 Miss. 621, 114 So. 390 (1927).

This section [Code 1942, § 1770] is directory. *Haney v. State*, 129 Miss. 486, 92 So. 627 (1922); *Taylor v. State*, 148 Miss. 621, 114 So. 390 (1927).

In a county having two circuit court districts the venire may be drawn from



both districts of the county, but where one jury box is exhausted it is not reversible error for the trial court to draw all names from the other district. *Ferguson v. State*, 107 Miss. 559, 65 So. 584 (1914).

This section [Code 1942, § 1770] applies to Perry county notwithstanding the Act March 6, 1892 (Acts 1892 ch. 116) dividing it into two judicial districts and providing that no person shall be liable to jury service outside the district in which he lives. *Burt v. State*, 86 Miss. 280, 38 So. 233 (1905).

## 2. Jury selection.

Where defendant failed to show that the under-representation of a racial group on his jury was based on a systematic exclusion in selection of the jury venire, defendant was not denied a jury that was a fair cross-section of the community. *Pratt v. State*, 870 So. 2d 1241 (Miss. Ct. App. 2004).

## § 13-5-23. Exemptions; length of service of tales and grand jurors.

(1) All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes:

(a) When the juror is ill and, on account of the illness, is incapable of performing jury service;

(b) When the juror's attendance would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision; or

(c) When the potential juror is a breast-feeding mother.

(2) An excuse of illness under subsection (1)(a) of this section may be made to the clerk of court outside of open court by providing the clerk with a certificate of a licensed physician, stating that the juror is ill and is unfit for jury service, in which case the clerk may excuse the juror. If the excuse of illness is not supported by a physician's certificate, a judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(a) of this section.

(3)(a) The test of an excuse under subsection (1)(b) of this section for undue or extreme physical or financial hardship shall be whether the individual would either:

(i) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or

(ii) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support; or

(iii) Suffer physical hardship that would result in illness or disease.

(b) "Undue or extreme physical or financial hardship" does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment or business.

(c) A judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(b) of this section.

(d) A person asking to be excused based on a finding of undue or extreme physical or financial hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.

(e) A person asking a judge to grant an excuse under subsection (1)(b) of this section may be required to provide the judge with documentation such as, but not limited to, federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation may result in a denial of the request to be excused.

(f) In cases under subsection (1)(c) of this section, the excuse must be made by the juror in open court under oath.

(4) A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature. A person who has been summoned for jury duty who meets the age threshold for exemption from jury service shall have the option to be permanently excused from jury service due to age by filing with the circuit clerk a notarized request to be permanently excused.

(5) Grand jurors shall serve until discharged by the court.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 10 (4); 1857, ch. 61, art. 127; 1871, § 735; 1880, § 1662; 1892, § 2356; 1906, § 2686; Hemingway's 1917, § 2178; 1930, § 2031; 1942, § 1764; Laws, 1938, ch. 302; Laws, 1944, ch. 197; Laws, 1976, ch. 464, § 1; Laws, 1988, ch. 438; Laws, 1990, ch. 360, § 1; Laws, 2004, 1st Ex Sess, ch. 1, § 8; Laws, 2006, ch. 437, § 1; Laws, 2006, ch. 520, § 10; Laws, 2007, ch. 433, § 1, eff from and after Jan. 1, 2008.

**Joint Legislative Committee Note** — Section 1 of ch. 437 Laws of 2006, effective from and after passage (approved March 20, 2006), amended this section. Section 10 of ch. 520, Laws of 2006, effective from and after passage (approved April 3, 2006), also amended this section. As set out above, this section reflects the language of Section 10 of ch. 520, Laws of 2006, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

**Cross References** — Exemption from jury duty as personal privilege, see § 13-5-25.

Exemption of officers and employees of the state penitentiary from jury duty, see § 47-5-55.

Selection and service of jurors, see Miss. R. Civ. P. 47.

## JUDICIAL DECISIONS

### 1. In general.

Although defendant argued that the trial court committed reversible error by excusing two potential jurors because they had served on a jury in the past two

years, rather than permitting those jurors the discretion to decide whether or not to serve, procedural bar aside, the error was harmless because defendant did not claim any constitutional violation or that he was

in any manner prejudiced by the dismissal of the potential jurors. *Gause v. State*, 65 So. 3d 295 (Miss. 2011).

A trial court's excusal of a potential juror on hardship grounds was not an abuse of discretion where the juror had 4 children at home with no one to care for them. *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Non-compliance with § 13-5-23, on exemption of jurors, does not warrant quashing of venire unless there is showing of actual fraud, prejudice, or such flagrant violation of duty as to amount to fraud. *Pulliam v. State*, 515 So. 2d 945 (Miss. 1987).

The exemptions from jury duty set forth in this section [Code 1942, § 1764] are not unreasonable or discriminatory, and a defendant, indicted and tried for murder, was not thereby prejudiced in his right to a fair trial. *Capler v. State*, 237 So. 2d 445 (Miss. 1970), vacated in part, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972), on remand, 268 So. 2d 338 (Miss. 1972).

The trial court did not commit reversible error in overruling defendant's motion for a mistrial, or that a new panel of jurors be tendered to him, where, after ten jurors had been finally accepted to try the defendant for murder, the court, out of the presence of defendant or his counsel, excused a juror because illness required the

juror's presence at home, but allowed the defendant one additional peremptory challenge. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337 (1957).

While it is obvious that there may be circumstances, making strict compliance with this section [Code 1942, § 1764] impossible as regards presenting excuses from jury service, the trial judge is under a duty to require compliance therewith except where it is impracticable to do so. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947).

As regards the matter of presenting excuses from jury service, the rule is that it is not enough to warrant the court in quashing the venire that the trial judge has violated or failed to do his duty in this regard, but, to so warrant, the evidence and circumstances must show actual fraud or such flagrant violation of duty in this respect as that the proven facts and circumstances show a legal fraud on the rights of the defendant. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947).

In the absence of a showing of fraud on the rights of the accused in a criminal case, it was not reversible error for the trial court to excuse from jury service, for good cause, before the case was called for trial and in chambers without notice to the accused, 26 of the 74 persons who appeared in response to an order for a special venire of 90 persons. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947).

Indictment for murder held not void because grand juror allegedly served as both election commissioner and grand juror. *Robinson v. State*, 178 Miss. 568, 173 So. 451 (1937).

## ATTORNEY GENERAL OPINIONS

Since no state or federal statute requires private employer to pay wages or salary to employee serving on grand or petit jury, and who is therefore not working in employer's business during this

time, simple refusal of employer to pay employee under these circumstances would not constitute violation of Miss. Code Section 13-5-23. *Pacific*, Apr. 7, 1993, A.G. Op. #93-0112.

## RESEARCH REFERENCES

**ALR.** Power of grand jury after term of court for which organized. 75 A.L.R.2d 544.

Religious belief as ground for exemption or excuse from jury service. 2 A.L.R.3d 1392.



Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case, as ground of complaint by accused. 99 A.L.R.3d 1261.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 A.L.R.4th 800.

Jury: who is lawyer or attorney disqualified or exempt from service, or subject to challenge for cause. 57 A.L.R.4th 1260.

**Am Jur.** 38 Am. Jur. 2d (Rev), Grand Jury §§ 9, 12.

47 Am. Jur. 2d (Rev), Jury §§ 160.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 131 (order excusing juror).

**CJS.** 38A C.J.S., Grand Juries § 36.

50 C.J.S., Juries §§ 285, 286, 302-305.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:14.

## § 13-5-25. Who is exempt as a personal privilege.

Every citizen over sixty-five (65) years of age, and everyone who has served as a grand juror or as a petit juror in the trial of a litigated case within two (2) years, shall be exempt from service if the juror claims the privilege. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim.

Provided, however, that no person who has served as a grand juror or as a petit juror in a trial of a litigated case in one (1) court may claim the exemption in any other court where the juror may be called to serve.

**SOURCES:** Codes, 1880, §§ 1661, 1683; 1892, § 2357; 1906, § 2687; Hemingway's 1917, § 2179; 1930, § 2032; 1942, § 1765; Laws, 1958, ch. 287; Laws, 1960, ch. 236; Laws, 1966, ch. 353, § 1; Laws, 1976, ch. 464, § 2; Laws, 1990, ch. 360, § 2, eff from and after July 1, 1990; Laws, 2004, 1st Ex Sess, ch. 1, § 9; Laws, 2006, ch. 437, § 2; Laws, 2007, ch. 433, § 2, eff from and after Jan. 1, 2008.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

## JUDICIAL DECISIONS

1. In general.
2. Harmless error.

### 1. In general.

The exemptions under Miss. Code Ann. § 13-5-25 are not mandatory and must be asserted by the individual. *Trevillion v. State*, 26 So. 3d 1098 (Miss. Ct. App. 2009).

Although a trial court erred in removing a potential juror, defendant failed to object at trial; therefore, he was procedurally barred from arguing the error at trial. Moreover, the error was harmless. *Spire v. State*, 10 So. 3d 477 (Miss. 2009).

The exemption contemplated by this section does not apply to service within a designated venire period. *Galloway v. State*, 735 So. 2d 1117 (Miss. Ct. App. 1999).

Transfer of venue to another county for trial proceedings did not deprive defendant in murder prosecution of his right to be tried by jury chosen from fair cross-section of community including senior citizens, despite defendant's contention that moving jurors to the other county made elderly persons more inclined to exercise their statutory exemption from jury service; defendant failed to present any evi-

dence indicating that jury lists were not representative of community. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Mississippi's exemption of jurors who are illiterate or under 21 years of age, pursuant to § 13-5-1, or over 65 years of age, pursuant to § 13-5-25, did not violate the defendant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Although persons over 65 years of age and persons who have served on a jury within 2 years are exempt from jury service under § 13-5-25, neither the circuit court nor the deputy circuit clerk have authority to act unilaterally and strike such persons from the jury list. Such persons are eligible for jury service and have every lawful right and authority to serve if called and selected. When their names are drawn, such persons must be summoned the same as other prospective jurors and no one has authority to exempt any such juror from service unless he or she claims the privilege and asks to be excused. Thus, a judgment of conviction and sentence was reversed where the deputy cir-

cuit clerk unilaterally struck from the jury list all persons over 65 years of age and all persons who had served on a jury within the 2 preceding years. *Adams v. State*, 537 So. 2d 891 (Miss. 1989).

It was not error to excuse veniremen who had served as petit jurors a few weeks prior to the trial. *Brown v. State*, 38 So. 316 (Miss. 1905).

## 2. Harmless error.

Although defendant argued that the trial court committed reversible error by excusing two potential jurors because they had served on a jury in the past two years, rather than permitting those jurors the discretion to decide whether or not to serve, procedural bar aside, the error was harmless because defendant did not claim any constitutional violation or that he was in any manner prejudiced by the dismissal of the potential jurors. *Gause v. State*, 65 So. 3d 295 (Miss. 2011).

Although the trial court erred by informing two potential jurors that he was required to dismiss them because they had previously served on a jury in the last two years, the error was harmless, and defendant had not preserved his challenge for appellate review since there had not been a contemporaneous objection to the error. *Trevillion v. State*, 26 So. 3d 1098 (Miss. Ct. App. 2009).

## \* RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d (Rev), Grand Jury §§ 9, 12.

47 Am. Jur. 2d (Rev, Jury §§ 160-163.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 131 (order excusing juror).

**CJS.** 38A C.J.S., Grand Juries § 36.

50 C.J.S., Juries §§ 285, 286, 302-305.

**Law Reviews.** 1989 Mississippi Supreme Court Review: Challenge to Jury. 59 Miss. L. J. 868, Winter, 1989.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:14.

## § 13-5-26. Jury box; deposit of names drawn from jury wheel; drawing and assignment of jurors; use of computer or electronic device for random selection.

(1) The circuit clerk shall maintain a jury box and shall place therein the names or identifying numbers of all prospective jurors drawn from the jury wheel.

(2) A judge or any court or any other state or county official having authority to conduct a trial or hearing with a jury within the county may direct the circuit clerk to draw and assign to that court or official the number of jurors he deems necessary for one or more jury panels or as required by law for a

grand jury, except as otherwise provided by subsection (3) of this section. Upon receipt of the direction, and in a manner prescribed by the court, the circuit clerk shall publicly draw at random from the jury box the number or jurors specified.

(3) The court may order that the drawing and assigning of jurors pursuant to subsection (2) of this section may be performed by random selection of a computer or electronic device pursuant to such rules and regulations as may be prescribed by the court. The jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

**SOURCES:** Laws, 1974, ch. 378, § 6(1, 2); Laws, 1986, ch. 312, § 2, eff from and after July 1, 1986.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### JUDICIAL DECISIONS

1. In general.
2. No deficiency in jury selection.

#### 1. In general.

Trial judge's questioning of circuit clerk established that clerk had complied, or substantially complied, with statute with respect to random selection of jurors to try defendant charged with attempting to obtain controlled substance by misrepresentation or fraud. *Griffin v. State*, 494 So. 2d 376 (Miss. 1986).

#### 2. No deficiency in jury selection.

Trial court properly denied defendant's motion to quash a venire because defendant did not show that the exclusion of persons with surnames beginning with "T-Z," which was due to an algorithm used by the county's computer system,

disproportionally affected any distinctive group in the county; defendant alleged no prejudice resulting from the trial court's noncompliance with the statute, and failed to show that persons whose surnames began with "A" through "S" did not represent a fair cross-section of the community. *Presley v. State*, 9 So. 3d 442 (Miss. Ct. App. 2009).

Under Miss. Code Ann. § 13-5-26, the circuit court did not violate method of drawing and summoning jury where defendant did not allege that any deficiency in jury selection resulted in prejudice to his case or that the nine jurors were not qualified to serve. *Havard v. State*, 986 So. 2d 333 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 557 (Miss. 2008).

### RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 8, 13, 19, 21.

47 Am. Jur. 2d Jury §§ 104, 105, 110, 123, 143, 165, 226, 227.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selection, drawing, and summoning of jurors).

**CJS.** 38A C.J.S., Grand Juries §§ 6, 7, 38-41, 43, 44.

50 C.J.S., Juries §§ 308, 309, 311-313, 324, 328, 329, 333, 335, 336.

## § 13-5-27. Repealed.

Repealed by Laws of 1974, ch. 378, § 11, effective from and after Jan. 1, 1975.



[Codes, 1892, § 2365; 1906, § 2694; Hemingway's 1917, § 2186; 1930, § 2039; 1942, § 1772; Laws, 1938, ch. 298; 1938, Ex. ch. 84; 1960, ch. 237; Am Laws, 1972, ch. 372, § 1]

**Editor's Note** — Former § 13-5-27 provided for the drawing of grand and petit jurors in open court.

### § 13-5-28. Summoning of person drawn for jury duty.

If a grand, petit or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons, either personally or by mail, addressed to the juror at the juror's usual residence, business or post office address, requiring the juror to report for jury service at a specified time and place. The summons shall include instructions to the potential jurors that explain, in layman's terms, the provisions of Section 13-5-23.

**SOURCES:** Laws, 1974, ch. 378, § 6(3); Laws, 2004, 1st Ex Sess, ch. 1, § 10; Laws, 2006, ch. 437, § 3; Laws, 2007, ch. 433, § 3, eff from and after Jan. 1, 2008.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

## ATTORNEY GENERAL OPINIONS

When a jury is needed in justice court, the justice court clerk must notify the circuit clerk of the number of jurors to be summoned and the circuit clerk must draw the jury pool and issue summonses

to those jurors. Section 13-5-28 allows the circuit clerk to serve the summonses either personally or by mail. Wilson, November 15, 1996, A.G. Op. #96-0792.

### § 13-5-29. Repealed.

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, 1892, § 2366; 1906, § 2695; Hemingway's 1917, § 2187; 1930, § 2040; 1942, § 1773]

**Editor's Note** — Former § 13-5-29 provided for the envelopes containing slips with jurors' names to be opened and venire facias to be issued.

### § 13-5-30. Summoning of jurors where there is shortage of petit jurors drawn from jury box.

If there is an unanticipated shortage of available petit jurors drawn from a jury box, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the jury box in a manner prescribed by the court.

**SOURCES:** Laws, 1974, ch. 378, § 6(4), eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Grand Jury § 22.  
47 Am. Jur. 2d, Jury §§ 122, 123, 188.  
15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selection, drawing, and summoning of jurors).

**CJS.** 38A C.J.S., Grand Juries §§ 46-49.  
50 C.J.S., Juries §§ 317-319, 326, 331.

§ 13-5-31. Repealed.

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, Hutchinson's 1848, ch. 61, art. 8 (3); 1857, ch. 61, art. 138; 1871, § 739; 1880, § 1687; 1892, § 2367; 1906, § 2696; Hemingway's 1917, § 2188; 1930, § 2041; 1942, § 1774]

**Editor's Note** — Former § 13-5-31 pertained to the drawing of jurors in vacation term.

§ 13-5-32. Names of jurors drawn from jury box to be made public; exception.

The names of jurors drawn from the jury box shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

**SOURCES:** Laws, 1974, ch. 378, § 6(5), eff from and after Jan. 1, 1975.

JUDICIAL DECISIONS

1. In general.

Trial court did not improperly sequester the names of the jurors in defendant's trial for tax evasion. The judge decided in the case at bar to keep the jurors' names secret based on events from defendant's previous prosecution; moreover, defendant failed to properly brief this issue. *King v. State*, 897 So. 2d 981 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Because defendant adopted son failed to show that sealing of the venire panel list pursuant to Miss. Code Ann. § 13-5-32 without notice or opportunity for a hearing prejudiced him in any way, the error was not a basis for reversal. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Before a trial judge makes a determination not to make a jury list available to litigants or trial attorneys whose clients will have a cause for trial, he should cause the record clearly to demonstrate good and sufficient reason "in the interest of justice" as the section provides. Before making his determination to keep confidential or secret the names of the jurors drawn from the jury box, the litigants or counsel should have notice that such action is being considered by the trial judge; then the court should make its decision only after a hearing is accorded the defendant on the issue. *Valentine v. State*, 396 So. 2d 15 (Miss. 1981).

## RESEARCH REFERENCES

CJS. 50 C.J.S., Juries §§ 307, 308, 315.

**§ 13-5-33. Juror may postpone jury service one time only; conditions for postponement; extreme emergency exception.**

(1) Notwithstanding any other provisions of this chapter, individuals scheduled to appear for jury service have the right to postpone the date of their initial appearance for jury service one (1) time only. Postponements shall be granted upon request, provided that:

(a) The juror has not been granted a postponement within the past two (2) years;

(b) The prospective juror appears in person or contacts the clerk of the court by telephone, electronic mail or in writing to request a postponement; and

(c) Prior to the grant of a postponement with the concurrence of the clerk of the court, the prospective juror fixes a date certain to appear for jury service that is not more than six (6) months or two (2) terms of court after the date on which the prospective juror originally was called to serve and on which date the court will be in session, whichever is the longer period.

(2) A subsequent request to postpone jury service may be approved by a judicial officer only in the event of an extreme emergency, such as a death in the family, sudden illness, or a natural disaster or a national emergency in which the prospective juror is personally involved, that could not have been anticipated at the time the initial postponement was granted. Prior to the grant of a second postponement, the prospective juror must fix a date certain on which the individual will appear for jury service within six (6) months or two (2) terms of court after the postponement on a date when the court will be in session.

(3) The Administrative Office of Courts shall promulgate rules for the implementation of this section.

**SOURCES:** Laws, 2004, 1st Ex Sess, ch. 1, § 14; Laws, 2006, ch. 437, § 4, eff from and after passage (approved Mar. 20, 2006.)

**Editor's Note** — A former § 13-5-33 [Codes, 1892, § 2368; 1906, § 2697; Hemingway's 1917, § 2190; 1930, § 2043; 1942, § 1776; Repealed by Laws, 1974, ch. 378, § 11, eff from and after Jan. 1, 1975] provided for the coroner or justice of the peace to perform the duties of the chancery clerk in relation to juries when the same person holds both clerks' offices, and for the performance of such duties in case of absence or illness of a clerk or sheriff.

Laws of 2004, 1st Ex Sess, ch. 1, § 20 provides:

"SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007." Laws of 2006, ch. 437, § 4, extended the effective date of this section until January 1, 2008."



**§ 13-5-34. Punishment for failure to appear or to complete jury service.**

(1) A person summoned for jury service who fails to appear or to complete jury service as directed, and who has failed to obtain a postponement in compliance with the provisions for requesting a postponement, or who fails to appear on the date set pursuant to Section 13-5-33, may be ordered by the court to appear and show cause for failure to comply with the summons. If the juror fails to show good cause for noncompliance with the summons, the juror may be held in civil contempt of court and may be fined not more than Five Hundred Dollars (\$500.00) or imprisoned not more than three (3) days, or both. The prospective juror may be excused from paying sanctions for good cause shown or in the interest of justice.

(2) In addition to, or in lieu of, the fine or imprisonment provided in subsection (1) of this section, the court may order that the prospective juror complete a period of community service for a period no less than if the prospective juror would have completed jury service, and provide proof of completion of this community service to the court.

**SOURCES:** Laws, 1974, ch. 378, § 6(6); Laws, 2004, 1st Ex Sess, ch. 1, § 11; Laws, 2006, ch. 437, § 5; Laws, 2007, ch. 433, § 4, eff from and after Jan. 1, 2008.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

**RESEARCH REFERENCES**

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 95-98. **CJS.** 50 C.J.S., Juries §§ 345, 346.  
15 Am. Jur. Pl & Pr Forms (Rev), Jury,  
Form 122 (order for defaulting juror to  
show cause).

**§ 13-5-35. Employment protections for jurors.**

(1) It shall be unlawful for any employer or any other person to persuade or attempt to persuade any juror to avoid jury service; to intimidate or to threaten any juror in that respect; or to remove or otherwise subject an employee to adverse employment action as a result of jury service if the employee notifies his or her employer that he or she has been summoned to serve as a juror within a reasonable period of time after receipt of a summons.

(2) It shall be unlawful for an employer to require or request an employee to use annual, vacation or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process, or time spent actually serving on a jury. Nothing in this provision shall be construed to require an employer to provide annual, vacation or sick leave to employees under the provisions of this statute who otherwise are not entitled to such benefits under company policies.

(3) Any violation of subsection (1) or (2) of this section shall be deemed an interference with the administration of justice and a contempt of court and punishable as such.

(4) A court shall automatically postpone and reschedule the service of a summoned juror employed by an employer with five (5) or fewer full-time employees, or their equivalent, if another employee of that employer has previously been summoned to appear during the same period. Such postponement will not constitute the excused individual's right to one (1) automatic postponement under Section 13-5-24.

**SOURCES:** Laws, 2004, 1st Ex Sess, ch. 1, § 15; Laws, 2006, ch. 437, § 6, eff from and after passage (approved Mar. 20, 2006.)

**Editor's Note** — Laws of 2004, 1st Ex Sess, ch. 1, § 20 provides:

"SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007." Laws, 2006, ch. 437, § 6, extended the effective date of this section until January 1, 2008.

A former § 13-5-35 [Codes, Hutchinson's 1848, ch. 61, art. 8 (5); 1857, ch. 61, art. 140; 1871, § 741; 1880, § 1692; 1892, § 2369; 1906, § 2698; Hemingway's 1917, § 2191; 1930, § 2044; 1942, § 1777; Repealed by Laws, 1974, ch. 378, § 11, eff from and after Jan. 1, 1975] provided for the summoning of jurors and penalties for failure of a juror to attend.

### **§ 13-5-36. Preservation of records and papers in connection with selection and service of jurors.**

All records and papers compiled and maintained by the jury commission or the clerk in connection with selection and service of jurors shall be preserved by the clerk for four (4) years after the jury wheel used in their selection is emptied and refilled, and for any longer period ordered by the court.

**SOURCES:** Laws, 1974, ch. 368 § 7, eff from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

### **§ 13-5-37. Repealed.**

Repealed by Laws of 1974, ch. 378, § 11, eff from and after Jan. 1, 1975.

[Codes, 1892, § 2370; 1906, § 2699; Hemingway's 1917, § 2192; 1930, § 2045; 1942, § 1778]

**Editor's Note** — Former § 13-5-37 provided for a fine and contempt of court for officials who failed to perform specified duties pertaining to juries.

### **§ 13-5-38. Payment of cost of implementation of law.**

In counties where the implementation of Sections 13-5-2 through 13-5-16, 13-5-21, 13-5-26 through 13-5-38, and 13-5-41, requires additional clerical or other personnel, the board of supervisors, in its discretion, may pay for such services out of the general county fund of the respective county.

**SOURCES:** Laws, 1974, ch. 378, § 10, eff from and after Jan. 1, 1975.

**Editor's Note** — Sections 13-5-27, 13-5-29, 13-5-31 and 13-5-37 referred to in the paragraph were repealed by Laws, 1974, ch. 378, § 11, effective from and after Jan. 1, 1975.

**Cross References** — Selection and service of jurors, see Miss. R. Civ. P. 47.

## § 13-5-39. Terms of grand juries limited.

Unless otherwise directed by an order of the senior circuit judge, not more than two (2) grand juries shall be drawn or impaneled during a calendar year at or for a term or terms of the circuit court in any county or judicial district of a county; provided, however, upon impanelment, a grand jury may be convened and reconvened in termtime and in vacation. It shall continue to serve from term to term until the next grand jury is impaneled, and it may return indictments to any term of court, notwithstanding that a term of court at which criminal business may be conducted shall intervene between the time the grand jury is impaneled and the time an indictment is returned.

**SOURCES:** Codes, Hemingway's 1917, § 2189; 1930, § 2042; 1942, § 1775; Laws, 1910, ch. 107; Laws, 1983, ch. 499, § 1; Laws, 1984, ch. 351, eff from and after July 1, 1984.

### JUDICIAL DECISIONS

#### 1. In general.

Post-conviction relief was denied in a case where defendant entered a guilty plea to the crime of the sale of cocaine because an indictment was not void due to the fact that it was returned during a July term, but filed during a November term, since this was not prohibited under Miss. Code Ann. § 13-5-39; the grand jury continued to serve from term to term until the next grand jury was impaneled, and it was allowed to return indictments at any term of court. *Belton v. State*, 968 So. 2d 501 (Miss. Ct. App. 2007), writ of certiorari

denied by 968 So. 2d 948, 2007 Miss. LEXIS 643 (Miss. 2007).

An indictment returned by grand jury impaneled in April and reconvened in September after an intervening term of court in July was not void since the statute fixing court terms in the county, § 9-7-49, specifically provided that a grand jury should be impaneled at the April and October terms but left the question of impaneling for the January and July terms discretionary with the judge. *J.B. Womack Constr. Co. v. Laws Constr. Co.*, 330 So. 2d 602 (Miss. 1976).

### RESEARCH REFERENCES

**ALR.** Power of grand jury after term of court for which organized. 75 A.L.R.2d 544.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury § 15.

**CJS.** 38A C.J.S., Grand Juries §§ 76-79.

## § 13-5-41. Number of grand jurors.

The number of grand jurors shall not be less than fifteen (15) nor more than twenty (20), in the discretion of the court.



**SOURCES:** Codes, 1892, § 2371; 1906, § 2700; Hemingway's 1917, § 2193; 1930, § 2046; 1942, § 1779; Laws, 1896, ch. 84; Laws, 1974, ch. 378, § 9, eff from and after Jan. 1, 1975.

## JUDICIAL DECISIONS

### 1. In general.

Even if the appellate court assumed the person that sat on the grand jury was the same person that sat on the petit jury, it was unable to determine whether that person took part in the grand jury deliberations incident to the indictment against defendant. *Havard v. State*, 986 So. 2d 333 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 557 (Miss. 2008).

Where ground of motion to quash indictment in murder prosecution "for defects and irregularities in the drawing, summoning, impaneling and organization of the grand jury" was too broad, the supreme court would assume, to the advantage of defendant, that the basis was made particular by the introduction of testimony purporting to relate to the

method of summoning and impaneling the grand jury. *Gipson v. State*, 203 Miss. 434, 35 So. 2d 327 (1948), error overruled, 203 Miss. 439, 36 So. 2d 154 (1948).

The trial judge cannot lawfully draw out and select only such names from the box as he desires in the formation of a grand jury and on proper objection to such grand jury an indictment found by them will be quashed. *Sheppard v. State*, 89 Miss. 147, 42 So. 544, 10 Am. Ann. Cas. 963 (1907).

Where a grand jury of sixteen men was determined on by the court and after the impaneling of such a jury two of them were excused, the court was authorized to cause the number of jurymen to be increased to any number not exceeding twenty. *Posey v. State*, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Grand Jury § 17.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selecting, drawing, and summoning of jurors).

**CJS.** 38A C.J.S., Grand Juries §§ 53-55.

### § 13-5-43. Impaneling as conclusive evidence of competency and qualifications.

Before swearing any grand juror as such, he shall be examined by the court, on oath, touching his qualification. After the grand jurors shall have been sworn and impaneled, no objection shall be raised, by plea or otherwise, to the grand jury, but the impaneling of the grand jury shall be conclusive evidence of its competency and qualifications. However, any party interested may challenge or except to the array for fraud.

**SOURCES:** Codes, 1857, ch. 61, art. 131; 1871, § 729; 1880, § 1667; 1892, § 2375; 1906, § 2704; Hemingway's 1917, § 2197; 1930, § 2050; 1942, § 1784.

## JUDICIAL DECISIONS

1. In general.
2. Swearing the jurors.
3. Time for objections.
4. Irregularities cured by statute.
5. Irregularities not cured by statute.
6. Challenge or exception to array.
7. Validity of indictments.
8. Impeachment of indictment by juror.

**1. In general.**

Supreme Court must indulge presumption that grand jury is composed of persons who have reasonable degree of intelligence and would perform their duties in accordance with law and evidence before them. *State v. Pacific*, 705 So. 2d 1308 (Miss. 1997).

Petitioner's allegation in an application for writ of habeas corpus that his conviction constituted a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment of the United States Constitution because of the systematic exclusion of members of his race from the lists from which grand and petit juries were selected in the county where he was indicted and convicted, and because of his ignorance and circumstances of his arrest and incarceration, and as a consequence of the law of Mississippi he was not able to challenge the competency of the grand jury, together with a showing of the speed in which the petitioner was tried following his indictment, were sufficient to entitle the petitioner to a hearing on the question of whether he had adequately safeguarded his constitutional rights during his trial for murder. *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417 (5th Cir. 1957), cert. denied, 80 S. Ct. 109, 361 U.S. 850, 4 L. Ed. 2d 89.

Grand jury which returned indictment is not shown to be illegal on hearing on motion for new trial after conviction of felonious assault by cutting with knife when circuit clerk merely stated that all jurors were white men, and it was neither shown nor intimated that there were no names of Negroes in jury box out of which grand and petit jury were drawn, but it did appear that jury boxes were practically exhausted after these juries had

been drawn, it being common knowledge that number of Negroes who register and qualify for jury service are almost nominal in comparison with number of white persons who do so. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

It is duty of circuit and chancery clerks, board of supervisors and sheriff to comply strictly with all of requirements of statutes in manner of listing, drawing and selecting jurors, compiling jury lists, and summoning and impaneling juries, but since statutes on the subject are merely directory, judgment will not be reversed where there was no radical departure from statutory scheme of selecting and impaneling jury and jury selected was fair and impartial. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

On motion to quash jury list from which grand and petit juries were to be chosen, for alleged reason that board of supervisors had not selected names of jurors in manner required by law governing selection of qualified electors, placing names in jury box, and subsequent drawing of juries, it is competent to show by testimony of chancery and circuit clerks manner in which statutory requirements were complied with. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

The strict language of this section [Code 1942, § 1784], that the impaneling of the grand jury shall be conclusive evidence of its competence and qualification, permits of no exception. *Reynolds v. State*, 199 Miss. 409, 24 So. 2d 781 (1946).

Unless the contrary appear from the record, the presumption is that the grand jury was legally organized. *Chase v. State*, 46 Miss. 683 (1872).

This statute completely cuts off the plea in abatement challenging the fitness and qualifications of the grand jury or of any of its members. *Head v. State*, 44 Miss. 731 (1870), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985); *Durrah v. State*, 44 Miss. 789 (1870).

**2. Swearing the jurors.**

A defendant may, in the discretion of the court, after a plea of not guilty, move to quash the indictment on the ground that

the record failed to show that the grand jury was sworn. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

A motion in an arrest of judgment should be overruled where based on objection that grand jury was not sworn in the absence of a record to the contrary. *Hays v. State*, 96 Miss. 153, 50 So. 557 (1909).

### 3. Time for objections.

Defendant argued, on appeal, that his indictment on two counts of aggravated assault and possession of a firearm by a felon should have been dismissed because the alleged victim's brother-in-law sat on the grand jury that indicted defendant; however, defendant failed to submit this issue to the trial court, either in a motion to dismiss, or in defendant's motion for J.N.O.V. *Townsend v. State*, 939 So. 2d 796 (Miss. 2006).

Where the accused had been in jail during the session of the grand jury throughout the previous week, the court-appointed defense counsel resided in the county seat of the county where the rape indictment was returned, and it was not claimed that no opportunity was afforded to the defense for the making of a motion to quash the indictment at the time required by this section [Code 1942, § 1784], a later motion to quash indictment was properly overruled. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

It is matter of state procedure as to when objections to indictment shall be raised to avoid expense and delay where no right of accused under federal Constitution is involved. *Flowers v. State*, 209 Miss. 86, 41 So. 2d 352 (1949), appeal dismissed, cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

Manner in which lists of jurors are selected by board of supervisors and placed in jury box involves solely question of state procedure and trial court is not in error in overruling motion to quash indictment on that ground when objections to qualification of grand jurors is not made before they are impaneled and defendant was at time represented by able lawyer and had reason to believe his case would be investigated by grand jury and he could have obtained information as to venire from which grand jury would be drawn.

*Flowers v. State*, 209 Miss. 86, 41 So. 2d 352 (1949), appeal dismissed, cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

This section [Code 1942, § 1784], requires that objections to qualifications of grand jurors be made, if at all, before they are impaneled, unless accused has been denied opportunity for doing so, and objection cannot be raised afterward. *Flowers v. State*, 209 Miss. 86, 41 So. 2d 352 (1949), cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950); *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958); *Gordon v. State*, 160 So. 2d 73 (Miss. 1964).

Motion to quash jury list from which grand jury was chosen, made by defendant after indictment by grand jury, but before arraignment, is made too late as strict language of this section [Code 1942, § 1784] that impaneling of grand jury shall be conclusive evidence of its competence and qualifications admits of no exceptions. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

It is too late to make a motion to quash an indictment where objection to the illegal organization of a grand jury had not been made before it was impaneled. *State v. Forbes*, 134 Miss. 425, 98 So. 844 (1924).

In a motion to quash an indictment on a right claimed under the United States Constitution, the state court is bound by decisions of the United States court and the objection may be taken by plea in abatement or motion to quash before a plea of not guilty is entered. *Hill v. State*, 89 Miss. 23, 42 So. 380 (1906).

Under this section [Code 1942, § 1784] challenges to grand jurors for disqualifications must be submitted before the grand jury is impaneled, regardless of whether the disqualification arises from bias or personal incompetency. *Cain v. State*, 86 Miss. 505, 38 So. 227 (1905).

The statute applies to the case of a defendant who was not advised that his case was to come before the grand jury for investigation and precludes him from raising any question as to the competency of any one or more grand jurors by motion to quash the indictment. *Cain v. State*, 86 Miss. 505, 38 So. 227 (1905).

This section [Code 1942, § 1784] requires that objections to the qualifications



of grand jurors must be made, if at all, before they are impaneled, and they cannot be raised afterward. *Dixon v. State*, 74 Miss. 271, 20 So. 839 (1896).

#### 4. Irregularities cured by statute.

After the impaneling of a grand jury, certain members having been excused, the court directed that certain bystanders serve as grand jurors, though such persons were not among those listed by the supervisors for jury service, and though their names were not on the venire drawn for service during that term, defendant made no direct challenge and took no exception at the time. In the absence of any showing that the grand jury was not fair and impartial, there was no ground for reversal of a conviction on an indictment found by it. *Posey v. State*, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

In the absence of evidence that a grand jury was unfair and of an objection at the time, the court may select grand jurors from bystanders. *Posey v. State*, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

#### 5. Irregularities not cured by statute.

The trial judge should not select a jury from slips with jurors' names thereon turned up where he ignores the names of those he does not wish to serve and exceptions to his actions should be sustained and his error is not cured by the statute. *Sheppard v. State*, 89 Miss. 147, 42 So. 544, 10 Am. Ann. Cas. 963 (1907).

#### 6. Challenge or exception to array.

Even though grand jury was improperly selected, once it had been impaneled defendant could not thereafter challenge its competency or qualifications except as to a challenge to the array for fraud, and consequently where there was no such challenge, motion to quash indictment after jury had been impaneled was properly overruled. *Reynolds v. State*, 199 Miss. 409, 24 So. 2d 781 (1946).

An objection to the grand jury as a body, on the ground that the sheriff, whom defendant was charged with assaulting, assisted in the drawing of the jury, could not be made by motion to quash indictment but only by a challenge to the array

for fraud. *Long v. State*, 133 Miss. 33, 96 So. 740 (1923).

#### 7. Validity of indictments.

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

Where the accused had been in jail during the session of the grand jury throughout the previous week, the court-appointed defense counsel resided in the county seat of the county where the rape indictment was returned, and it was not claimed that no opportunity was afforded to the defense for the making of a motion to quash the indictment at the time required by this section [Code 1942, § 1784], a later motion to quash indictment was properly overruled. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

Indictment for murder held not void because grand juror allegedly serves as both election commissioner and grand juror. *Robinson v. State*, 178 Miss. 568, 173 So. 451 (1937).

A county prosecuting attorney may be present with the grand jury while considering a case and may find a valid indictment while he is present but he must not improperly influence the jury. *State v. Coulter*, 104 Miss. 764, 61 So. 706 (1913); *Le Barron v. State*, 107 Miss. 663, 65 So. 648 (1914).

An indictment found when only fourteen grand jurors were present and twelve or more concurred when finding it and was returned into court by the full grand jury of eighteen members was valid. *McCoy v. State*, 101 Miss. 613, 57 So. 622 (1912).

The foreman of a grand jury has no authority to discharge a member thereof

but the court may do so and he should supply the place by selecting another juror. *McCoy v. State*, 101 Miss. 613, 57 So. 622 (1912).

It is unlawful for the sheriff to be called into the grand jury room to aid in examining a witness and an indictment based on such testimony is invalid. *Herrington v. State*, 98 Miss. 410, 53 So. 783 (1911).

The minutes of the court must show that the grand jury was sworn, otherwise an indictment found by them is void. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

A plea of not guilty does not waive the right to file a motion to quash a void indictment since permitting such motion is discretionary. *Hardy v. State*, 96 Miss. 844, 51 So. 460 (1910).

#### 8. Impeachment of indictment by juror.

Grand jurors cannot impeach their indictment by their testimony. *Lewis v. State*, 132 Miss. 200, 96 So. 169 (1923), error overruled, 137 Miss. 70, 96 So. 737 (1923).

### RESEARCH REFERENCES

**ALR.** Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 9-12, 18.

12 Am. Jur. Pl & Pr Forms (Rev), Grand Jury, Form 2 (challenge to array of grand jury).

**CJS.** 38A C.J.S., Grand Juries §§ 11, 22-35.

## § 13-5-45. Foreman to be appointed and all to be sworn.

The court shall appoint one of the grand jurors to be foreman of the grand jury, to whom the following oath shall be administered in open court, in the presence of the rest of the grand jurors, to wit:

"You, as foreman of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unrepresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God."

And the following oath shall be administered to the other jurors, to wit:

"The same oath that your foreman has now taken before you on his part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God."

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 61, art. 1 (128); 1857, ch. 61, art. 130; 1871, § 731; 1880, § 1666; 1892, § 2372; 1906, § 2701; *Hemingway's* 1917, § 2194; 1930, § 2047; 1942, § 1780.

**Cross References** — Swearing of state grand jurors pursuant to this section, see § 13-7-15.

Foreman and deputy foreman to be sworn pursuant to this section, see § 13-7-17.

Grand juror compensation, see § 25-7-61.

Grand jury, see Miss. Uniform Rule of Circuit and County Court Practice 7.02.

## JUDICIAL DECISIONS

### 1. In general.

A trial court did not err in overruling a defendant's motion to quash the indictment and/or demur to the indictment, even though the minutes of the court did not reflect that a grand jury foreman was appointed or that the foreman was given the oath as required by § 13-5-45, where one of the names of the grand jurors was listed on the indictment as the grand jury foreman, the foreman signed the grand jury report and indictment in the slot where the foreman signs, and the foreman's name was listed along with the other sworn grand jurors, since the statute does not provide that the court minutes must reflect that a grand jury foreman was appointed and sworn. *Rogers v. State*, 599 So. 2d 930 (Miss. 1992).

A defendant's claim that his indictment for murder was void on the ground that black foremen were systematically not appointed to the grand jury would be rejected where there was no testimony in the record to the effect that failure to

select a black grand jury foreman had been intentionally or purposely done and where the crucial period for determining discrimination did not begin until 1975 when the new Jury Selection Act went into effect and there was an insufficient period of time to enable the Court to determine whether there had been constitutionally prohibited discrimination. *Johnson v. State*, 404 So. 2d 553 (Miss. 1981), cert. denied, 502 U.S. 898, 112 S. Ct. 274, 502 U.S. 898, 116 L. Ed. 2d 226 (1991).

In a homicide prosecution, the trial judge correctly overruled a defense motion to quash the indictment, venire and panel on the ground that blacks and women were systematically excluded from serving as grand jury foremen, where Mississippi followed the "random" method of jury selection and where the evidence was insufficient to establish a prima facie case of discrimination in the selection of jury foremen by trial judges. *Herring v. State*, 374 So. 2d 784 (Miss. 1979).

## ATTORNEY GENERAL OPINIONS

If a grand juror, including a foreman, is absent, the court shall have the authority to cause another to be sworn in his place. The court, not the District Attorney, is responsible for appointing a "substitute"

foreman if necessary, who must be administered the foreman's oath in open court, in the presence of the rest of the grand jurors. *Peterson*, March 9, 2007, A.G. Op. #07-00113, 2007 Miss. AG LEXIS 90.

## RESEARCH REFERENCES

**Am Jur.** 38 **Am. Jur.** 2d, **Grand Jury** § 26.

**CJS.** 38A **C.J.S.**, **Grand Juries** §§ 58-64.

### § 13-5-47. Judge to charge the grand jury.

The judge shall charge the grand jury concerning its duties and expound the law to it as he shall deem proper, and he shall particularly charge it concerning enforcement of the following statutes:

- (1) those against gambling and the unlawful selling and handling of intoxicating liquors;
- (2) those relating to gambling with minors, and the giving or selling to them tobacco, narcotics, or liquors;
- (3) those providing for the assessment, collection and disbursement of the public revenues, both state and county;
- (4) those defining the duties of public officers;



(5) those relating to the collection and paying over of fines and forfeitures;

(6) those relating to providing fire escapes in hotels, theaters and other buildings;

(7) those relating to the management of sixteenth section school trust lands; and

(8) all such other statutes as he shall deem proper at any time.

Moreover, the judge shall especially charge the grand jury with respect to the state forest fire laws as set forth in Section 95-5-25 and Section 92-17-13, and charge that the grand jury shall report to him as to the status of forest protection in the county.

It shall be unlawful for the district attorney or other officer, or person, to deliver to the grand jury the charge required by this section to be delivered by the judge, but this shall not prevent the judge from having the circuit clerk read the charge proposed by the judge, to the grand jury in the presence of the judge, when, by reason of physical infirmity, the judge shall be unable to deliver his charge.

**SOURCES:** Codes, 1892, § 2373; 1906, § 2702; Hemingway's 1917, § 2195; 1930, § 2048; 1942, §§ 1781, 1782; Laws, 1908, ch. 179; Laws, 1932, ch. 145; Laws, 1970, ch. 340, § 1; Laws, 1978, ch. 525, § 3, eff from and after July 1, 1978.

**Cross References** — Application of this section to swearing of jurors for state grand jury, see § 13-7-15.

Duty of grand jury to inquire into violations of laws relating to wild animals, birds and fish, see § 49-5-47.

Duty of grand jury to inquire into condition of county roads, see § 65-7-119.

Criminal offense of firing woods or fields of another, see § 97-17-13.

Necessity that indictment or presentment be concurred in by twelve grand jurors, see § 99-7-11. \*

Duty of grand jury to inquire into breaches of peace bonds, see § 99-23-17.

## JUDICIAL DECISIONS

1. In general.
2. Extent of authority to charge.

### 1. In general.

A circuit judge's supplemental charge to the grand jury that citizens had reported to the court that the district attorney had "failed to investigate and prosecute" certain crimes and that, if the jurors should "determine that the district attorney has actively disobeyed investigation of these matters," they were to apply to the court for further instructions singled out the district attorney and his office as targets for grand jury action and should have been expunged for exceeding the judge's authority which did not extend to denun-

ciation of individuals. *Necaise v. Logan*, 341 So. 2d 91 (Miss. 1976).

One indicted for robbery committed seven months prior thereto is not prejudiced by circuit judge's charge to grand jury which made indictment that "there has been a series of outbreaks of crime in your community recently. I \_\_\_\_\_ want you to bring me these indictments by noon today," as remark did not direct undue attention to any particular single crime. *Goss v. State*, 205 Miss. 177, 38 So. 2d 700 (1949).

Where the defendant charged with selling liquor relies solely on her testimony as her only evidence, jurors to try the same are incompetent who have heard the judge

charge the grand jury that "blind tigers" were unworthy of belief and would commit perjury. *Johnson v. State*, 106 Miss. 598, 64 So. 261 (1914).

It was prejudicial error as against one convicted of unlawfully selling liquor for the court in charging the grand jury relative to such offense to say, "Have you ever heard the name of C. F. [defendant's name]?" *Fuller v. State*, 85 Miss. 199, 37 So. 749 (1905).

It is improper for a judge, directly or indirectly, to designate a particular individual as making unlawful sales of intoxicants. If he does and the individual is indicted on seasonable motion the indictment will be quashed. *Fuller v. State*, 85 Miss. 199, 37 So. 749 (1905).

A conviction for such unlawful sale will be reversed if on overruling an application for a continuance the judge announces, in the presence of jurors, that there has been much complaint about the failure to convict "these criminals" and that the court feared it largely due to continuances. *Fuller v. State*, 85 Miss. 199, 37 So. 749 (1905).

It is sufficient ground for quashing an indictment under Code 1892 §§ 1120, 1121 (Code 1906 §§ 1201, 1202) that the

grand jury sought to be finally discharged without indicting defendant and the court refused to discharge them and instructed them specifically as to the criminal character of defendant's business, saying that the law was plain and it was of opinion that it had sufficient evidence to find an indictment, that other grand juries had indicted, and that the business in which defendant was engaged was a flagrant violation of the statute. *Blau v. State*, 82 Miss. 514, 34 So. 153 (1903).

## 2. Extent of authority to charge.

Grand juries are statutorily charged to investigate possible violations of statutes related to expenditure of county funds by county officials. *State v. Pacific*, 705 So. 2d 1308 (Miss. 1997).

Judge cannot charge grand jury to investigate and/or indict a particular person and, thus, cannot charge grand jury not to investigate and/or indict a particular person. *State v. Pacific*, 705 So. 2d 1308 (Miss. 1997).

Trial court did not have authority to enjoin county grand jury from investigating district attorney's alleged receipt of improper payments. *State v. Pacific*, 705 So. 2d 1308 (Miss. 1997).

## RESEARCH REFERENCES

**ALR.** Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial-state cases. 36 A.L.R.4th 1046.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 A.L.R.4th 676.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

**Am Jur.** 38 Am. Jur. 2d, Grand Jury § 26.

**CJS.** 38A C.J.S., Grand Juries §§ 85-87.

## § 13-5-49. Repealed.

Repealed by Laws of 1973, ch. 342, § 1, eff from and after passage (approved March 22, 1973).

[Codes, 1892, § 2374; 1906, § 2703; Hemingway's 1917, § 2196; 1930, § 2049; 1942, § 1783]

**Editor's Note** — Former § 13-5-49 required all county officers to attend court, hear the charges of the grand jury, and be charged as to their duties.

## § 13-5-51. Places of absent jurors to be filled.

If, after the grand jury has been sworn, any of the members thereof should absent themselves from any cause, or become incompetent to sit, or be excused by the court, the court shall have power to cause others to be sworn in their places.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 1 (131); 1857, ch. 61, art. 132; 1871, § 730; 1880, § 1669; 1892, § 2376; 1906, § 2705; Hemingway's 1917, § 2198; 1930, § 2051; 1942, § 1785.

## JUDICIAL DECISIONS

### 1. In general.

After impaneling a grand jury of sixteen and excusing two members thereof the court was authorized to increase the num-

ber of grand jurors to eighteen. *Posey v. State*, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

## ATTORNEY GENERAL OPINIONS

Based on the Section 13-5-51 and *Posey v. State*, 38 So. 324 (Miss. 1905), the court, in accordance with the public policy of the state, may fill the vacancies on a grand jury by the same or a similar method or provided by statute for the selection of the original jurors. Landrum, March 29, 1996, A.G. Op. #96-0176.

If a grand juror, including a foreman, is absent, the court shall have the authority

to cause another to be sworn in his place. The court, not the District Attorney, is responsible for appointing a "substitute" foreman if necessary, who must be administered the foreman's oath in open court, in the presence of the rest of the grand jurors. Peterson, March 9, 2007, A.G. Op. #07-00113, 2007 Miss. AG LEXIS 90.

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Grand Jury § 16. **CJS.** 38A C.J.S., Grand Juries § 59.

## § 13-5-53. Adjournment of grand jury to a day; pay in such case.

The court or judge, in its discretion, may adjourn the grand jury to a subsequent day in termtime or vacation, and the jurors shall receive pay only for the number of days they shall be actually engaged in the performance of their duties.

**SOURCES:** Codes, 1880, § 1670; 1892, § 2377; 1906, § 2706; Hemingway's 1917, § 2199; 1930, § 2052; 1942, § 1786; Laws, 1983, ch. 499, § 19, eff from and after July 1, 1983.

**Cross References** — Keeping of jury fee book by circuit court clerk, see § 9-7-131. Imposition and collection of jury-tax in circuit court, see § 9-7-133. Making and filing of bill of costs generally, see § 11-53-65.



## JUDICIAL DECISIONS

**1. In general.**

In a prosecution for capital murder an indictment returned by a grand jury was not void on the asserted ground that the grand jury was recalled by the district attorney's office, where the judge recalled the grand jury initially, where once the grand jury was impanelled or recalled it was in session for the duration of the term or until discharged, and where in the present case the district attorney merely selected the days it would actually meet and was not recalling the grand jury. *Oates v. State*, 421 So. 2d 1025 (Miss. 1982).

The fact that the grand jury was in session at the time defendant was arrested for armed robbery and then adjourned without returning an indictment, has no bearing on the question of the right

to release on bail, in absence of proof of any investigation of the case by the grand jury. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

A grand jury may be recalled after it is discharged. *Bell v. State*, 118 Miss. 140, 79 So. 85 (1918); *Kyzar v. State*, 125 Miss. 79, 87 So. 415 (1921).

Under ch. 253 Laws of 1916 it is mandatory that a circuit judge impanel a grand jury during the first half of each term of court but there is no limitation as to how long it shall continue. *Bell v. State*, 118 Miss. 140, 79 So. 85 (1918).

Under Code 1906, §§ 2706, 2718, the court may reassemble the grand jury after its discharge when necessary during the same term of the court. *Haynes v. State*, 93 Miss. 670, 47 So. 522, 17 Am. Ann. Cas. 653 (1908).

## RESEARCH REFERENCES

**CJS.** 38A C.J.S., Grand Juries §§ 80-82, 85.

**§ 13-5-55. Grand jury to inspect jail; sheriff punishable.**

Each grand jury which is impaneled shall make a personal inspection of the county jail, its condition, sufficiency for the safekeeping of prisoners, and their accommodation and health, and make reports thereof to the court. For any violation or neglect of duty as to the jail, the sheriff may be punished as for a misdemeanor, or may be fined as for a contempt, such not to exceed Fifty Dollars (\$50.00).

**SOURCES:** Codes, 1857, ch. 64, art. 251; 1871, § 2844; 1880, § 1673; 1892, § 2378; 1906, § 2707; Hemingway's 1917, § 2200; 1930, § 2053; 1942, § 1787; Laws, 1983, ch. 499, § 20.

**Cross References** — Duty of sheriff to furnish prisoners proper necessities, see §§ 19-25-71, 47-1-51.

Criminal offense of maltreating county prisoners, see § 47-1-27.

Duty of grand jury to examine records of county prisoners and their treatment and condition, see § 47-1-31.

Clothing and food to be furnished county convicts, see § 47-1-47.

Hours of labor of county convicts, see § 47-1-47.

Furnishing of medical and surgical aid to county prisoners, see § 47-1-57.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

## ATTORNEY GENERAL OPINIONS

A sheriff may provide a meal from the county jail at no cost to the members of the grand jury as part of their inspection of the county jail. Caranna, April 21, 2000, A.G. Op. #2000-0207.

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 2, 3, 33, 34 et seq. **CJS.** 38A C.J.S., Grand Juries §§ 88-99, 100-109.

## § 13-5-57. Grand jury may examine all county offices.

The grand jury shall have free access at all proper hours to the papers, records, accounts and books of all county officers, for all examinations which, in its discretion, it may see fit to make, and may make report to the court in relation thereto.

**SOURCES:** Codes, 1857, ch. 64, art. 251; 1871, § 2845; 1880, § 1674; 1892, § 2379; 1906, § 2708; Hemingway's 1917, § 2201; 1930, § 2054; 1942, § 1788.

## RESEARCH REFERENCES

**ALR.** Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct. 63 A.L.R.3d 586. **CJS.** 38A C.J.S., Grand Juries §§ 88-99, 100-109.  
**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March 1979.  
**Am Jur.** 38 Am. Jur. 2d, Grand Jury §§ 2, 3, 33, 34 et seq.

## § 13-5-59. Grand jury to examine tax collector's books.

It shall be the duty of each grand jury which is impaneled to examine the tax collector's books and his reports and settlements, and make report thereon.

**SOURCES:** Codes, 1880, § 1675; 1892, § 2380; 1906, § 2709; Hemingway's 1917, § 2202; 1930, § 2055; 1942, § 1789; Laws, 1983, ch. 499, § 21.

**Cross References** — Duty of clerk of board of supervisors to examine accounts, dockets and records of county officers and to report to grand jury, see § 19-17-17.

Monthly report of county tax collector of all taxes collected by him during previous month, see § 27-29-11.

Report and settlement of county tax collector at end of fiscal year, see § 27-29-13.

## RESEARCH REFERENCES

**CJS.** 38A C.J.S., Grand Juries §§ 88-99, 100-109.

### § 13-5-61. Grand jury not to disclose secrets of jury-room.

A grand juror, except when called as a witness in court, shall not disclose any proceeding or action had by the grand jury in relation to offenses brought before it, within six (6) months after final adjournment of the grand jury upon which he served, nor shall any grand juror disclose the name or testimony of any witness who has been before the grand jury on pain of fine or imprisonment for contempt of court.

**SOURCES:** Codes, 1857, ch. 64, art. 252; 1871, § 2846; 1880, § 1676; 1892, § 2381; 1906, § 2710; Hemingway's 1917, § 2203; 1930, § 2056; 1942, § 1790; Laws, 1983, ch. 499, § 22, eff from and after July 1, 1983.

**Cross References** — Exemption of jury deliberations from provisions of open meetings law, see § 25-41-3.

Penalty on grand juror for disclosing facts about indictments, see § 97-9-53.

## JUDICIAL DECISIONS

### 1. In general.

The general rules of grand jury secrecy have no application to testimony given by witnesses who are to be used by the State at a pretrial hearing or at trial with respect to charges lodged by an indictment rendered and served as a result of such testimony. *Addikson v. State*, 608 So. 2d 304 (Miss. 1992).

Grand jurors are prohibited from giving evidence under oath and, therefore, an evidentiary hearing to determine the effect of improper influences on a grand jury would be prohibited. *Hood v. State*, 523 So. 2d 302 (Miss. 1988).

## RESEARCH REFERENCES

**ALR.** Discovery, in civil proceeding, of records of criminal investigation by state grand jury. 69 A.L.R.4th 298.

What are "matters occurring before the grand jury" within prohibition of Rule 6(e) of the Federal Rules of Criminal Procedure. 50 A.L.R. Fed. 675.

What is "judicial proceeding" within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure permitting disclosure of matters occurring before grand jury when so directed by court preliminarily to or in connection with such proceeding. 52 A.L.R. Fed. 411.

Who are "government personnel" within meaning of Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure to whom matters occurring before grand jury may be disclosed. 54 A.L.R. Fed. 805.

Relief remedy, or sanction for violation of Rule 6(e) of Federal Rules of Criminal Procedure, prohibiting disclosure of matters occurring before grand jury. 73 A.L.R. Fed. 112.

**Practice References.** Young, *Trial Handbook for Mississippi Lawyers* §§ 15:9, 17:15.

### § 13-5-63. Witnesses before grand jury may be subpoenaed and sworn.

The foreman of the grand jury shall have power to order subpoenas for all witnesses desired to be produced, and he shall also have power to swear all witnesses. A record shall be kept by the foreman and returned to court,



certified and signed by the foreman, of the names of all witnesses sworn before the grand jury.

**SOURCES:** Codes, 1857, ch. 61, art. 134; 1871, § 735; 1880, § 1677; 1892, § 2382; 1906, § 2711; Hemingway's 1917, § 2204; 1930, § 2057; 1942, § 1791.

**Cross References** — Issuance of subpoenas to compel attendance of witnesses in court, see §§ 13-3-93, 99-9-11.

Applications by district attorney to clerk of circuit court in vacation for subpoena for witnesses to attend before grand jury at next term, see § 99-9-23.

Attachment of witnesses failing to appear before grand jury, see § 99-9-25.

Issuance of subpoena for a witness by justice of the peace, see § 99-33-5.

## JUDICIAL DECISIONS

### 1. In general.

The opinion of a well-respected federal judge was improper influence and such evidence should not have been presented to the grand jury. *Hood v. State*, 523 So. 2d 302 (Miss. 1988).

The filing of the list of witnesses sworn before the grand jury in the circuit clerk's grand jury docket prior to trial fulfilled the requirements of § 13-5-63. *Shaw v. State*, 521 So. 2d 1278 (Miss. 1987).

Statute was complied with where list of witnesses was filed with clerk, which constituted return to court. *Shaw v. State*, 513 So. 2d 916 (Miss. 1987).

The important and solemn responsibilities of the grand jury ought to be performed without fear or favor and without any manner of influence, and the door to the grand jury should be closed to outsiders who are not witnesses and who have no official business to perform. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

It is improper for a private prosecuting attorney to go before the grand jury. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

A committee of the bar association whose motives were admittedly good should not be permitted to appear before the grand jury. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

The fact that a forestry commission employee, who investigated a forest fire and

talked to the witnesses but had no personal knowledge of the facts, testified before the grand jury that he brought the case up in justice of the peace court and had the witnesses there for the preliminary hearing, did not place him in the category of a special prosecutor employed to assist with the prosecution, and hence his appearance before the grand jury was not an improper influence. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

The appearance of a forestry commission employee, who had investigated a forest fire and talked to the witnesses, but had no personal knowledge of the facts, did not constitute an improper influence on the grand jury which indicted the defendant on a charge of feloniously firing woods not his own. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

Witnesses who voluntarily appear before grand juries and other investigative bodies have a constitutional right not to be required to testify against themselves. *Kellum v. State*, 194 So. 2d 492 (Miss. 1967).

Presence during session in grand jury room of any person other than the witness undergoing examination and the duly authorized prosecuting officer is improper, in the absence of any imperative necessity therefor. *Sanders v. State*, 198 Miss. 587, 22 So. 2d 500 (1945).

## RESEARCH REFERENCES

**ALR.** Validity of indictment where grand jury heard incompetent witness. 39 A.L.R.3d 1064.

**Am Jur.** 12 Am. Jur. Pl & Pr Forms (Rev ed), Grand Jury, Form 1 (subpoena to appear before grand jury).

38 Am. Jur. Trials, Representing the Grand Jury Target Witness, §§ 1 et seq. CJS. 38A C.J.S., Grand Juries §§ 110, 111, 123-126, 135-196.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March 1979.

## § 13-5-65. Impaneling of petit juries.

After the drawing of the grand jury, the remaining jurors in attendance shall be impaneled into three petit juries for the first week of court if there be a sufficient number left, and, if not, the court may direct a sufficient number for that purpose to be drawn and summoned. If there be more than enough jurors for the three juries, or for two juries if the court shall direct only two to be impaneled, the excess may be discharged, or they may be retained, in the discretion of the court, to serve as talesmen. If so retained, they shall have the privilege of members of the regular panel, of exemption from service.

**SOURCES:** Codes, 1892, § 2383; 1906, § 2712; Hemingway's 1917, § 2205; 1930, § 2058; 1942, § 1792; Laws, 1938, ch. 301.

**Cross References** — Summoning and impaneling of jurors for special court of eminent domain, see §§ 11-27-11, 11-27-13.

Summoning of jurors for trial before justice of peace, see § 11-9-143.

## JUDICIAL DECISIONS

1. In general.
2. Drawing jurors from bystanders.

### 1. In general.

In prosecution for unlawful possession of intoxicating liquor, where only four jurors were on the jury panel and presumably twelve jurors were at the time deliberating another case, and trial judge entered order adjudicating that there were insufficient number of jurors on the petit jury panels for the week from which to obtain a jury to try the case and the sheriff was directed to summon from the body of the county twelve men to serve as jurors in the case and the sheriff called additional jurors from the bystanders in the courtroom and the jury so impaneled was tendered for trial, defendant's motion to quash the panel should have been sustained and enough jurors to compute the jury panels should have been drawn from the jury box and summoned. *Moffett v. State*, 220 Miss. 587, 71 So. 2d 303 (1954).

It is only when the full panels have been drawn and made up and are subsequently exhausted that the trial judge may direct the sheriff to select additional men from

the body of the county without drawing them from the jury box. *Moffett v. State*, 220 Miss. 587, 71 So. 2d 303 (1954).

A fairer trial was assured the defendant in a murder prosecution by the court's overruling a motion, made after the case had been called for trial and while the jury was being selected, to call additional jurors from the jury box after the regular panel and special venire had both been exhausted, leaving the defendant with only two peremptory challenges which he immediately expended, than would have been by drawing from the general jury box which was so nearly depleted that many jurors would have had to be drawn from the box of the district where the homicide occurred. *Lewis v. State*, 201 Miss. 48, 28 So. 2d 122 (1946), cert. denied, 331 U.S. 785, 67 S. Ct. 1305, 91 L. Ed. 1816 (1947).

This section [Code 1942, § 1792], applies to drawing of jurors for regular panels, and is inapplicable to jurors summoned to complete a panel for the trial of a particular case made necessary by the exhaustion of regular panels for the week. *Smith v. State*, 196 Miss. 524, 18 So. 2d 300 (1944).

Where both of two regular panels for the week became exhausted before the jury in a criminal case was completed, whereupon the court ordered the sheriff "to go into the body of the county and bring in 13 jurors," which the sheriff did, summoning no jurors who were then in the courtroom, defendant's objection that jurors for completion of the panel should be drawn from the jury box as required by this section [Code 1942, § 1792] and not from a panel composed in whole or in part of jurors so summoned by sheriff, was without merit. *Smith v. State*, 196 Miss. 524, 18 So. 2d 300 (1944).

The court should not lecture the petit jury and acquaint them with his desire to have a business term and have the court self-supporting, although such lecture is not ground for reversal. *Butler v. State*, 102 Miss. 575, 59 So. 845 (1912); *Cook v. State*, 59 So. 846 (Miss. 1912).

## 2. Drawing jurors from bystanders.

The circuit court did not err in refusing defendant's request in a prosecution for burglary to complete the jury, where there was an insufficient number, by drawing additional names from the general jury box of the county, and in directing the sheriff to complete the required number from bystanders, where the words providing that juries might be completed from the bystanders as it appeared in the former enactment and omitted under the

amendatory act, applied only to the original organization of the court in the first week of the term; in other words, neither Code 1930, § 2058, nor chapter 301, Laws of 1938, dealt with or gave directions to the trial court as to the procedure in handling a jury after the original organization of the court in the first week of that term. *McCary v. State*, 187 Miss. 78, 192 So. 442 (1939).

Where only sixteen of twenty jurors summoned were present and court excused eight, there was no irregularity where rest were called from bystanders sheriff requested to be present. *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

Panel should not be quashed except for fraud and unless there was total departure from course described by statute. *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

Persons whom sheriff had previously notified to be at court were bystanders within jury statute. *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

That judge anticipated shortage of jurors and asked sheriff to request persons to be present at court did not show departure from statute. *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

Where the regular panel are disqualified the court trying the case may form a jury with talesmen summoned from the bystanders. *Whitehead v. State*, 97 Miss. 537, 52 So. 259 (1910).

## RESEARCH REFERENCES

**ALR.** Impaneling or selection of jury in accused's absence. 26 A.L.R.2d 762.

Juror's reading of newspaper account of trial in criminal case during its progress as ground for mistrial, new trial or reversal. 31 A.L.R.2d 417.

Cure of prejudice resulting from statement by prospective juror during voir dire,

in presence of other prospective jurors, as to defendant's guilt. 50 A.L.R.4th 969.

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 165 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 91-112 (selecting, drawing, and summoning of jurors).

**CJS.** 50 C.J.S., Juries §§ 514 et seq.

## § 13-5-67. Impaneling of alternate jurors.

Except in cases in which jury selection and selection of alternate jurors is governed by rules promulgated by the Mississippi Supreme Court, whenever, in the opinion of a circuit judge or chancellor presiding in a case in which a jury is to be used, the trial is likely to be a protracted one, such circuit judge or chancellor, in his discretion, may direct that one (1) or two (2) jurors in addition



to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict. In capital cases the defendant and the state shall each be allowed two (2) peremptory challenges to alternate jurors in addition to those otherwise provided by law. In all other cases each party shall be allowed one (1) peremptory challenge to alternate jurors in addition to those otherwise provided by law. In any criminal case all peremptory challenges by the state shall be made before the alternate juror is presented to the defendant. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges allowed by law may not be used against an alternate juror.

**SOURCES:** Codes, 1942, § 1792.5; Laws, 1954, ch. 241, §§ 1, 2 [¶¶ 1-2]; Laws, 1991, ch. 573, § 103, eff from and after July 1, 1991.

**Cross References** — Rules relative to jurors, juries, and jury verdicts, see Miss. R. Civ. P. 47 and 48.

## JUDICIAL DECISIONS

1. In general.
2. Application.

### 1. In general.

Defendant's allegation on appeal that a juror should have been stricken was procedurally barred because defendant failed to object to the juror's competency at trial. *Wright v. State*, 9 So. 3d 447 (Miss. Ct. App. 2009).

At the hearing on defendant's motion for a new trial, the juror testified that she did not know why she did not respond when asked if anyone knew defendant, adding that she did not know defendant, only that she knew of him from seeing him around the community and was aware he had dated her daughter some 10 years earlier. The juror testified that she held no bias or hard feelings towards defendant, and the trial court properly found incredible defendant's testimony that he was unaware of the juror's presence on the jury until after trial, and found it more likely that defendant believed the juror would have been a favorable juror, and

therefore he did not challenge her; thus, the denial of defendant's motion for a new trial on the alleged basis that the juror withheld information and precluded defendant from having an impartial jury was not an abuse of discretion. *Doss v. State*, 906 So. 2d 836 (Miss. Ct. App. 2004).

Defendant's murder conviction was proper where the denial of defendant's motion for a mistrial was permissible, even though a juror failed to disclose certain information during voir dire, because the jury panel was untainted; the juror stated that she never discussed the case with other jurors, and she was removed from the panel. *Ables v. State*, 850 So. 2d 172 (Miss. Ct. App. 2003).

Where a driver sued a utility company for negligence after the driver drove into utility poles stacked in a trailer parked off a highway, on voir dire, the jurors did not conceal material information that denied the driver the right of a fair and impartial jury. *Myles v. Entergy Miss., Inc.*, 828 So. 2d 861 (Miss. Ct. App. 2002).

It was harmless error for trial judge to allow an alternate juror to retire to the deliberation room with the rest of the jury after the close of the trial because the alternate juror did not contribute to the deliberations in any way and the trial judge actually polled the jurors to be certain that no harm was done. *Maldonado v. State*, 796 So. 2d 247 (Miss. Ct. App. 2001).

The mere presence of an alternate juror during jury deliberation, without evidence that the deliberation was affected by it, does not constitute reversible error. *Department of Human Servs. v. Moore*, 632 So. 2d 929 (Miss. 1994).

A trial judge in a murder prosecution did not err in refusing to exclude a juror after she had been accepted, even though the juror's daughter had been murdered six years earlier, where the attorneys inadvertently failed to ask the juror during voir dire whether a member of her family had been a victim of a crime, and therefore the juror neither withheld nor misrepresented information. *Spivey v. Mowdy*, 617 So. 2d 999 (Miss. 1992).

It was error for a trial court to excuse a juror and replace her with an alternate after the jury had retired to deliberate a sentencing verdict, since substitution of a juror with an alternate must occur prior to the time the jury retires to consider its verdict. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992). \*

In civil jury trial in Federal District Court, equal protection component of Fifth Amendment due process clause prohibits private litigant from using peremptory challenge to exclude prospective jurors on account of race because such race-based exclusion violates equal protection rights of excluded jurors; opposing litigant has third-party standing to raise excluded jurors' rights in opposing litigant's own behalf; and, while role of litigants in determining jury's composition may provide one reason for wide acceptance of jury system and its verdicts, if race stereotypes are price for acceptance of jury panel, price is too high to meet standard of constitution. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), on remand, 943 F.2d 551 (5th Cir. La. 1991), reh'g denied, (5th Cir. Oct. 21, 1991).

A trial court erred when it seated an alternate juror after the alternate jurors had been dismissed from jury service and after the jury had been in deliberations for almost 2 hours, where the alternate juror had been neither sequestered nor instructed regarding the case for the period beginning when the jury retired and until he was placed on the jury panel. *Folk v. State*, 576 So. 2d 1243 (Miss. 1991).

In determining whether a juror is "disqualified" within the meaning of § 13-5-67 when he or she has withheld information or misrepresented material facts on voir dire examination, the test is whether the juror withheld substantial information or misrepresented material facts in the face of a clearly worded question which was relevant to the case at bar. Voir dire examination is often the most crucial crucible in forging the primary instrument of justice—the fair and impartial jury. When offering challenges for cause and challenges peremptory, parties and their lawyers must rely on the objective candor and responsiveness of prospective jurors, and nothing turns on who asks the question, so long as it was clearly worded. Following a jury's verdict, where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court must grant a new trial; prejudice is presumed. Where, as a matter of common experience, a full and correct response would have provided the basis for a peremptory challenge, not rising to the dignity of a challenge for cause, the courts have greater discretion, though a discretion that should always be exercised against the backdrop of the duty to secure to each party trial before a fair and impartial jury. Thus, in a prosecution for felony sale of alcoholic and intoxicating beverages, the circuit court's action in removing a juror was within the scope of its authority where the juror failed to respond on 3 separate occasions during voir dire to defense counsel's questions as to whether any prospective juror or any "relative or member of the juror's immediate family" had been involved in a criminal proceeding, and the juror's husband had 2 liquor-



related criminal convictions. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

Section 13-5-67 is read against the backdrop of the general rule that a party who fails to object to the jury's composition before it is impaneled waives any right to complain thereafter. The word "disqualified" in § 13-5-67 has breadth considerably beyond that of § 13-5-1's initial qualifications for jury service. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

It was harmless error for trial judge to allow 2 alternate jurors to retire with jury where there was no showing of any resulting prejudice, although action of trial judge was clearly in violation of statute and alternate jurors are to be discharged and not be present or participate in deliberations under any circumstances not prescribed by statute. *Luster v. State*, 515 So. 2d 1177 (Miss. 1987).

Trial judge who chose to hear matter concerning dismissal of juror for good cause, and replacement of her with an alternate, in chambers should have informed counsel for both sides and given opportunity for them to be present, or at least to object and make record; however, counsel cited no actual prejudice to defendant arising out of substitution of jurors, and court assumed that juror was excused for good cause. *Stevens v. State*, 513 So. 2d 603 (Miss. 1987).

Fact that a juror subpoenaed to appear before a county court had been placed onto a circuit court jury panel, which panel tried a homicide case did not require reversal of panel's verdict, although when the error was discovered and defendant's motion made, after both sides had rested but before the case was submitted to the jury, however, the juror mistakenly sitting should have been replaced with an alternate juror. *Porter v. State*, 492 So. 2d 970 (Miss. 1986).

When bailiff excuses juror on last day of murder trial on basis of death of juror's grandmother, rather than escorting juror back to court and informing trial judge of situation so judge can determine whether juror is unable to perform duty and order excusal, and trial court subsequently impanels alternate juror without objection by defense, and defendant fails to show prejudice resulting from impaneling of al-

ternate, conviction is not subject to reversal on basis of improper excusal of original juror. *Fuller v. State*, 468 So. 2d 68 (Miss. 1985).

In a prosecution for capital murder, the trial court erred in permitting the state to peremptorily challenge on juror after the panel had been accepted on the grounds that the juror's son was under indictment in a criminal matter where the record did not show that the juror was incompetent to serve and where the challenged juror could not be presumed to be incompetent merely because her son had been indicted; the trial court further erred by denying defendant's peremptory challenge to the alternate juror, where it seemed to discriminate against defendant in favor of the state. Fairness required that defendant be granted a new trial. *Caldwell v. State*, 381 So. 2d 591 (Miss. 1980).

Absent a showing that the defendant was prejudiced thereby, the fact that it was discovered during the course of a misdemeanor trial in circuit court one of the jurors had served upon the jury which heard the case in justice of the peace court, was thereby removed, and replaced with an alternate juror, such did not constitute error. *Russell v. State*, 220 So. 2d 334 (Miss. 1969).

## 2. Application.

Defendant's convictions for manslaughter and rape were proper because there was no error in the trial court's dismissal of a juror. The trial court specifically found on the record that the particular juror had failed to follow clear instructions given numerous times during the trial not to speak to outside persons; the trial court further noted that the failure to follow basic instructions demonstrated additional concern that the juror might be unable to follow other, more important instructions to the jury concerning the law in the case. *Brown v. State*, 999 So. 2d 853 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 44 (Miss. 2009).

Defendant's conviction for aggravated assault was appropriate because a juror's statement that she could not sit in judgment of another person properly led to her excuse for cause; additionally, she was excused immediately following the impan-



eling of the jury, which was within the time frame allotted in Miss. Code Ann. § 13-5-67. *Hawthorne v. State*, 944 So. 2d 928 (Miss. Ct. App. 2006).

Trial judge was in violation of Miss. Code Ann. § 13-5-67 where, although the judge attempted to assess and rectify the damage done by the alternate juror, it was apparent that there may have been a contaminated verdict by having the alternate juror sit in on jury deliberations, and

defendant was prejudiced by the presence of the alternate juror; therefore, defendant was entitled to a new trial. *Archie v. State*, 844 So. 2d 1173 (Miss. Ct. App. 2003).

The court did not abuse its discretion when it replaced a juror who disappeared from the courthouse after the jury was sworn in. *Vaughn v. State*, 712 So. 2d 721 (Miss. 1998).

## RESEARCH REFERENCES

**ALR.** Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 84 A.L.R.2d 1288.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 A.L.R.4th 1127.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury — post-Batson state cases. 47 A.L.R.5th 259.

Selection and impaneling of alternate jurors under Rule 24(c) of Federal Rules of Criminal Procedure. 119 A.L.R. Fed. 589.

**Am Jur.** 15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 131 (order excusing juror).

**CJS.** 50 C.J.S., Juries §§ 254-261, 519.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Juries and Jury Verdicts — Rules 38, 48-51, and 59. 52 Miss. L. J. 163, March 1982.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 6:4, 6:11, 6:13.

## § 13-5-69. Examination of jurors by attorneys or litigants.

Except in cases in which the examination of jurors is governed by rules promulgated by the Mississippi Supreme Court, the parties or their attorneys in all jury trials shall have the right to question jurors who are being impaneled with reference to challenges for cause, and for peremptory challenges, and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys or by litigants not represented by attorneys.

**SOURCES:** Codes, 1930, § 2068; 1942, § 1802; Laws, 1922, ch. 294; Laws, 1991, ch. 573, § 104, eff from and after July 1, 1991.

**Cross References** — When an opinion as to guilt or innocence will not render person incompetent in a criminal case, see § 13-5-79.

Challenges to arrays and quashals of venire facias generally, see § 13-5-81.

Number of peremptory challenges allowed in criminal cases, see § 99-17-3.

Peremptory challenges of jointly tried defendants, see § 99-17-5.

Rules relative to jurors, juries, and jury verdicts, see Miss. R. Civ. P. 47 and 48.

Voir dire examination of jurors in circuit and county courts, see Miss. Uniform Rule of Circuit and County Court Practice 3.05.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application, generally.
3. Examination as to particular matters.

**1. Validity.**

Trial court did not err in refusing to enforce a blanket denial of the use of peremptory strikes in jury selection where there was no Mississippi precedent binding on the appellate court that suggested that Miss. Code Ann. § 13-5-69 was unconstitutional under any provisions of the Mississippi Constitution. *Plair v. State*, 867 So. 2d 289 (Miss. Ct. App. 2004).

This section [Code 1942, § 1802] is not unconstitutional as taking away the inherent powers of the court. *House v. State*, 133 Miss. 675, 98 So. 156 (1923).

**2. Construction and application, generally.**

Juror is disqualified under statute where on voir dire examination he or she has withheld information or misrepresented material facts. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Trial court has considerable discretion in determining when questions asked by prosecutors to probe prejudices of prospective jurors are improper. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's failure to move prospective jurors to one side of courtroom, which was crowded with spectators, and instead requiring defendant to conduct voir dire with jury panel scattered throughout courtroom, interspersed with spectators, was not clear error in armed robbery prosecution, where defendant counsel asked questions to the panel and was able to ask questions to individuals who responded to his questions. *McLemore v. State*, 669 So. 2d 19 (Miss. 1996).

It is up to court to ensure that defendant in fact received effective voir dire. *McLemore v. State*, 669 So. 2d 19 (Miss. 1996).

Defendant was not denied opportunity to intelligently use peremptory challenges when trial court conducted voir dire itself; trial court asked venire whether anyone would automatically vote for death penalty regardless of mitigating circumstances, counsel for both sides stated they were satisfied with voir dire, and defendant did not ask trial court to further voir dire jurors and did not ask that she be allowed to do so. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Voir dire is conducted under supervision of trial court, and a great deal must, of necessity, be left to its sound discretion. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Court has duty to see that competent, fair and impartial jury is empaneled. *Tighe v. Crosthwait*, 665 So. 2d 1337 (Miss. 1995).

To ensure party's right to fair trial and impartial jury, free of bias and prejudice, Mississippi law allows broad latitude on voir dire. *Tighe v. Crosthwait*, 665 So. 2d 1337 (Miss. 1995).

While it is error to refuse to allow party to question prospective jurors to determine whether they are biased, prejudiced or have any interest in outcome of case, counsel is not free of limits during voir dire; rather, voir dire examination is subject to reasonable limitations, especially in insurance cases. *Tighe v. Crosthwait*, 665 So. 2d 1337 (Miss. 1995).

A trial court in a capital murder prosecution did not err by allowing the prosecutor to question potential jurors first in individual sequestered voir dire or by allowing the prosecutor to use leading questions during voir dire. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A trial court in a capital murder prosecution did not abuse its discretion by re-



fusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pre-trial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

United States Supreme Court has found that, in civil case, use of peremptory challenge based on race violates Fifth Amendment; however, where at time of trial Fifth Circuit operated under rule that such holding did not apply to civil trials, failure to object on voir dire to counsel's use of challenge against black prospective juror foreclosed post trial objection. *Dawson v. Wal-Mart Stores, Inc.*, 781 F. Supp. 1166 (N.D. Miss. 1992), aff'd, 978 F.2d 205 (5th Cir. 1992).

Batson claim of racial discrimination in exercise of peremptory challenge to juror requires 3-step process: party claiming discrimination must make prima facie showing that challenge was on basis of race; burden then shifts to striking party to articulate race-neutral explanation; and ultimately trial court must determine whether claimant has proven purposeful discrimination. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

In determining peremptory challenge was unlawfully exercised on racial grounds in contravention of Batson, District Court has discretion to fashion procedure necessary to evaluate counsel's race-neutral explanation; trial court's decision on ultimate question of discriminatory intent is finding of fact usually accorded great deference on appeal, because of inherent credibility assessment. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

In determining race-neutrality for purposes of assessing peremptory challenge to jurors, neutral explanation being one "based upon something other than race of

juror," legitimate reasons undergirding court's allowing trial counsel to exercise challenge relying upon counsel's intuitive assumptions, include age, appearance, familial relationships, responsiveness to questions, and background knowledge that raised possibility of bias; explanation "need not be quantifiable" provided the intent is not race-based. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

Disproportionate exclusion from jury of members of certain race, while not itself prohibited, may nevertheless constitute evidence that counsel's stated reason for exercising challenge was mere pretext for racial discrimination. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

Fact that counsel did not use third peremptory challenge against black prospective juror substantially supports finding that counsel did not exercise discrimination in using challenges against other 2 black prospective jurors. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

On particular facts of case, articulated race-neutral reasons for exercising peremptory challenge to strike 2 black prospective jurors in diversity suit arising out of automobile accident were not pretextual. *Moore v. Keller Indus., Inc.*, 948 F.2d 199 (5th Cir. 1991), cert. denied, 504 U.S. 912, 112 S. Ct. 1945, 118 L. Ed. 2d 550 (1992).

In action against insurance company in which verdict and judgment were rendered in favor of defendant company, and plaintiffs raised claim charging that court erred in refusing to require defense counsel to indicate non-racial motive for exercising 2 of its peremptory challenges, case would be remanded to District Court to determine whether plaintiffs presented prima facie case of racial discrimination in exercise of peremptory challenges; if District Court determines such case is presented, it shall afford defendant opportunity to show challenges were made for non-racial reasons, failing which, court shall grant plaintiffs new trial. *Polk v.*



Dixie Ins. Co., 943 F.2d 553 (5th Cir. 1991).

An opening statement during voir dire is permitted as long as the attorney confines the statement to the facts expected to be proved. *Woodward v. State*, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

A defendant was not entitled to individual sequestered voir dire to allow him to individually examine jurors out of the presence of the others. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

Trial judge did not err in failing to excuse members of jury panel who were members of defendant electric power association, where jury venire was asked and responded affirmatively that they could be fair and impartial even though they might be members of association; plaintiff did not ask for change of venue, and his attorneys chose not to exercise right to challenge juror for cause. *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332 (Miss. 1987).

Under this section, counsel for the defense has the right to question the jurors for cause after they have been determined to be qualified jurors on voir dire by the court, but this does not mean that he may not be required to interrogate the jurors before the state accepts the jury. *Peters v. State*, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

Jury selection procedure provided in Circuit Court Rule 13, which requires that counsel for the defendant direct his questions on voir dire to the entire group of jurors presented, is not improper, so long as the defendant is given a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge a juror. *Peters v. State*, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

It was within the sound discretion of the trial judge as to how many jurors would be submitted to the litigant for their voir dire. *Bright v. State*, 293 So. 2d 818 (Miss. 1974).

District attorney has right to examine jurors after trial judge has satisfied himself as to competency of panel. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

To allow attorneys in a case to examine jurors does not deprive the court of its inherent power. *House v. State*, 133 Miss. 675, 98 So. 156 (1923).

A denial of the right under this section [Code 1942, § 1802] is reversible error. *Jones v. State*, 133 Miss. 684, 98 So. 150 (1923).

### 3. Examination as to particular matters.

Defendant's conviction for manslaughter was appropriate because he had, or should have had, actual knowledge that a juror was untruthful during voir dire in regard to knowing defendant's mother; yet, defendant remained silent; further, the trial court clearly found that defendant's mother's affidavit lacked credibility. *Lindsey v. State*, 965 So. 2d 712 (Miss. Ct. App. 2007).

Where defendant's first trial resulted in a mistrial based on a Batson challenge, because the jury had not been sworn, the rules prohibiting double jeopardy were not violated; double jeopardy protection did not attach to defendant's first proceeding, so as to preclude a second trial. *Gaskin v. State*, 856 So. 2d 363 (Miss. Ct. App. 2003).

Prosecutor's question to prospective jurors during voir dire asking whether they would be influenced by fact that thirty years had passed between murder and current trial was appropriate to determine whether any jurors were predisposed to finding defendant not guilty simply due to passage of such length of time. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

It is perfectly proper for counsel to ask questions during voir dire that are beyond court's inquiries reasonably necessary to assure himself and court that jurors selected will give his client benefit of every right to which he is entitled under the law, as well as to reveal or signify particular antipathies that could prejudice his client before any proposed juror. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert.

denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Prosecutor's question to potential jurors asking whether they could conceive of imposing death penalty in murder case with no eyewitness was proper means of probing into their prejudices to get insight into their thoughts. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's questioning and dismissal of 6 venire members who expressed opposition to the death penalty was adequate, even though defense counsel was not allowed to repeat questions in his own words to prospective jurors during court's voir dire, where trial court rephrased questions as requested, defense did not request permission to ask further questions, and there was no showing that further questioning would have rehabilitated dismissed venire members. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defense counsel's extensive voir dire of venire members regarding attitudes toward death penalty precluded claim on appeal that trial court's inadequate voir dire questioning permitted seating of jurors with bias in favor of death penalty. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Circuit court should take substantial role in conducting voir dire to determine whether prospective jurors would vote automatically for death penalty regardless of aggravating and mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Trial court erred by refusing to allow medical malpractice plaintiff to ask questions during voir dire to determine if prospective jurors had been exposed to and/or

affected by media campaign on tort reform; however, error was harmless, as advertisements in question were geared towards reducing amount of damages and did not suggest that jurors should find defendants not liable, and plaintiff was allowed to ask jurors whether they belonged to any tort reform group, whether they had personal feelings that there were too many lawsuits, whether they felt medical doctors should not be sued, and whether they should give large damages if they were justified by proof. *Tighe v. Crosthwait*, 665 So. 2d 1337 (Miss. 1995).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

In civil jury trial in Federal District Court, equal protection component of Fifth Amendment due process clause prohibits private litigant from using peremptory challenge to exclude prospective jurors on account of race because such race-based exclusion violates equal protection rights of excluded jurors; opposing litigant has third-party standing to raise excluded jurors' rights in opposing litigant's own behalf; and, while role of litigants in determining jury's composition may provide one reason for wide acceptance of jury



system and its verdicts, if race stereotypes are price for acceptance of jury panel, price is too high to meet standard of constitution. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), on remand, 943 F.2d 551 (5th Cir. La. 1991), reh'g denied, (5th Cir. Oct. 21, 1991).

Prospective jurors in a capital murder prosecution who had stated their opposition to the death penalty were improperly excluded without allowing the defense counsel the opportunity to question them. However, this error was harmless beyond a reasonable doubt where the answers the jurors gave were substantially clear, it was reasonably certain that the jurors were "Witherspoon-excludable," and it was unlikely that voir dire examination by the defense counsel would have rehabilitated the jurors sufficient to take them out of Witherspoon. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A defendant was not denied his right to use a peremptory challenge on a juror who failed to answer the defense attorney's question during voir dire as to whether any of the jurors knew either attorney in the case, even though the juror had been injured when the defense attorney collided with him during a softball game 3 years earlier, where the juror did not recognize the defense attorney at the time of voir dire and only sometime thereafter recognized him as being the person who had collided with him at the ball game, the juror had not seen the defense attorney since that time, and the juror said that he felt no ill will toward the attorney for the injury he received and that the incident did not color his judgments during trial. *Bush v. State*, 585 So. 2d 1262 (Miss. 1991), opinion after remand, 597 So. 2d 656 (Miss. 1992).

A juror's failure to respond to a voir dire question asking whether any of the potential jurors were related by blood or mar-

riage to the victim was proper, where the juror was the aunt of a man who had at one time lived with the victim and had 2 children with the victim, but had never been married to the victim. *Lewis v. State*, 580 So. 2d 1279 (Miss. 1991).

Although an attorney may probe the prejudices of prospective jurors to the end that all will understand the juror's thoughts on matters directly related to the issues to be tried, it is impermissible for an attorney to attempt to secure from the juror a pledge that, if a certain set of facts occur or are presented, the juror will vote a certain way. There may well be other facts which would require a conscientious juror to do otherwise even though the assumed hypothetical fact comes to pass. Furthermore, in the course of deliberation a juror should be encumbered by his or her oath, the evidence and the instructions from the trial court, and nothing more. *Baker v. Baker*, 553 So. 2d 8 (Miss. 1989).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A trial judge properly sustained the state's objections to a defense counsel's voir dire questions which particularized what the facts would show and then asked the jurors if they would return a verdict of not guilty. *Harris v. State*, 532 So. 2d 602 (Miss. 1988).

A potential juror, who is a member or customer of a co-operative electrical power association, is not per se disqualified from sitting as a juror in a lawsuit to which the co-operative is a party. *Garcia v. Coast Elec. Power Ass'n*, 493 So. 2d 380 (Miss. 1986).



When asked on voir dire examination whether any juror had a close relative who was involved in law enforcement, the failure of one juror to disclose that his brother was one of the police officers who was involved in the investigation of the burglary being prosecuted gave rise to a reasonable inference of prejudice to the defendant in selecting the jury. *Odom v. State*, 355 So. 2d 1381 (Miss. 1978).

Where the prosecution, on voir dire, asked a prospective juror in effect if he would return a verdict of guilty if the state should prove that the prosecutrix was a female child under the age of 12 and that the defendant attempted forcibly to have carnal knowledge of her and that her body was thereby torn or lacerated, and the question was not objected to by the defendant, the question was harmless or was waived by the defendant's failure to object, and its allowance not an abuse of discretion, particularly in view of later proper instructions defining the crime. *South Miss. Elec. Power Ass'n v. Pryor*, 246 So. 2d 920 (Miss. 1971).

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trials in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969), appeal dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80 (1970).

Where funds to pay special prosecutor, in prosecution for murder, were raised by public subscription, court stated it would have been better to grant defendant's request for list of contributors to aid in selection of jury, but added it was not reversible error to refuse since each prospective juror could have been asked if he had contributed. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61 (1950).

In a capital case, trial judge must ask every juror tendered on trial panel

whether he has any conscientious scruples against infliction of capital punishment and must exclude any juror who has such scruples. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

If the juror has not understood meaning of question as to "conscientious scruples" against capital punishment, trial judge should explain it to him in simple form by asking whether juror is opposed to hanging, etc. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

District attorney may examine jurors as to "conscientious scruples" against death penalty, although jury has passed judge's examination. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

District attorney's examination as to "conscientious scruples" against death penalty should be in the abstract and must not go to extent of forcing a commitment with respect to what juror or jury would do in the particular case, nor should examination create impression juror would be looked upon with displeasure unless he returned death verdict. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

District attorney's statements to jury on voir dire that state was going to ask death penalty, and anyone opposed to death penalty would be excused, held erroneous, but error was cured by statements of trial judge and district attorney that it was for jury to say whether capital punishment should be inflicted, and by instruction for state that if guilty verdict was returned, jury could fix punishment at death or life imprisonment. *Phenizee v. State*, 180 Miss. 746, 178 So. 579 (1938).

Error, if any, in sustaining objection to question to jurors, on voir dire examination held not to warrant reversal, where question was in form of statement of principle of law. *Roney v. State*, 167 Miss. 532, 142 So. 475 (1932).

Sustaining objection to question pertaining to reasonable doubt in mind of any one juror was not error. *Roney v. State*, 167 Miss. 532, 142 So. 475 (1932).

## RESEARCH REFERENCES

**ALR.** Questions to jurors in personal injury or death action as to interest in, or

connection with, indemnity insurance company. 4 A.L.R.2d 761.

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal case. 54 A.L.R.2d 1204.

Juror's false or erroneous answer on voir dire as to previous claims or actions against himself or family. 63 A.L.R.2d 1061.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. 72 A.L.R.2d 673.

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in civil case. 72 A.L.R.2d 905.

Right of counsel in criminal case personally to conduct voir dire examination of prospective jurors. 73 A.L.R.2d 1187.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 A.L.R.2d 7.

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. 43 A.L.R.3d 1081.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 A.L.R.3d 1052.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 A.L.R.3d 126.

Competency of juror as affected by his membership in co-operative association interested in the case. 69 A.L.R.3d 1296.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 A.L.R.3d 172.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 A.L.R.4th 429.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. 38 A.L.R.4th 267.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 A.L.R.4th 969.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. 52 A.L.R.4th 964.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family. 66 A.L.R.4th 509.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error. 68 A.L.R.4th 954.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits. 69 A.L.R.4th 131.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured. 71 A.L.R.4th 1025.

Prospective juror's connection with insurance company as ground for challenge for cause. 9 A.L.R.5th 102.

**Am Jur.** Note, Beyond Batson: eliminating gender-based peremptory challenges. 105 Harv L Rev 1920, June 1992.

47 Am. Jur. 2d, Jury §§ 167 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 264 (challenge to panel of jurors).

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 141(request that court examine panel on voir dire with respect to certain matters); Forms 171-186 (challenges to poll).

2 Am. Jur. Proof of Facts, Bias or Prejudice, Proof No. 1 (bias or prejudice of juror).

20 Am. Jur. Proof of Facts, Religious Prejudice, § 32 (proof of prejudice of prospective juror — trial of a challenge on voir dire).

5 Am. Jur. Trials, Selecting the jury, §§ 1 et seq.

**CJS.** 50 C.J.S., Juries §§ 215, 238, 352, 367, 371, 424, et seq.

**Lawyers' Edition.** Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors

— Supreme Court cases. 114 L. Ed. 2d 763.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 6:7, 6:9.

## § 13-5-71. Oath of petit jurors.

Petit jurors shall be sworn in the following form:

“You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence. So help you God.”

The oath shall authorize the jury to try all issues and execute all writs of inquiry which may be submitted to it during that term of the court. Talesmen, if any be summoned or retained, shall in like manner be sworn to try all issues and execute all writs of inquiry which may be submitted to them during the day for which they are summoned or the time for which they are retained.

**SOURCES:** Codes, Hutchinson’s 1848, ch. 61, art. 1 (132); 1857, ch. 61, art. 143; 1871, § 744; 1880, § 1697; 1892, § 2384; 1906, § 2713; Hemingway’s 1917, § 2206; 1930, § 2059; 1942, § 1793.

**Cross References** — Oath of jurors serving in special court of eminent domain, see § 11-27-17.

Oath of jurors in capital case, see § 13-5-73.

Petit juror compensation, see § 25-7-61.

## JUDICIAL DECISIONS

1. Oath, necessity and sufficiency of.
2. —Capital cases.
3. Swearing jurors after commencement of trial.
4. Disability of juror.

### 1. Oath, necessity and sufficiency of.

Defendant argued that a trial judge failed to swear in a jury during defendant’s trial for kidnapping, sexual battery, and aggravated assault; however, while the record did not explicitly reflect a reading of the oath, the record did include references to the oath. The trial judge was presumed to have performed his duties. *Moore v. State*, 996 So. 2d 756 (Miss. 2008).

There was no plain error because defendant did not overcome the presumption that the jury was sworn since the sole mention in the record of the administration of the oath reflected that the jury was

sworn, counsel never objected to a failure to swear the jury, and counsel did not object to the giving of a jury instruction that acknowledged that the jury was sworn. *Holbrook v. State*, 4 So. 3d 382 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 115 (Miss. 2009).

Transcript did not indicate the actual giving of the oath under Miss. Code Ann. § 13-5-71, but the cover page of the transcript stated that the jury was duly impaneled and an instruction stated that the jury took an oath, and defendant’s assertion that the jury was not properly sworn was insufficient to overcome the established presumption that the trial court properly performed its duties; however, because this issue causes concern to members of court, the court urges the lower courts to place in every official record evidence that the trial jury took the offi-



cial oath to well and truly try the issues. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Although the trial court administered an oath different than that mandated by the Legislature, defendant failed to raise a contemporaneous objection; because the trial judge did not have an opportunity to pass on the question, this issue was not preserved for appellate review. *Debrow v. State*, 972 So. 2d 550 (Miss. 2007).

In a drug case, defendant did not receive ineffective assistance of counsel because (1) he offered no evidence to rebut the presumption that the jury had been properly sworn, so no objection by counsel was required; (2) defense counsel was not required to request an instruction regarding an accomplice because the State's evidence did not rest upon the testimony of two others involved; (3) defense counsel's failure to request an additional instruction when mention was made of defendant's prior incarceration was not deficient where an objection was made immediately and a curative instruction was given; and (4) the failure to object to defendant's criminal record was not deficient since the testimony of a correctional department custodian was permissible to authenticate such under Miss. R. Evid. 901. *Vardaman v. State*, 966 So. 2d 885 (Miss. Ct. App. 2007).

In a prosecution of defendant for exploitation of a minor, defendant's assertion that the petit jury was not properly sworn as required by Miss. Code Ann. § 13-5-71 was insufficient to overcome the established presumption that the trial court properly performed its duties. *Allen v. State*, 945 So. 2d 422 (Miss. Ct. App. 2006).

In a drug case, defendant failed to present sufficient evidence to overcome the presumption that the trial judge administered the oath to the jury because, although the record did not explicitly reflect a reading of the oath, the record did reveal references made by the court to the oath; furthermore, the court's judgment of conviction stated that "a trial before a jury has been duly sworn," and therefore it could be presumed that the jury was sworn. *Carlisle v. State*, 936 So. 2d 415 (Miss. Ct. App. 2006).

Court rejected defendant's claim that his conviction for felony shoplifting should be reversed due to the lack of evidence in the record that the petit jury was sworn in as required by Miss. Code Ann. § 13-5-71 because the record did not indicate that the jury was not sworn and there was no objection by trial counsel to the failure to administer the oath. The sole mention of the oath in the record indicated that the oath was administered. *Biggs v. State*, 942 So. 2d 185 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Defendant did not present evidence sufficient to overcome the presumption that the judge properly performed his duties by placing the jury under oath where a boilerplate warning was present and there were references throughout the record by the judge, prosecutor, and even defense counsel to an oath being given. *Lawrence v. State*, 928 So. 2d 894 (Miss. Ct. App. 2005).

Defendant's conviction for three counts of armed robbery was proper where the failure to administer a second oath to the jurors, as set out in Miss. Code Ann. § 13-5-73, was not reversible error; the oath administered under Miss. Code Ann. § 13-5-71 was sufficient. *Boggans v. State*, 867 So. 2d 279 (Miss. Ct. App. 2004).

Recital in the judgment and sentence that the jury was specially sworn is conclusive of the fact. *Ratcliff v. State*, 201 Miss. 259, 29 So. 2d 321 (1947).

In the absence of evidence to the contrary, it will be presumed that the jury were sworn. *Waddell v. Magee*, 53 Miss. 687 (1876).

If the record recite that the jury were "impaneled and sworn to sit as jurors in the case," it will be presumed that they were legally sworn. *Furniss v. Meredith*, 43 Miss. 302 (1870).

Where the jury appeared to have been sworn "truly to try the issue joined between the parties," it was held sufficient. *Windham v. Williams*, 27 Miss. 313 (1854).

It is not necessary to swear the jury for the week in each case, and talesmen will be presumed to have been duly sworn unless the record shows the contrary. *Pierce v. Tate*, 27 Miss. 283 (1854).

## 2. —Capital cases.

Pursuant to Miss. Code Ann. § 13-5-73, jurors in a capital case should be sworn to well and truly try the issue between the state and the prisoner, and a true verdict should be given according to the evidence and law, and because the crime of forcible rape was a capital crime under Miss. Code Ann. § 97-3-65(4)(a), defendant was entitled to have the capital oath administered to the jurors, but the trial judge failed to administer that oath; however, the capital oath given in the middle of the trial, together with the petit oath given at the beginning of defendant's trial, which were substantially the same, were sufficient to instruct the jury of their duty. *Golden v. State*, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

In a prosecution for forcible rape of a female adult, the failure to administer to the jury the special oath in capital cases required by § 13-5-73 was not error where the jury received the oath of petit jurors prescribed by § 13-5-71 which is substantially equivalent to the special oath, the defendant refused any attempt by the trial judge to cure the omission, the defendant was not taxed by the jury with the maximum sentence of life imprisonment, and a special venire was neither requested nor empaneled in the trial of the case, but rather the jury was selected and accepted from the regular panel for the week. *Wilburn v. State*, 608 So. 2d 702 (Miss. 1992).

Defendants charged with capital offenses are entitled to have the jury trying them impaneled and specially sworn as the law directs. *Miller v. State*, 122 Miss. 19, 84 So. 161 (1920).

The voir dire oath is not sufficient in a capital case. *Miller v. State*, 122 Miss. 19, 84 So. 161 (1920).

## 3. Swearing jurors after commencement of trial.

Defendant failed to present sufficient evidence to overcome the presumption that the trial judge administered the oath to the jury. Although the record did not expressly reflect a reading of the oath, the record did reveal, however, that the trial court made two references to an oath during trial; the appellate court had to presume that the trial judge properly performed his duties, and it failed to find reversible error or harm that would have warranted a reversal of defendant's conviction under the plain error doctrine. *Acreman v. State*, 907 So. 2d 1005 (Miss. Ct. App. 2005).

An instance where the oath was administered in a felony case over the objection of the defendant after the state had closed its evidence and the error held to be harmless. *Stark v. State*, 133 Miss. 275, 97 So. 577 (1923).

A failure to swear seven tales jurors until the case was closed will not vitiate a verdict of guilty unless the defendant was prejudiced thereby. *Boroum v. State*, 105 Miss. 887, 63 So. 297 (1913), error overruled, 105 Miss. 893, 63 So. 457 (1913).

## 4. Disability of juror.

If on the trial of a case a juror should become insane the court should begin the trial de novo, and the defendant should have the whole jury, as reconstituted for new trial, tendered to him, with the right to exercise all his challenges given him by law. *Dennis v. State*, 96 Miss. 96, 50 So. 499 (1909).

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 192 et seq.

**CJS.** 50 C.J.S., Juries §§ 520 et seq.

**Law Reviews.** 1978 Mississippi Su-

preme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:19.

## § 13-5-73. Oath of jurors and bailiffs in capital cases.

The jurors in a capital case shall be sworn to "well and truly try the issue between the state and the prisoner, and a true verdict give according to the



evidence and the law.” Bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them.

**SOURCES:** Codes, 1880, § 3060; 1892, § 1410; 1906, § 1483; Hemingway’s 1917, § 1241; 1930, § 1264; 1942, § 2507.

## JUDICIAL DECISIONS

### 1. In general.

Pursuant to Miss. Code Ann. § 13-5-73, jurors in a capital case should be sworn to well and truly try the issue between the state and the prisoner, and a true verdict should be given according to the evidence and law, and because the crime of forcible rape was a capital crime under Miss. Code Ann. § 97-3-65(4)(a), defendant was entitled to have the capital oath administered to the jurors, but the trial judge failed to administer that oath; however, the capital oath given in the middle of the trial, together with the petit oath given at the beginning of defendant’s trial, which were substantially the same, were sufficient to instruct the jury of their duty. *Golden v. State*, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

In a capital murder case, excusing a juror who was ambivalent as to whether she could impose the death penalty was proper and reflected the public policy set forth in Miss. Code Ann. § 13-5-73. *Dycus v. State*, 875 So. 2d 140 (Miss. 2004).

Defendant’s conviction for three counts of armed robbery was proper where the failure to administer a second oath to the jurors, as set out in Miss. Code Ann. § 13-5-73, was not reversible error; the oath administered under Miss. Code Ann. § 13-5-71 was sufficient. *Boggans v. State*, 867 So. 2d 279 (Miss. Ct. App. 2004).

Trial court in county where venue in murder prosecution was transferred following jury selection had jurisdiction to re-administer oath to jurors before trial, following administration of oath in county of jury selection that did not conform to special statutory requirements for oaths in capital cases. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Fact that bailiffs accompanied jurors to their respective homes after jurors were administered improper oath, but before re-administration of correct oath the following day was not prejudicial error in capital murder prosecution. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

In a prosecution for forcible rape of a female adult, the failure to administer to the jury the special oath in capital cases required by § 13-5-73 was not error where the jury received the oath of petit jurors prescribed by § 13-5-71 which is substantially equivalent to the special oath, the defendant refused any attempt by the trial judge to cure the omission, the defendant was not taxed by the jury with the maximum sentence of life imprisonment, and a special venire was neither requested nor empaneled in the trial of the case, but rather the jury was selected and accepted from the regular panel for the week. *Wilburn v. State*, 608 So. 2d 702 (Miss. 1992).

Although the beginning of the record did not indicate whether or not the jury was specially sworn as required by Miss Code § 13-5-73, the first part of the judgment indicated the jury was specially sworn prior to the introduction of evidence. *Young v. State*, 425 So. 2d 1022 (Miss. 1983).

Although the record in a murder prosecution did not reflect that the jury had been specially sworn, as required by statute, such omission was not reversible error where the rebuttable presumption that the trial judge properly performed his duty had not been overcome. *Bell v. State*, 360 So. 2d 1206 (Miss. 1978), cert. denied, 440 U.S. 950, 99 S. Ct. 1433, 59 L. Ed. 2d 640 (1979).

Where the trial court’s failure to have the jury sworn as required by this section



[Code 1972, § 13-5-73] was brought to its attention immediately after a few preliminary questions had been asked of the first witness in the case, after which the jury was sworn as required by law and the few questions that had been asked were repeated, there was a technical error but it was harmless error and not reversible. *Thomas v. State*, 298 So. 2d 690 (Miss. 1974).

That the oath administered to a jury calls for a true "and good" verdict is not

reversible error. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961).

By virtue of this provision, in capital cases the accused is entitled to have the jury sworn specially. *Miller v. State*, 122 Miss. 19, 84 So. 161 (1920).

The failure of the court to specially swear a jury in a capital case is waived where no objection is made thereto by the defendant until after a verdict against him. *Hill v. State*, 112 Miss. 375, 73 So. 66 (1916).

## RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 192 et seq.

**CJS.** 50 C.J.S., Juries §§ 520 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:19.

## § 13-5-75. Repealed.

Repealed by Laws of 1974, ch. 378, § 11.

[Codes, Hutchinson's 1848, ch. 61, art. 10 (2); 1857, ch. 61, art. 141; 1871, § 742; 1880, § 1693; 1892, § 2385; 1906, § 2714; Hemingway's 1917, § 2207; 1930, § 2060; 1942, § 1794; Laws, 1938, ch. 304]

**Editor's Note** — Former § 13-5-75 specified when the circuit court was to order jurors drawn and summoned.

## § 13-5-77. Special venire facias to issue in certain criminal cases.

When any person charged with a capital crime, or with the crime of manslaughter, shall have been arraigned and the plea of not guilty entered, the accused or the district attorney in any such case shall, upon demand, be entitled to a special venire. If at a term of court a special venire has been demanded for any case or cases, it shall be the duty of the court to cause to be drawn, in open court, from the jury box as many names as the judge in his discretion may direct, not to be less than forty (40) for each special venire as the judge in his discretion may direct to be called, and it shall be the duty of the clerk to issue a special venire facias, commanding the sheriff to summon the persons whose names are so drawn, to attend the court on a particular day to be named in the writ. It shall not be necessary that a separate special venire be drawn for each case in which a special venire is demanded. Those persons summoned pursuant to the issuance of a special venire facias shall attend the court on the day named in the writ and shall serve as the court may direct on any case for which a special venire has been demanded; provided, however, no juror summoned as a special venireman shall be impaneled or serve on more

than one (1) case. In the event a special venire be exhausted in a case without a jury being impaneled from those summoned and in attendance, the court shall proceed to make up the jury for the trial of the case from the regular panel and tales jurors who may have been summoned for the day. If, after exhausting said regular panel and tales jurors, a competent jury be not obtained, the court shall direct the sheriff to summon forthwith as many tales jurors as shall be sufficient to complete the jury.

In the event that there should be no such box, or the same should be mislaid, or the names therein have been exhausted, then the court may order a special venire facias to be issued by the clerk, directing the sheriff to summon as many jurors as may be necessary, not less than forty (40) for each special venire as the judge in his discretion may direct to be called and, after exhausting a special venire in any case, to impanel the jury as hereinbefore directed. The slips containing the names of all jurors drawn or summoned on a special venire, and not impaneled on a jury, shall be returned to the box from which they were drawn immediately after a jury shall be impaneled. If a special venire be not demanded, the jury in each case shall be composed of the regular venire for the week and as many talesmen and bystanders as may be required, to be summoned under the order of the court.

**SOURCES:** Codes, Hutchinson's 1848, ch. 65, art. 7 (1); 1857, ch. 64, art. 295; 1871, § 2759; 1880, § 3058; 1892, § 2386; 1906, § 2715; Hemingway's 1917, § 2208; 1930, § 2061; 1942, § 1795; Laws, 1985, ch. 443, § 1, eff from and after July 1, 1985.

**Cross References** — Criminal defendant's right to jury trial in case before a justice of the peace, see § 99-33-9.

### JUDICIAL DECISIONS

1. In general.
2. Special venire.
3. Time for requesting special venire.
4. Second special venire.
5. Drawing and executing special venire.
6. —Summoning venire.
7. —Number of persons.
8. —Waiver.
9. Selecting jurors from bystanders.
10. Discharge of venireman.
11. Quashing special venire.

#### 1. In general.

Supreme Court will not overrule lower court's denial of motion for special venire except upon showing of abuse of discretion. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

In a prosecution for murder in which defendant moved for a special venire, the

trial court committed reversible error where, instead of filling the panel with members of that week's regular jury panel who were in the courtroom, it presented defendant with 11 jurors who had been accepted by the State, and, over objection, required the defense to make its peremptory challenges to the 11 accepted jurors, in violation of statute mandating that in capital cases the defendant must be presented a full panel before being called upon to make his 12 peremptory challenges. *Sellen v. State*, 374 So. 2d 781 (Miss. 1979).

Under this section, which permits the jurors to be impaneled from those "summoned and in attendance" under the special venire, the trial judge in an armed robbery prosecution did not err in sua sponte excusing the husband of a prospective juror named in the venire facias,

where the mistake of serving the husband for jury service rather than his wife was not discovered until after the jury and an alternate juror had been accepted and impaneled, where the trial judge initially offered the defense an extra challenge as to the husband following such discovery, where the defense rejected such offer and moved for a new panel, and where the trial judge placed the alternate juror on the panel following the excusing of the husband from service. *Thorne v. State*, 348 So. 2d 1011 (Miss. 1977).

Where special venire of 75 prospective jurors was called at defendant's request but was exhausted before 12 jurors were qualified and accepted by both sides, trial judge did not err in completing jury selection process by using members of regular panel. *Odum v. State*, 311 So. 2d 346 (Miss. 1975).

The statutory method of selecting jurors is directory, not mandatory, and unless it is shown that the method used was fraudulent or such a radical departure from the method prescribed by the statute as to be unfair to the defendant or to prevent due process of law, the supreme court will not reverse. *Armstrong v. State*, 214 So. 2d 589 (Miss. 1968), cert. denied, 395 U.S. 965, 89 S. Ct. 2109, 23 L. Ed. 2d 750 (1969).

The provisions of the law in regard to the listing, drawing, summoning or impaneling of juries are directory merely. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962).

A fairer trial was assured the defendant in a murder prosecution by the court's overruling a motion, made after the case had been called for trial and while the jury was being selected, to call additional jurors from the jury box after the regular panel and special venire had both been exhausted, leaving the defendant with only two peremptory challenges which he immediately expended, than would have been by drawing from the general jury box which was so nearly depleted that many jurors would have had to be drawn from the box of the district where the homicide occurred. *Lewis v. State*, 201 Miss. 48, 28 So. 2d 122 (1946), cert. denied, 331 U.S. 785, 67 S. Ct. 1305, 91 L. Ed. 1816 (1947).

This section [Code 1942, § 1795] is directory. *Buchanan v. State*, 84 Miss. 332,

36 So. 388 (1904); *McVey v. State*, 117 Miss. 243, 78 So. 150 (1918); *Taylor v. State*, 148 Miss. 621, 114 So. 390 (1927).

## 2. Special venire.

In a manslaughter case, a trial court did not err by denying a motion for a special venire under Miss. Code Ann. § 13-5-77 because sufficient steps were taken to see that defendant received the benefits of such around the holidays; the granting of the motion would have delayed the trial for at least six months. *Speagle v. State*, 956 So. 2d 237 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

In a capital murder case, the inmate's counsel were not ineffective for removing a request for a special venire under Miss. Code Ann. § 13-5-77 because nothing in the record indicated that the jury panel was insufficient or that a special venire was necessary. *Wilcher v. State*, 863 So. 2d 776 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

Procedure for special venire is available to persons accused of certain serious crimes as matter of right, and such persons are entitled to have sheriff proceed in good faith and with due diligence to end that all persons listed upon special venire in fact be served and summoned for jury duty; it is not within sheriff's authority to decide unilaterally that there will be enough jurors at trial and make no further effort to summon unserved jurors after certain number of persons have been served. *Ratliff v. State*, 515 So. 2d 877 (Miss. 1987).

Defendant in a capital murder prosecution waived his request pursuant to §§ 13-5-77 and 99-15-27 for a special venire and for a list of the veniremen so summoned, where he never objected to the failure to provide for the special venire, and where at least fifty jurors were considered prior to impaneling the twelve jurors and two alternates. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief



aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

The trial judge in a prosecution for capital murder complied with the requirement of § 13-5-77 in directing the clerk to draw 150 names from the jury wheel for a special venire, notwithstanding the fact that only 67 of the names drawn were statutorily qualified to serve on the special venire, where the statute required that no fewer than 40 names be drawn. *Booker v. State*, 449 So. 2d 209 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984), vacated, 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985), on remand, 511 So. 2d 1329 (Miss. 1987).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under § 99-19-83, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under § 99-17-3 was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; § 99-19-83 does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. *Yates v. State*, 396 So. 2d 629 (Miss. 1981).

Where the charge is for manslaughter, the defendant has a right to call a special venire. *Hathorn v. State*, 225 Miss. 77, 82 So. 2d 653 (1955).

A jury impaneled from a special venire and accepted by the accused without objection, is not illegal because of failure of the court to examine the jurors. *Skinner v. State*, 53 Miss. 399 (1876).

If, on defendant's motion, the special venire be quashed because the box from which it was drawn was not legally prepared, he cannot be heard to complain of

the court ordering a special venire summoned. *Russell v. State*, 53 Miss. 367 (1876).

A direction in a special venire to summon a jury "residing as near as may be to the place where the murder was committed," is erroneous. *Shaffer v. State*, 2 Miss. (1 Howard) 238 (1835).

### 3. Time for requesting special venire.

Capital murder defendant was not entitled to special venire without making timely request before trial, notwithstanding that state made such request. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Although a special venire could have been demanded in an armed robbery prosecution if the demand had been timely made, the trial court did not abuse its discretion in overruling the defendant's motion for a special venire where the motion was made just prior to the start of trial. *Williams v. State*, 590 So. 2d 1374 (Miss. 1991).

A motion for a special venire was properly denied where the motion was not filed until approximately one week before the start of trial, even though the court had announced that the case was ready for trial some two weeks earlier, and where the motion was not called to the court's attention until the day of trial. *Sharplin v. State*, 357 So. 2d 940 (Miss. 1978).

It is not necessary that a special venire, if desired, be requested immediately upon the entry of a plea of not guilty, the purpose of the statute being accomplished if such request be made when the court ascertains and announces that the case is ready for trial. *Porter v. State*, 193 Miss. 774, 10 So. 2d 377 (1942).

When court in a capital case announced ready for trial, the request for a special venire became due without reference to the time then set for trial, and, counsel for the accused having failed at that time to request a special venire or to obtain permission from the court to make such request at a later date, denial of counsel's request for special venire, when the case was called for trial, was proper, notwithstanding counsel stated to the court, when the case was set for trial, that he would decide later whether he wanted a special

venire, in the absence of any understanding to that effect on the part of the court or of its doing anything to mislead counsel into thinking the contrary. *Porter v. State*, 193 Miss. 774, 10 So. 2d 377 (1942).

#### 4. Second special venire.

Upon exhaustion of special venire, the lower court did not abuse its discretion in overruling defendant's motion for continuance and that another special venire be drawn, since it could properly resort to the regular venire to complete the jury. *McBride v. State*, 492 So. 2d 581 (Miss. 1986).

Where all except about twelve of special venire were found disqualified on voir dire, court properly disallowed second special venire. *Harrison v. State*, 168 Miss. 699, 152 So. 494 (1934).

Second special venire is allowed only when first has been quashed for reasons which so completely dislodge first special venire that it never became special venire. *Harrison v. State*, 168 Miss. 699, 152 So. 494 (1934).

#### 5. Drawing and executing special venire.

Capital murder defendant's absence during the drawing of a special venire was not reversible error and did not support a claim of ineffective assistance of counsel where no prejudice resulted. *Burns v. State*, 813 So. 2d 668 (Miss. 2001).

While it would be the better practice to have the accused present when a special venire is drawn, the drawing of a special venire for a robbery prosecution, in the absence of the defendant and his counsel, was not reversible error, particularly where the defendant did not claim that he was prejudiced or that his case was not heard by an impartial jury, the drawing of a special venire not being a part of the actual trial. *Kendall v. State*, 249 So. 2d 657 (Miss. 1971), cert. denied, 404 U.S. 1040, 92 S. Ct. 725, 30 L. Ed. 2d 733 (1972).

In selecting the members of a special venire, pursuant to the court's order because the jury box was empty, it was proper for the sheriff's office deputy to make that selection from the registration list with the view of obtaining only qualified electors who were not exempt from

jury service. *Dampier v. State*, 31 So. 2d 115 (Miss. 1947).

In homicide prosecution, where court ordered special venire from first district of county, refusal to order one from second district held not error, statutes being directory. *Taylor v. State*, 148 Miss. 621, 114 So. 390 (1927).

The special venire should be drawn from the jury box as directed where it contains sufficient names and a failure to do so is error. *Lee v. State*, 138 Miss. 474, 103 So. 233 (1925).

The statute is directory merely and any irregularity of the court in the drawing of a special venire is not prejudicial where the jury drawn is an impartial one. *Buchanan v. State*, 84 Miss. 332, 36 So. 388 (1904).

A special venire may be drawn during the pendency of another case. *Penn v. State*, 62 Miss. 450 (1884).

#### 6. —Summoning venire.

The fact that the trial court gave an order for the issuance of a special venire facias directed to the sheriff instead of to the circuit clerk did not require that the special venire be quashed, for the provisions of this section [Code 1942, § 1795] are directory only. *Moore v. State*, 237 So. 2d 844 (Miss. 1970).

Sheriff may be directed to summon qualified electors as a special venire, without all of them having been drawn from the jury box. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958).

All provisions of law for impaneling juries are directory merely and where there are not sufficient names in the jury box for the venire the court may order the jury summoned by him. *McVey v. State*, 117 Miss. 243, 78 So. 150 (1918).

The sheriff is not required to furnish a list of those who would be summoned to the clerk before summoning them but it is sufficient to furnish their names after they are summoned. *Walford v. State*, 106 Miss. 19, 63 So. 316 (1913).

It is not reversible error in a capital case to refuse, both before and after exhausting the regular venire, to receive as a juror a member of the special venire who was absent on the call thereof but present when offered by the defense, and who thereupon ordered talesmen to be sum-



moned where the whole record shows that the accused was not thereby prejudiced. *Steele v. State*, 76 Miss. 387, 24 So. 910 (1899).

Under this section [Code 1942, § 1795], requiring that where a special venire is ordered, the jury shall be impaneled from those "examined and in attendance," it is not error to refuse accused compulsory process for a venireman summoned and not in attendance. *Hale v. State*, 72 Miss. 140, 16 So. 387 (1894), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

In executing a special venire, where the names are not drawn, the sheriff is not bound to summon every man he meets until he gets the required number. *Cavanah v. State*, 56 Miss. 299 (1879).

#### 7. —Number of persons.

In directing clerk to draw 150 names, trial judge complies with statutory requirement of § 13-5-77 for the number of names to be drawn for special venire even though of 150 names drawn, only 67 were statutorily qualified to serve on special venire. *Booker v. State*, 449 So. 2d 209 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984), vacated, 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985), on remand, 511 So. 2d 1329 (Miss. 1987).

Unless record shows that defendant requested larger number, limitation and special venire to forty men at instance of state is not ground for complaint, even though all of the special veniremen except eleven were excused at the trial and only three of these were accepted to serve as jurors. *Williams v. State*, 26 So. 2d 64 (Miss. 1946).

In murder prosecution, limiting number of special venire to 100 citizens after granting motion for special venire by defendant who asked for 250 citizens held not abuse of trial court's discretion. *Owens v. State*, 169 Miss. 141, 152 So. 651 (1934).

Where the sheriff served only thirty men instead of forty as directed from which a jury was obtained the defendant cannot complain where it is not shown that the jury was prejudiced or impartial. *Walford v. State*, 106 Miss. 19, 63 So. 316 (1913).

#### 8. —Waiver.

Defendant in capital case not having interposed objections to manner of drawing of special venire at time venire was being drawn waived objection. *Arnold v. State*, 171 Miss. 164, 157 So. 247 (1934).

#### 9. Selecting jurors from bystanders.

In the absence of fraud or other improper motive the fact that a bailiff summoned additional prospective jurors by telephone rather than selecting them from among the bystanders was not reversible error. *Boles v. State*, 288 So. 2d 718 (Miss. 1974).

Where on the motion of the defendant in a capital case the court directed the sheriff to summon a jury from the bystanders the defendant cannot complain thereat after conviction. *Cook v. State*, 90 Miss. 137, 43 So. 618 (1907).

#### 10. Discharge of venireman.

The judge has no authority to discharge one of the special venire without sufficient cause shown. *Boles v. State*, 21 Miss. (13 S. & M.) 398 (1850); *Boles v. State*, 24 Miss. 445 (1852).

It is a proper exercise of the discretion of the court to set aside a venireman who is the acting jailer of a county. *Hale v. State*, 72 Miss. 140, 16 So. 387 (1894), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

After the jury had been impaneled and sworn, a juror arose and informed the court that he had been of the grand jury that found the bill. It was not error for the court to set him aside, complete the jury and have it resworn. *Jefferson v. State*, 52 Miss. 767 (1876).

#### 11. Quashing special venire.

A special venire will not be quashed because only eleven of the forty called are available. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962).

Special venire will not be quashed except for fraud or a total departure from procedure laid down by the statute. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950); *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962).

Special venire will not be set aside merely because sheriff did not follow court's recommended procedure in select-



ing panel where time was short and fair and impartial panel was summoned. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950).

Drawing of special venire in capital case where regular jury box was exhausted from jury list made up by board of supervisors for succeeding year, although thirty days had not yet elapsed since making up of list as required by statute before persons on list became eligible as jurors, held mere irregularity only and not to warrant quashing of panel. *Arnold v. State*, 171 Miss. 164, 157 So. 247 (1934).

A special jury properly summoned under this statute will not be quashed unless fraud is shown. *Bond v. State*, 128 Miss. 792, 91 So. 461 (1922).

A special venire will not be quashed because the trial judge caused the sheriff

to submit to him before the service of the writ the names of the deputies selected to execute it, that they might be shown to the attorneys in the case with a view of receiving objections to them, or because on objection by the state's attorney two of the persons named were not appointed, the sheriff appointing two unobjectionable persons in their place. If such a proceeding be irregular, it is cured by Code 1906, § 2718 (Code 1942, § 1798) providing that juries irregularly summoned shall be deemed legal after being impaneled and sworn. *Lipscomb v. State*, 76 Miss. 223, 25 So. 158 (1899).

It is no ground to quash a special venire that one of the jurors was not a citizen of the United States. *Durrah v. State*, 44 Miss. 789 (1870).

## RESEARCH REFERENCES

**ALR.** Right of accused to insist, over objection of prosecution or court, upon trial by court without a jury. 51 A.L.R.2d 1346.

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 110, 123.

**CJS.** 50 C.J.S., Juries §§ 322 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:13.

## § 13-5-79. When opinion as to guilt or innocence will not render one incompetent in a criminal case.

Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct. Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.

**SOURCES:** Codes, 1880, § 3072; 1892, § 2355; 1906, § 2685; Hemingway's 1917, § 2177; 1930, § 2030; 1942, § 1763.

**Cross References** — Examination of jurors by attorneys or litigants, see § 13-5-69. Challenges to arrays and quashals of venires facias generally, see § 13-5-81.

## JUDICIAL DECISIONS

1. Validity.
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**1. Validity.**

This section [Code 1942, § 1763] is not in violation of Const. 1890 § 26, securing the right of an accused person to an "impartial jury." *Alfred v. State*, 37 Miss. 296 (1859); *Green v. State*, 72 Miss. 522, 17 So. 381 (1895).

**2. Construction and application generally.**

In a capital case each juror must be sworn to try the case. *Miller v. State*, 122 Miss. 19, 84 So. 161 (1920).

The intention of the laws is that the juror shall be unaffected by any previous judgment, opinion or bias, either as respects the parties or the subject-matter in controversy. *Brown v. State*, 57 Miss. 424 (1879).

**3. Power and duty of court.**

Before any juror is excused from service, he or she must be found to be unable to decide the case fairly and impartially on the merits and the reason, whatever it may be, should always be noted on the record. *Brown v. State*, 763 So. 2d 189 (Miss. Ct. App. 2000).

A judge has broad discretion to determine whether a prospective juror can be impartial, notwithstanding the juror's admission under oath that he or she can be impartial. *Coverson v. State*, 617 So. 2d 642 (Miss. 1993).

Trial court did not abuse its discretion in excluding for cause a potential juror who was a double first cousin to a defendant charged with uttering a forgery, and with whom defendant had discussed the case prior to trial, despite the juror's testimony that she could still be fair and impartial. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

One may not complain of exclusion of jurors by trial judge, if those selected were fair and impartial. *Sherman v. State*, 234 Miss. 775, 108 So. 2d 205 (1959).

Where qualification of prospective juror is a close question but he is held to be qualified and defendant peremptorily excuses such juror, there is no legal duty on the court to grant an extra peremptory challenge to the defendant. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

If a doubt arises as to the competency of a juror he should be excluded. The court has the discretion to do this at any time before evidence is submitted. *Mabry v. State*, 71 Miss. 716, 14 So. 267 (1894).

The court always has power to impanel an impartial jury, and when it is apparent that such only is the effect of its ruling, the same will be sustained. *Smith v. State*, 61 Miss. 754 (1884).

The court may discharge from the panel a juror who has been accepted and sworn before testimony is introduced, if it be discovered that he is incompetent. *Williams v. State*, 32 Miss. 389 (1856).

The court must examine into the sufficiency of every objection to a juror. The consent of the other party to the objection does not deprive the court of the power. *McCarty v. State*, 26 Miss. 299 (1853).

The court may set aside a juror who has not been challenged by either party. *Lewis v. State*, 17 Miss. (9 S. & M.) 115 (1850); *Williams v. State*, 32 Miss. 389 (1856).

It is the duty of the court to see that a fair, competent and impartial jury is selected to try every case. *Ferriday v. Selser*, 5 Miss. (4 Howard) 506 (1840); *Gilliam v. Brown*, 43 Miss. 641 (1870), overruled on other grounds, *Woodson v. Hopkins*, 85 Miss. 171, 187, 37 So. 1000 (1905); *White v. State*, 52 Miss. 216 (1876).

#### 4. Examination on voir dire.

Defendant cited no authority for his proposition that the trial judge's actions during voir dire were inappropriate, nor did he cite any evidence in the record that indicated the jury was prejudiced against him. *Neal v. State*, 15 So. 3d 388 (Miss. 2009).

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pre-trial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Ruling out defendant's questions to jurors as to effect on them of federal government's participation in prosecution held not prejudicial error. *Eaton v. State*, 163 Miss. 130, 140 So. 729 (1932).

In personal injury for punitive damages plaintiff may inquire of jurymen whether they would impose punitive damages if so instructed. *Yazoo & Miss. V. Ry. v. Roberts*, 88 Miss. 80, 40 So. 481 (1906).

A man's conception of a reasonable doubt is not a proper subject of inquiry when he is presented as a juror in a criminal case and examined on his voir dire. *Fugitt v. State*, 85 Miss. 86, 37 So. 557 (1904).

Whether a juror would believe certain witnesses for the state on oath is not a proper subject of inquiry upon his voir dire examination in a criminal case. *Fugitt v. State*, 85 Miss. 86, 37 So. 557 (1904).

It is the duty of the court to see that an impartial jury is impaneled and it may in a murder case ask each juror if he is opposed to capital punishment. *White v. State*, 52 Miss. 216 (1876).

#### 5. —Concealment of facts.

Court rejected defendant's argument that the jury panel was tainted by the foreperson, who was a retired law enforcement officer who had previously had a

civil conflict with defendant's father, because, although the juror did not provide any information about a prior relationship or interaction with defendant's father during the voir dire, the juror took an oath to be fair and impartial. *Jordan v. State*, 995 So. 2d 94 (Miss. 2008).

If a juror on his voir dire conceals facts which render him incompetent and serves upon the jury, a verdict of conviction will be set aside and a new trial granted. *Sheppric v. State*, 79 Miss. 740, 31 So. 416 (1902).

A juror who on his voir dire conceals the fact from the court that he has formed and expressed such an opinion, is not rendered competent by this section [Code 1942, § 1763], and a verdict of guilty found by a jury of which he is a member should be set aside. The juror must disclose all of the facts, and then the court, under the statute, must pass upon his competency. *Jefries v. State*, 74 Miss. 675, 21 So. 526 (1897).

#### 6. Impartiality of jurors in general.

In a thirteen-year-old defendant's trial for murder, the trial court properly excluded jurors that it determined would be influenced by defendant's age. *Edmonds v. State*, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

The trial court did not err in failing to dismiss a juror whose sister-in-law was in some manner (unknown by the juror) related to the victim's nephew by marriage. *Langston v. State*, 791 So. 2d 273 (Miss. Ct. App. 2001).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).



Where a venireman, contrary to the trial judge's instructions at the beginning of the voir dire examination, volunteered in the presence of others that in his opinion the accused was automatically guilty of rape, whereupon the trial court sent the offending juror to jail and interrogated the other veniremen as to whether they could disregard the expressed opinion and base a verdict solely upon the evidence of the case, and the court's instructions, which was answered in the affirmative by all of the veniremen, the trial court did not err in overruling the accused's motion to enter a mistrial and quash the venire. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

In action against city for damages, error in excusing prospective jurors from city on ground that being taxpayers, of itself, disqualified them did not require reversal, where it did not appear that the jurors who were impaneled and before whom case was tried were not fair and impartial. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937).

Jury hearing testimony in liquor case could try similar case in which same witness testified regarding alleged liquor sales made same night. *Ladner v. State*, 148 Miss. 243, 114 So. 341 (1927).

The juror who was an employee of the party alleged to be robbed of electricity is not impartial and cannot be allowed to sit in the case. *Berbette v. State*, 109 Miss. 94, 67 So. 853 (1915).

Every defendant is entitled to a fair and impartial jury. *Collins v. State*, 99 Miss. 47, 54 So. 665, Am. Ann. Cas. 1913C, 1256 (1911).

The competency of jurors is not determined by the character of evidence expected to be introduced, but by the fitness or unfitness of the juror with respect to the standard erected by law for every character of case. *Coleman v. State*, 59 Miss. 484 (1882).

## 7. Interest, bias or prejudice.

That a juror in an armed robbery case knew the victim and had herself been a robbery victim did not disqualify her from serving as a juror and did not require the trial court to sua sponte disqualify her because the juror affirmatively indicated that neither her relationship with the

victim nor her prior circumstance as a robbery victim would prevent her from being fair and impartial and would not affect her ability to render a judgment based solely on the evidence presented. *Archer v. State*, 986 So. 2d 951 (Miss. 2008).

Where a juror in a sexual battery case admitted that she knew many of the witnesses who were going to be called to testify, the trial court did not abuse its discretion by failing to dismiss the juror for cause under Miss. Code Ann. § 13-5-79. The juror did not have a close personal relationship with the witnesses, but only knew them as members of the community; the juror confirmed that she could be fair and impartial. *Smith v. State*, 989 So. 2d 973 (Miss. Ct. App. 2008).

The court properly excused a juror for cause in a murder prosecution where the juror was related to the defendant and her stepfather was going to be called as a witness during the case in chief. *Humphrey v. State*, 759 So. 2d 368 (Miss. 2000).

In a case where defendant was convicted of simple assault and kidnapping, a juror was properly excluded for cause under Miss. Code Ann. § 13-5-79 for going off on a tangent during questioning; inter alia, the juror started asking about when it would be permissible to hit a woman, such as in a case of self-defense, and this issue was totally irrelevant to the case. *Williams v. State*, 960 So. 2d 506 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 385 (Miss. 2007), writ of certiorari denied by 552 U.S. 1068, 128 S. Ct. 722, 169 L. Ed. 2d 565, 2007 U.S. LEXIS 12894, 76 U.S.L.W. 3287 (2007).

A juror in a criminal prosecution should have been struck for cause where his sister was employed as an assistant district attorney. *Hartfield v. Hartford Life & Accident Ins. Co.*, 656 So. 2d 104 (Miss. 1995).

A trial court in a robbery prosecution did not err in excusing a juror where the juror indicated extra-judicial knowledge concerning the person with whom the defendant was living at or near the time of the robbery, his statements were confusing concerning the effect of this knowl-

edge, and it was not clear whether this knowledge would affect his verdict. *Green v. State*, 644 So. 2d 860 (Miss. 1994).

While a prospective juror is not per se precluded from serving on the jury where the juror or a member of his or her family has been represented by an attorney who is involved in the case, a trial judge should carefully consider those instances in which a prospective juror or a family member has been represented by one of the attorney's involved in the matter before him or her; despite a prospective juror's honest and sincere belief that he or she can be completely fair and impartial, that person may find it very difficult to return a verdict against the client of an attorney to whom that person or a family member has turned for legal counsel in the past. *Toyota Motor Corp. v. McLaurin*, 642 So. 2d 351 (Miss. 1994).

In a capital murder case, the trial court properly excused a juror whose wife was defendant's second cousin. *Gilliard v. State*, 428 So. 2d 576 (Miss. 1983), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (1983), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Action of court, in murder prosecution wherein defendants were convicted and death sentence imposed, in holding as qualified a prospective juror who was present at deceased's funeral, did not prejudice defendants where they peremptorily excused the juror. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

The fact that prospective juror from city is a taxpayer may be basis of bias or prejudice that might, owing to existence of such bias or prejudice, disqualify the prospective juror in action against city, and, if trial judge is of the opinion, after inquiry, that prospective juror is not fair and impartial, he may be excused. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937).

The mere fact that a prospective juror from city is a taxpayer with no interest different from other taxpayers of city does not, per se, disqualify prospective juror in action against city. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937).

In action against city for damages, excusing prospective jurors from city on

ground that being taxpayers, of itself, disqualified them, constituted error. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937).

Where a material witness for the state is a Negro the admission of a juror that he would not convict on Negro testimony renders such juror incompetent. *Burrage v. State*, 101 Miss. 598, 58 So. 217 (1912).

The statement of juror that he would give defendant "a life time sentence anyway" renders him prejudiced. *Martin v. State*, 98 Miss. 676, 54 So. 148 (1911).

A venireman who believed an insult given by a Negro would fully justify a white man in killing him is unfit for jury service in the prosecution at bar. *Stricklin v. State*, 13 So. 898 (Miss. 1893).

One who has no hostility to the accused, and who is not shown to be so biased by a preconceived opinion as to render him incompetent as a juror, is not disqualified though he may have a bad opinion of the defendant's character. *Helm v. State*, 67 Miss. 562, 7 So. 487 (1890).

The cousin of a party indicted for the same offense as the prisoner, and also one who states he sympathizes with defendants, are incompetent. *Smith v. State*, 61 Miss. 754 (1884).

## 8. Formation or expression of opinion.

Prospective jurors' answer to one question about whether they would automatically impose a life sentence on a person convicted of rape was insufficient to establish a clear showing of impaired ability to perform the responsibilities of a juror, as required to strike prospective jurors for cause. *Martin v. State*, 592 So. 2d 987 (Miss. 1991).

That a juror has formed an impression about the case does not disqualify him where he states that his opinion is not fixed and that he will decide the case on the evidence. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961).

Where a venireman, contrary to the trial judge's instructions at the beginning of the voir dire examination, volunteered in the presence of others that in his opinion the accused was automatically guilty of rape, whereupon the trial court sent the offending juror to jail and interrogated the other veniremen as to whether they could



disregard the expressed opinion and base a verdict solely upon the evidence of the case, and the court's instructions, which was answered in the affirmative by all of the veniremen, the trial court did not err in overruling the accused's motion to enter a mistrial and quash the venire. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

This section [Code 1942, § 1763] does not necessarily imply that a man is incompetent who has an opinion. The onus is on the court in the exercise of its enlightened discretion to decide whether the person tendered can "try the case impartially." *Klyce v. State*, 79 Miss. 652, 31 So. 339 (1902).

#### 9. —Opinion not affecting competency.

Trial court did not abuse its discretion in denying defendant's challenges for cause to three jurors as each took an oath that they were able to remain impartial; the fact that some of the jurors wondered why defendant was in the room was not dispositive that they could not be impartial. *White v. State*, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Trial court's refusal to excuse for cause jurors who stated on voir dire that they had read newspaper articles or seen television newscasts about the case after being admonished by trial court not to do so was not prejudicial error in murder prosecution; upon questioning, none of these jurors said that his or her opinion would be affected by anything they had read or seen. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Proposed juror, although having fixed opinion as disclosed by voir dire examination, held competent, where entire examination disclosed he had no interest, bias, or prejudice, and that personal opinion would yield to evidence. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

A mere opinion formed on rumor may not render a juror incompetent. *Donahue v. State*, 142 Miss. 20, 107 So. 15 (1926).

Opinions founded on rumor will not render incompetent one who declares he

can bring in an impartial verdict. *Sam v. State*, 21 Miss. (13 S. & M.) 189 (1849); *Nelms v. State*, 21 Miss. (13 S. & M.) 500 (1850); *Ogle v. State*, 33 Miss. 383 (1857); *Logan v. State*, 50 Miss. 269 (1874).

Merely slight impressions in the mind of a juror that will not influence him do not disqualify him. *Schwartz v. State*, 103 Miss. 711, 60 So. 732 (1913); *Howell v. State*, 107 Miss. 568, 65 So. 641 (1914).

Superficial impressions which will yield to testimony readily do not disqualify a juror. *Whitehead v. State*, 97 Miss. 537, 52 So. 259 (1910); *Howell v. State*, 107 Miss. 568, 65 So. 641 (1914).

Under Code 1892, § 2355 (Code 1942, § 2177), jurors who have an opinion based on rumors which they have heard, which may be removed by evidence, and who have not talked to witnesses, have no prejudice against accused, and state that they can give him a fair trial on the evidence, uninfluenced by the rumors, are competent. *Evans v. State*, 87 Miss. 459, 40 So. 8 (1905); *Cook v. State*, 90 Miss. 137, 43 So. 618 (1907).

A juror who had heard rumors but had never heard any of the witnesses and who had an opinion from what he had heard, but could give defendant a fair trial, or a juror who had heard nothing from anyone who personally knew the facts, but who had formed an opinion from what he had seen in the newspapers and could give defendant a fair trial, is competent. *Gammons v. State*, 85 Miss. 103, 37 So. 609 (1905).

If a juror states that he had formed and expressed an opinion but that it was not fixed and would not affect his verdict, and the accused, without having exhausted his peremptory challenges, does not offer to challenge him either for cause or peremptorily, he will not, after conviction, be granted a new trial because the juror had expressed the opinion that he ought to be convicted. *Schrader v. State*, 84 Miss. 593, 36 So. 385 (1904).

Under this section [Code 1942, § 1763] one is not incompetent merely because on his voir dire he states that he lives in the immediate neighborhood where the crime was committed, had heard it discussed and had formed an opinion as to the guilt or innocence of accused of such a fixed



character that it would require evidence to remove it, provided that he makes oath that he can try the case fairly and impartially according to the evidence. *Green v. State*, 72 Miss. 522, 17 So. 381 (1895).

The fact that a juror had conversed with a witness does not disqualify him if he have not a "fixed opinion" as to the guilt or innocence of the accused. *Penn v. State*, 62 Miss. 450 (1884).

A juror, accepted by the accused, who had expressed an opinion founded on rumors but who stated he could do justice is not incompetent, where one of the counsel for accused knew that the juror had expressed such opinion. *Parker v. State*, 55 Miss. 414 (1877).

A mere opinion on rumor that requires no testimony to remove will not render a juror incompetent. *Lee v. State*, 45 Miss. 114 (1871); *White v. State*, 52 Miss. 216 (1876); *Evans v. State*, 87 Miss. 459, 40 So. 8 (1905); *Cook v. State*, 90 Miss. 137, 43 So. 618 (1907).

#### 10. —Opinion rendering juror incompetent.

Defendant's conviction for aggravated assault was appropriate pursuant to Miss. Code Ann. § 13-5-67 and Miss. Code Ann. § 13-5-79 because a juror's statement that she could not sit in judgment of another person properly led to her excuse for cause. *Hawthorne v. State*, 944 So. 2d 928 (Miss. Ct. App. 2006).

A juror fully acquainted with all testimony in the case by hearsay who has an opinion is disqualified. *Darby v. State*, 128 Miss. 438, 91 So. 37 (1922).

A juror who has expressed an opinion that defendant should be convicted on general principles and his voir dire examination did not disclose such statement entitles defendant to a new trial. *Martin v. State*, 98 Miss. 676, 54 So. 148 (1911).

Only strong and deep impressions that will preclude the mind against testimony in opposition thereto constitute objections that disqualify. *Whitehead v. State*, 97 Miss. 537, 52 So. 259 (1910).

An opinion as to the guilt of the party which will require strong evidence to remove renders juror incompetent, although juror swears that he will be controlled by the evidence. *Murphy v. State*, 92 Miss. 203, 45 So. 865 (1908).

Where it develops on a motion for a new trial that the juror had expressed an adverse opinion a new trial should be granted. *Dennis v. State*, 91 Miss. 221, 44 So. 825 (1907).

The oath of the proffered juror is not conclusive, nor is he the judge of his own competency. A person is not qualified as a juror who has an opinion about the case and cannot say positively that he can try the case as though he had none, or who has an opinion about the case and from what he knows could bring in a verdict other than one predicated of a want of further knowledge without further evidence, or who has an opinion which it would require strong testimony to remove. *Fugitt v. State*, 82 Miss. 189, 33 So. 942 (1903).

A juror in a criminal case who before the trial heard all the facts of the case from an eyewitness whom he regarded as truthful, whose statements he believed, and on them he had formed a fixed opinion, is incompetent under Const. 1890 § 26, securing a trial by an impartial jury and is not within this section [Code 1942, § 1763]. *Sheppric v. State*, 79 Miss. 740, 31 So. 416 (1902).

A venireman who testifies on his voir dire that he had heard witnesses for the state talk about the case and believes what they told him and has formed and expressed an opinion which he still retains, and which he supposes would require testimony to remove, is incompetent under the Const. 1890 § 26, guaranteeing a trial by an impartial jury, although he further testifies that what he had heard would not prevent him from rendering a fair and impartial verdict. *Klyce v. State*, 79 Miss. 652, 31 So. 339 (1902).

If a juror on his voir dire disclose that he has an opinion touching defendant's guilt which would require testimony to remove, or has doubts as to his ability to render an impartial verdict, it is not error for the court under this section [Code 1942, § 1763] to exclude him from the panel. *McGuire v. State*, 76 Miss. 504, 25 So. 495 (1899).

A juror who has formed and expressed the opinion that defendant charged with murder "was not justified in killing deceased," is incompetent. *Jeffries v. State*, 74 Miss. 675, 21 So. 526 (1897).

A juror who on his voir dire conceals the fact from the court that he has formed and expressed such an opinion is not rendered competent by this section [Code 1942, § 1763], and a verdict of guilty found by a jury of which he is a member should be set aside. The juror must disclose all the facts, and then the court, under the statute, must pass upon his competency. *Jeffries v. State*, 74 Miss. 675, 21 So. 526 (1897).

One who has heard parts of a former trial, who declares that he has a fixed and definite opinion and will not say positively that he could try the accused as though he had no opinion, is not a competent juror. *Mabry v. State*, 71 Miss. 716, 14 So. 267 (1894).

On a trial for perjury, one who has a fixed opinion as to the guilt of the person on whose trial the perjury is charged to have been committed, is disqualified although he has neither formed nor expressed an opinion as to the guilt of the accused. *Brown v. State*, 57 Miss. 424 (1879).

A juror whose opinion is formed on common rumor which would require evidence to remove, is not an impartial juror. *Cotton v. State*, 31 Miss. 504 (1856).

### 11. —Prior knowledge.

Where the record does not show prejudice—the objection that a grand jury's report was read in the hearing of some of the jury trying the case, where there is no objection then made, cannot be assigned as error. *Spence v. State*, 131 Miss. 91, 95 So. 97 (1923).

Jurors who heard the evidence on a former trial of a co-defendant are incompetent. *Langston v. State*, 129 Miss. 394, 92 So. 554 (1922).

In a murder case one is not incompetent because he heard the killing talked of at the time it occurred, but does not think he formed or expressed an opinion as to the guilt or innocence of the accused. *Skinner v. State*, 53 Miss. 399 (1876).

### 12. Non-belief in, or opposition to, capital punishment.

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the

death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prospective juror may not be struck from the jury venire for cause simply because the juror voiced general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. If a juror indicates that if he or she was convinced of the guilt of the defendant and the circumstances warranted a verdict of guilty, he or she could return a verdict of guilty although that verdict could result in the death penalty, then the juror may not be struck from the jury venire for cause, despite his or her objections and concerns. A prospective juror may be struck if the juror indicates that he or she cannot consider and decide the facts impartially or cannot conscientiously apply the law or the court's instructions. The juror need not expressly state that he or she absolutely refuses to consider the death penalty; an equivalent response made in any reasonable manner which indicates that the juror's position is firm will suffice. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

The exclusion of jurors who would not consider the death penalty under any circumstances was not error. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608



So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

Although excusing a prospective juror who would not vote to impose the death penalty under any facts or circumstances may have been error, it was harmless error where the defendant was indicted for murder but convicted of manslaughter. *Wash v. State*, 241 So. 2d 155 (Miss. 1970).

A juror is not rendered incompetent who when asked if he had conscientious scruples against capital punishment replied that he "would not like for a man to be hung." *Smith v. State*, 55 Miss. 410 (1877).

In a capital case the court of its own motion and over defendant's objection may reject a juror who is opposed to capital punishment. *White v. State*, 52 Miss. 216 (1876); *Russell v. State*, 53 Miss. 367 (1876); *Cooper v. State*, 59 Miss. 267 (1881).

A juror who has conscientious scruples about the infliction of capital punishment is incompetent when a verdict might be followed by the infliction of the death penalty. *Lewis v. State*, 17 Miss. (9 S. & M.) 115 (1850); *Williams v. State*, 32 Miss. 389 (1856); *Jones v. State*, 57 Miss. 684 (1880); *Spain v. State*, 59 Miss. 19 (1881).

A person who states on his voir dire that he has conscientious scruples against capital punishment is not impartial between the state and the prisoner. *Williams v. State*, 32 Miss. 389 (1856); *Fortenberry v. State*, 55 Miss. 403 (1877); *Jones v. State*, 57 Miss. 684 (1880).

### 13. Opposition to circumstantial evidence.

Jurors who will not on circumstantial evidence convict of murder may be rejected in a case depending on direct testimony. *Coleman v. State*, 59 Miss. 484 (1882).

### 14. Rulings on challenges.

Trial court could excuse prospective juror from serving on panel hearing capital murder case, on grounds that prospect was mother of 8-year-old boy and that she would feel apprehensive and be distracted if required to be away from child in event

jury was sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not improperly excuse prospective juror from service in capital murder case; prospect tailored her response to question whether she could follow the law at both phases of trial to whichever counsel was questioning her, and she indicated she did not want to be involved in jury service and only "guessed" that she would "try" to listen to evidence and be fair to both sides. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

A capital murder defendant was not denied a fair trial because he was forced to use his last peremptory challenge to remove a juror who was allegedly potentially biased since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury so long as the jury that sits is impartial, and the defendant did not show that an incompetent juror was forced to sit on the jury. *Mettetal v. State*, 615 So. 2d 600 (Miss. 1993).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

The denial of a challenge for cause is not error where it is not shown that the de-



fense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Defendant cannot lawfully complain of the action of the court in sustaining a challenge to a juror by the state for cause. *Smith v. State*, 103 Miss. 356, 60 So. 330 (1913).

### 15. Review.

Although defendant argued the circuit court erred in instructing potential jurors regarding the fact that defendant was 14 years old at the time he was accused of murder, the circuit court was bound by Miss. Code Ann. § 13-5-79 to exclude potential jurors who stated they would be influenced by defendant's age and could not try the case impartially. *Evans v. State*, — So. 2d —, 2011 Miss. App. LEXIS 343 (Miss. Ct. App. June 14, 2011).

Trial court did not abuse its discretion when it dismissed two jurors for cause based on the prosecution's representation that the jurors were under investigation

by a grand jury because defendant's claim of error was procedurally barred by Miss. Code Ann. § 13-5-79, which provided that where the trial court was of the opinion that the prospective juror could not try the case impartially, the exclusion would not be assignable for error. Defendant failed to cite any authority for his proposition that the trial court's acceptance of the representations of the prosecutor as to the two jurors was an abuse of discretion; and the trial court properly recognized that matters that have been or would be presented to the grand jury are uniquely known to the prosecutor. *Burnside v. State*, 912 So. 2d 1018 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 679 (Miss. 2005).

The defendant was barred from challenging the trial court's dismissal of a venire member who heard impermissible comments made by another venire member, but indicated that she could nevertheless keep a fair and open mind and render a fair verdict in the case, as the end result was a jury composed of fair and impartial jurors. *Puckett v. State*, 737 So. 2d 322 (Miss. 1999).

On appeal, a defendant may not challenge the dismissal of a juror for cause. *Edwards v. State*, 723 So. 2d 1221 (Ct. App. 1998).

Once a judge has exercised his or her discretion and determined that a juror probably could not be impartial, that determination may not be assigned on appeal as error. *Coverson v. State*, 617 So. 2d 642 (Miss. 1993).

In a burglary prosecution, although a prospective juror who expressed uncertainty as to her ability to be a fair juror because of her sympathy for the elderly victim should have been excused for cause, the error was harmless beyond a reasonable doubt where the defendant suffered no actual prejudice. *Carr v. State*, 555 So. 2d 59 (Miss. 1989).

Under statute, the excusing of prospective juror by trial judge, in exercise of discretion vested in him, is final. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937).

After jury had been accepted, but before evidence is introduced, court may exam-

ine juror as to alleged disqualification not previously known, and if examination leaves juror's qualification in doubt, may stand him aside or sustain challenge for cause, and such action does not require reversal in absence of abuse of discretion. *Sullivan v. State*, 155 Miss. 629, 125 So. 115 (1929).

Exclusion by court, of own motion, of juror who heard part of former trial held not reversible error. *Barnett v. State*, 146 Miss. 893, 112 So. 586 (1927).

On appeal the finding of the circuit court as to a juror's qualifications is *prima facie* correct. *Donahue v. State*, 142 Miss. 20, 107 So. 15 (1926).

The action of the court in setting aside a juror of its own motion is not assignable for error and neither is its action in sus-

taining a challenge on the ground that there is a criminal case pending against the challenged juror. *Lewis v. State*, 85 Miss. 35, 37 So. 497 (1904).

It is nonreversible error to sustain the state's challenge of a juror for the cause that there was a criminal case pending against him in the courts, since if the court had set him aside of its own motion, it could not have been assigned for error. *Lewis v. State*, 85 Miss. 35, 37 So. 497 (1904).

A finding by the trial court on motion for a new trial that a juror was not hostile to the accused will not be reversed where the testimony on the subject is conflicting. *Schrader v. State*, 84 Miss. 593, 36 So. 385 (1904).

## RESEARCH REFERENCES

**ALR.** Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror. 30 A.L.R.2d 914.

Admissibility, in civil case, of juror's affidavit or testimony to show bias, prejudice, or disqualification of a juror not disclosed on voir dire examination. 48 A.L.R.2d 971.

Racial, religious, economic, social, or political prejudice of proposed juror as subject of inquiry or ground of challenge in criminal case. 54 A.L.R.2d 1204.

Religious belief as ground for exemption or excuse from jury service. 2 A.L.R.3d 1392.

Beliefs regarding capital punishment as disqualifying juror in capital case — post-Witherspoon cases. 39 A.L.R.3d 550.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 A.L.R.4th 969.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury — post-Batson state cases. 47 A.L.R.5th 259.

**Am Jur.** 2 Am. Jur. Proof of Facts, Bias or Prejudice, Proof No. 1 (bias or prejudice — of juror).

**CJS.** 50 C.J.S., Juries §§ 390-402, 357-364.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March 1979.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 6:2, 6:8, 6:9.

## § 13-5-81. Challenge to array; quashing of venire.

A challenge to the array shall not be sustained, except for fraud, nor shall any venire facias, except a special venire facias in a criminal case, be quashed for any cause whatever.

**SOURCES:** Codes, Hutchinson's 1848, ch. 61, art. 10 (1); 1857, ch. 61, art. 142; 1871, § 743; 1880, § 1694; 1892, § 2387; 1906, § 2716; Hemingway's 1917, § 2209; 1930, § 2062; 1942, § 1796.

**Cross References** — Examination of jurors by attorneys or litigants, see § 13-5-69. Criminal offense of bribing jurors, see § 97-9-5.

Peremptory challenges of jointly tried defendants, see § 99-17-5.



## JUDICIAL DECISIONS

**1. In general.**

Under the Batson test, the prosecutor satisfied the burden of articulating a non-discriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), reh'g denied, 515 U.S. 1170, 115 S. Ct. 2635, 132 L. Ed. 2d 874 (1995), on remand, 64 F.3d 1195 (8th Cir. Mo. 1995).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

In a personal injury action against an automobile manufacturer arising out of a one-vehicle accident, the automobile manufacturer was not afforded the fair and impartial jury to which it was entitled where a substantial number of the jurors had in the past been represented by the attorney for the plaintiff, or had a family member who was represented by the attorney; due to the number of persons on the venire and the jury who had been represented by the plaintiff's attorney or whose family members had been clients of the attorney, there was a "statistical aberration" in the make-up of the venire and the jury, so that the opportunity for these jurors to exercise their influence over the remainder of the jury was too great a risk to be taken. *Toyota Motor Corp. v. McLaurin*, 642 So. 2d 351 (Miss. 1994).

The reasons proffered by the State for using 5 of its 7 peremptory challenges against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. *Henderson v. State*, 641 So. 2d 1184 (Miss. 1994).

Some acceptable race-neutral reasons for challenging a juror are: (1) involve-



ment in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. *Harper v. State*, 635 So. 2d 864 (Miss. 1994).

A trial judge is required to make an on-the-record factual determination that each reason proffered by the State for exercising a peremptory challenge is, in fact, race neutral; this requirement is to be prospective in nature. *Hatten v. State*, 628 So. 2d 294 (Miss. 1993).

The State successfully rebutted a black defendant's Batson challenge to the State's exercise of peremptory challenges to eliminate four black venire members where 2 of the venire members were challenged because they were of an age to be employed and had no occupation, and the other 2 were challenged because they were acquainted with the defendant or her family. *Porter v. State*, 616 So. 2d 899 (Miss. 1993).

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. *Griffin v. State*, 610 So. 2d 354 (Miss. 1992).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may

establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Griffin v. State*, 607 So. 2d 1197 (Miss. 1992).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. *Green v. State*, 597 So. 2d 656 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised peremptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. *Govan v. State*, 591 So. 2d 428 (Miss. 1991).

A county's jury venire selection did not systematically exclude blacks in violation of a black defendant's constitutional equal protection rights, even though there were only 2 blacks out of 12 on the jury which rendered a verdict against the defendant when 37 percent of the county was black, where the jury selection was based upon voter registration lists of the county without regard to race. *Harris v. State*, 576 So. 2d 1262 (Miss. 1991).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." *Bradley v. State*, 562 So. 2d 1276 (Miss. 1990).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

A defendant's motion to quash the array of jurors was properly denied where nothing in the record indicated that the sheriff, his deputies, or any other person tampered with the jury or purposely evaded serving jurors in order to stack the jury, even though 100 jurors were summoned and 53 of them were not found or marked "out of the county." *Avery v. State*, 555 So. 2d 1039 (Miss. 1990), overruled on other grounds, *Mayfield v. State*, 612 So. 2d 1120 (Miss. 1992).

No prima facie case of racial discrimination was shown in the prosecution's use of peremptory challenges, even though the prosecutor exercised 5 of his 7 peremptory challenges against black jurors, where the victim of the crime charged and the defendant were black, the prosecutor and the defendant had several challenges left, numerous potential black jurors were left uncalled, and one black juror was in the jury box. *Dennis v. State*, 555 So. 2d 679 (Miss. 1989).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

After the State has supplied a neutral nonracial explanation for peremptory challenges, in the absence of an actual proffer of evidence by the defendant concerning this issue, the Supreme Court may not reverse on this point. It is incumbent upon the defendant to come forward

with proof when given the opportunity for rebuttal. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

A plaintiff in a medical malpractice case was denied her right to an impartial jury where there were over 40,000 persons in the county from which a jury could have been drawn and the plaintiff was limited to a jury pool of 25, 48 percent of which were connected in some way to the defendant doctor, because of the "statistical aberration" of the makeup of the venire and the strong likelihood that the opportunity for undue influence over other jurors in the case was too great. *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989).

A defendant established a prima facie case of purposeful discrimination in the selection of a petit jury where he showed that he was a black person and that the district attorney had exercised peremptory challenges to remove 5 black persons from the jury. The fact that the prosecution used all of the peremptory strikes necessary to remove all but one black person from the jury satisfied the requirement of raising an inference of racial discrimination. *Conerly v. State*, 544 So. 2d 1370 (Miss. 1989).

When a criminal defendant establishes a prima facie case of the impermissible exclusion of black jurors through the use of peremptory challenges, the burden of proof shifts to the state to come forward with a racially neutral explanation for each of the challenges that must be related to the particular case being tried. *Dedeaux v. State*, 519 So. 2d 886 (Miss. 1988).

The provisions of the law in regard to the listing, drawing, summoning or impaneling of juries are directory merely. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962).

The trial court did not commit reversible error in overruling defendant's motion for a mistrial, or that a new panel of jurors be tendered to the defendant, where, after ten jurors had been finally accepted to try the defendant for murder, the court, out of the presence of defendant or his counsel, excused one of the jurors because illness



required the juror's presence at home, where the court had allowed the defendant one additional peremptory challenge. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337 (1957).

In prosecution for contributing to delinquency of minor under 18 years of age, failure to quash jury panel is not error when trial judge in sentencing defendant in case immediately preceding trial of defendant, involving similar circumstances, stated as reason for imposing fine and jail sentence that he was interested in protection of boys and girls, though statement was in presence of prospective jurors, since degree of punishment is matter with which trial jury has no concern. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

Special venire will not be set aside merely because sheriff did not follow court's recommended procedure in selecting panel where time was short and a fair and impartial panel was summoned. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950).

Denial of motion to quash special venire in homicide prosecution against Negro defendant because under the voir dire examination there appeared only one member of the Negro race did not constitute error where there was no showing how many other, if any, Negroes were summoned and failed to respond. *Patton v. State*, 207 Miss. 120, 40 So. 2d\*592 (1949), error overruled, 207 Miss. 134, 41 So. 2d 55 (1949), appeal dismissed, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523 (1949).

Special venire will not be quashed except for fraud or total departure from procedure laid down. *Moon v. State*, 176 Miss. 72, 168 So. 476 (1936); *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950).

Motion to quash special venire on ground that it should have been summoned from new jury list held properly overruled where new list had been in jury box less than thirty days before special venire was granted and trial had. *Moon v. State*, 176 Miss. 72, 168 So. 476 (1936).

Where trial was had during second week of term, overruling defendant's motion to quash jury panel summoned for first week held harmless. *Mississippi & S.V.R.R. v. Brown*, 160 Miss. 123, 132 So. 556 (1931).

Panel should not be quashed except for fraud and unless there was total departure from course described by statute. *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

No one of the twelve jurors can impeach the verdict where the verdict was reached by only nine. *Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522 (1917).

The testimony must show that fraud was committed or flagrant violations of the jury laws that constitute fraud in law before the court is authorized to quash a jury box. *Cook v. State*, 90 Miss. 137, 43 So. 618 (1907).

The venire in a criminal case will not be quashed because the jury was not drawn from the legal box prepared by the board of supervisors. *Campbell v. State*, 17 So. 441 (Miss. 1895).

## RESEARCH REFERENCES

**ALR.** Bias, prejudice, or conduct of individual member of jury panel as ground for challenge to entire panel. 76 A.L.R.2d 678.

Age group underrepresentation in grand jury or petit jury venire. 62 A.L.R.4th 859.

**Am Jur.** 47 Am. Jur. 2d, Jury §§ 216-227, 280.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 264 (challenge to panel of jurors).

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Forms 151-166 (challenges to array).

**CJS.** 50 C.J.S., Juries §§ 357-364.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:5.



**§ 13-5-83. Intoxicated jurors; jurors under the control of the court.**

If any juror summoned to appear at court, should render himself unfit for service by intoxication before his name is called in court, he shall be fined in a sum not exceeding One Hundred Dollars (\$100.00), and be imprisoned for a term not exceeding twenty-four hours. After grand and petit jurors are impaneled they shall be under the control of the court, and, for any breach of duty or contempt of court, may be fined and imprisoned.

**SOURCES:** Codes, 1871, § 752; 1880, § 1696; 1892, § 2388; 1906, § 2717; Hemingway's 1917, § 2210; 1930, § 2063; 1942, § 1797.

**Cross References** — Sheriffs, bailiffs, or other officers not being in room or conversing with a retired jury, see § 11-7-149.

Criminal offense of officer being guilty of habitual drunkenness, see § 97-11-23.

**JUDICIAL DECISIONS**

**1. In general.**

In prosecution for rape, new trial was not required by fact that during progress of trial, two jurors were inadvertently separated from the others for a period of approximately 15 or 20 minutes, where there was no suggestion that the separated jurors were contacted by anyone. *Lampley v. State*, 291 So. 2d 707, 72 A.L.R.3d 124 (Miss. 1974).

No new trial was warranted on grounds that a deputy sheriff without court authorization drove a bus and ate in the same room with the jurors where the deputy did not testify as a witness in the case on its merits, he did not even appear in the courtroom at any time in the course of the trial, his function was to assist in the process of making it possible for the jurors to eat, his only activity was to respond to the sheriff's direction that he drive the members of the jury, together with the two bailiffs, to the restaurant in the bus, and at all times complained of the jurors were in the protective custody of the bailiff; however, it would have been better policy for the bus driver to receive in open court detailed instructions from the trial judge in the presence of jurors, bailiffs, counsel, and the defendant. *Bickcom v. State*, 286 So. 2d 823 (Miss. 1973).

A conversation between a juror and a material witness in a prosecution, the witness being a deputy sheriff and jailer,

and having served as a courtroom deputy, just after the witness had testified for the state, was reversible error, where the defendant had, prior to the introduction of evidence, moved the court to direct police officers, including the instant witness, to remove themselves from close proximity to the jury box, and had moved for a mistrial immediately after the observed conversation, both of which requests were denied. *Perkins v. State*, 244 So. 2d 414 (Miss. 1971).

Undue pressure upon jury to reach verdict is not shown by fact that court ordered jury to retire to jury room at 6 p. m. and kept them in room until almost 8 p. m., without supper, or without asking them if they desired supper, where record is silent as to existence of any of the facts upon which this contention is predicated. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

One who attempts to bribe or influence decision of juror is guilty of contempt of court, regardless of whether act which constitutes contempt is committed in or out of presence of court, or whether juror is actually sworn on particular case or is only member of panel from which trial jury is to be selected. *Jones v. State*, 208 Miss. 762, 45 So. 2d 576 (1950).

Person is guilty of contempt of court when he approaches prospective juror, who has been summoned for trial of mur-

der case, at juror's home and advises juror that there are some things in favor of defendant that court will not permit to go to jury, that deceased had been running over defendant, but that fact would be kept from jury and if it wasn't brought out juror should give defendant a break. *Jones v. State*, 208 Miss. 762, 45 So. 2d 576 (1950).

Inquiries or requests made of bailiff by jury after it has retired to consider case should be reported to trial judge, and bailiff should never give opinion about anything involved in case. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

No meddling with, or intent to influence, jury is shown which could cause any harm by fact that after jury had retired for

deliberation, one asked bailiff if judge would further instruct them if liquor had any legal property value, bailiff stated that he did not think judge would give further instructions and that jury had their instructions, and door was shut and jury said nothing further. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

The mere fact that a jury in a capital case was allowed to separate because of sickness is held to be no ground for a new trial. *Haley v. State*, 123 Miss. 87, 85 So. 129, 10 A.L.R. 462 (1920).

It is not error for a jury to be retired pending argument to the court on the competency of a witness. *Lewis v. State*, 85 Miss. 35, 37 So. 497 (1904).

## RESEARCH REFERENCES

**ALR.** Indoctrination by court of persons summoned for jury service. 89 A.L.R.2d 197.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room. 32 A.L.R.3d 1356.

Holding jurors in contempt under state law. 93 A.L.R.5th 493.

**Am Jur.** 15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 121 (order of attachment of defaulting juror — failure to serve as juror); Form 122 (order for defaulting juror to show cause); Form 123 (order convicting defaulting juror of contempt).

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

## § 13-5-85. Selection of and service on juries in Harrison County.

In Harrison County, a county having two judicial districts, the law in relation to the selection and liability to jury service of grand and petit juries shall be applicable to each of the two judicial districts of the county in the same manner as if each district were a separate county, so far as the same may be made to apply. No person shall be made to serve as a grand or petit juror except in the district in which he resides. Lists of persons subject and liable to jury duty shall be made and grand and petit jurors shall be selected and empaneled in each of said districts in the same manner as if each were a separate county, except in such cases where it is otherwise provided by law.

**SOURCES:** Codes, 1942, § 2910-08; Laws, 1962, ch. 257, § 8, eff. from and after passage (approved June 1, 1962).

### § 13-5-87. Laws as to listing, drawing, summoning and impaneling of juries are directory.

All the provisions of law in relation to the listing, drawing, summoning and impaneling of juries are directory merely, and a jury listed, drawn, summoned or impaneled, though in an informal or irregular manner, shall be deemed a legal jury after it shall have been impaneled and sworn, and it shall have the power to perform all the duties devolving on the jury.

**SOURCES:** Codes, 1857, ch. 64, art. 250; 1871, § 2843; 1880, § 1672; 1892, § 2389; 1906, § 2718; Hemingway's 1917, § 2211; 1930, § 2064; 1942, § 1798.

#### JUDICIAL DECISIONS

1. In general.
2. Irregularities cured by statute.
3. Defects and errors not cured.
4. Review.

##### 1. In general.

Trial judge's questioning of circuit clerk established that clerk had complied, or substantially complied, with statute with respect to random selection of jurors to try defendant charged with attempting to obtain controlled substance by misrepresentation or fraud. *Griffin v. State*, 494 So. 2d 376 (Miss. 1986).

In a prosecution for robbery by assault, there was no reversible error in impaneling the juries where the system used consisted of a court administrator's shuffling information cards filled out by prospective jurors and arranging those cards in groups of 12, with the groups designated as Juries 1, 2 and 3. *Harris v. State*, 406 So. 2d 823 (Miss. 1981).

The method of selecting a jury is ordinarily within the sound judicial discretion of the trial judge, except in those circumstances where the jury selection method is set forth by statute. *Peters v. State*, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

It was within the sound discretion of the trial judge as to how many jurors would be submitted to the litigant for their voir dire. *Bright v. State*, 293 So. 2d 818 (Miss. 1974).

The statutory method of selecting a jury is discretionary and not mandatory. *Henry v. State*, 209 So. 2d 614 (Miss. 1968).

Considered as a whole, the statutes providing for the selection of jurors are not void for vagueness. *Reed v. State*, 199 So. 2d 803 (Miss. 1967), appeal dismissed, cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273 (1968).

The jury laws of Mississippi are directory and the selection of the jury list in an informal or irregular manner does not render it illegal. *Shinall v. State*, 199 So. 2d 251 (Miss. 1967), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660 (1967), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

The jury laws are merely directory, and a jury drawn informally or in an irregular manner is legal "after it shall have been impaneled and sworn." *Ladner v. State*, 197 So. 2d 257 (Miss. 1967).

The provisions of the law in regard to the listing, drawing, summoning or impaneling of juries are directory merely. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962); *Williams v. State*, 220 So. 2d 325 (Miss. 1969).

Petitioner's allegation in an application for writ of habeas corpus that his conviction constituted a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment of the United States Constitution because of the systematic exclusion of members of his race from the lists from which grand and petit juries were selected in the county where he was indicted and convicted, and that because of his ignorance and circumstances of his arrest and incarceration, and as a consequence of the law of Mississippi, he was not able to challenge the



competency of the grand jury, together with a showing of the speed in which the petitioner was tried following his indictment, were sufficient to entitle the petitioner to a hearing on the question of whether he had adequately safeguarded his constitutional rights during his trial for murder. *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417 (5th Cir. 1957), cert. denied, 80 S. Ct. 109, 361 U.S. 850, 4 L. Ed. 2d 89.

Since the laws with reference to the impaneling of jurors are directory, the trial court did not commit reversible error in overruling defendant's motion for a mistrial, or that a new panel be tendered him, where, after ten jurors had been finally accepted to try defendant for murder, the court, out of the presence of the defendant or his counsel, excused a juror because illness required the juror's presence at home, but allowed defendant one additional peremptory challenge. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337 (1957).

A Negro convicted of feloniously receiving stolen property was not entitled to a new trial upon the ground of unproven allegations of prejudice against members of his race by the jurors trying him, where no objection had been made to the qualifications of the jurors before the jury had been impaneled and sworn. *Walker v. State*, 229 Miss. 540, 91 So. 2d 548 (1956).

This section [Code 1942, § 1798] in relation to the listing, drawing, summoning, and impaneling of juries is directory merely and not mandatory. *Wiggins v. State*, 224 Miss. 414, 80 So. 2d 17 (1955).

The trial court in a prosecution for murder did not err in denying defendant's motion to quash a jury panel for the reason that the names of the jurors in the compartment of the jury box representing a particular supervisor's district had been exhausted and the jury was selected from other supervisors' districts. *Wiggins v. State*, 224 Miss. 414, 80 So. 2d 17 (1955).

Where the statute provides that not less than twenty names nor more than forty names are to be drawn for a jury box for each week of county term, the statute is mandatory as to the minimum number but only directory as to the maximum number. *Adams v. State*, 220 Miss. 812, 72 So. 2d 211 (1954).

Where the statute provides that a maximum of forty names should be drawn from the jury box for week of term, a defendant was not prejudiced by the drawing of sixty names. *Adams v. State*, 220 Miss. 812, 72 So. 2d 211 (1954).

Under this section [Code 1942, § 1798] jury laws are directory and not mandatory and case will not be reversed unless there is radical departure from statutory scheme of summoning and impaneling juries. *Kouvarakis v. Hawver*, 208 Miss. 697, 45 So. 2d 278 (1950).

Motion to quash indictment against Negro on ground that there were no Negro names listed or placed in jury box from which grand jury was drawn is properly overruled when it appears that there were only two Negroes in the county who were qualified electors and who could have served on either grand or petit juries at time juries were impaneled. *Flowers v. State*, 209 Miss. 86, 41 So. 2d 352 (1949), appeal dismissed, cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

Manner in which lists of jurors is selected by board of supervisors and placed in jury box involves solely question of state procedure and trial court is not in error in overruling motion to quash indictment on that ground when objections to qualification of grand jurors is not made before they are impaneled and defendant was at time represented by able lawyer and had reason to believe his case would be investigated by grand jury and he could have obtained information as to venire from which grand jury would be drawn. *Flowers v. State*, 209 Miss. 86, 41 So. 2d 352 (1949), appeal dismissed, cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

It is duty of circuit and chancery clerks, board of supervisors and sheriff to comply strictly with all of requirements of statutes in manner of listing, drawing and selecting jurors, compiling jury lists, and summoning and impaneling juries, but since statutes on the subject are merely directory, judgment will not be reversed where there was no radical departure from statutory scheme of selecting and impaneling jury and jury selected was fair and impartial. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

On motion to quash jury list from which grand and petit juries were to be chosen, for alleged reason that board of supervisors had not selected names of jurors in manner required by law governing selection of qualified electors, placing names in jury box, and subsequent drawing of juries, it is competent to show by testimony of chancery and circuit clerks manner in which statutory requirements were compiled with. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

Custom in selecting grand and petit jurors by clerks of circuit and chancery courts and the sheriff, pursuant to direction by a circuit judge, gathering together and taking slips out of the jury box and spreading them face up on a table so that they could see the names of the prospective jurors, and laying aside the names of those whom they did not think would make good jurors or who would be unable to serve, condemned as improper, since such action in effect constitutes a purging or revision of the board of supervisors' list regularly selected pursuant to law. *Reynolds v. State*, 199 Miss. 409, 24 So. 2d 781 (1946).

This section [Code 1942, § 1798] and other statutory provisions relating to listing, drawing, summoning, and impaneling juries are directory merely, and jury listed, drawn, summoned, and impaneled in irregular manner constitutes legal jury after it has been impaneled and sworn. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Statute declaring jury laws to be directory undertakes only to cure irregularities and defects in listing, drawing, summoning, and impaneling juries. *Rhodman v. State*, 153 Miss. 15, 120 So. 201 (1929).

In view of the directory character of the jury laws, the court, where the public interest requires, has the power to reassemble the grand jury during the term. *Haynes v. State*, 93 Miss. 670, 47 So. 522, 17 Am. Ann. Cas. 653 (1908).

## 2. Irregularities cured by statute.

Even conceding that the trial judge should have adopted some other and different mode of procuring additional members for a grand jury, still, after the jury was sworn and impaneled, it was by the law deemed a legal jury, and any error of

the court was cured by the express terms of the statute. *Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075 (Miss. 1998).

Section 13-5-9 is directory only and the selection of a jury under the section does not render the jury illegal. *Polk v. State*, 288 So. 2d 452 (Miss. 1974), cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

In the absence of a showing of fraud on the rights of the accused in a criminal case, it was not reversible error for the trial court to excuse from jury service, for good cause, before the case was called for trial and in chambers without notice to the accused, 26 of the 74 persons who appeared in response to an order for a special venire of 90 persons. *Parker v. State*, 201 Miss. 579, 29 So. 2d 910 (1947).

The fact that the trial judge required inquires as to challenges for cause to be directed to eighteen men instead of twelve men did not make the impanelment of the jury improper. *Smith v. State*, 190 Miss. 24, 198 So. 562 (1940).

Defendant in capital case not objecting to manner of drawing special venire at time of drawing, waived objection. *Arnold v. State*, 171 Miss. 164, 157 So. 247 (1934).

Where regular jury box exhausted, drawing special venire from jury list prepared for succeeding year, held mere irregularity. *Arnold v. State*, 171 Miss. 164, 157 So. 247 (1934).

Where regular jury panel was exhausted and the court directed the sheriff to fill the panel, which he did by summoning bystanders, rather than from the jury box, the court order not requiring this to be done, it was too late for defendant to complain of such procedure after the trial was over in view of the provisions of this section [Code 1942, § 1798]. *Wampold v. State*, 170 Miss. 732, 155 So. 350 (1934).

Error, if any, in proceedings for making up grand jury list pursuant to order directing issuance of special venire facias held mere irregularity, cured when jury was impaneled and sworn. *Nelson v. State*, 160 Miss. 401, 133 So. 248 (1931).

Error, if any, in not keeping jury box locked and sealed and prematurely preparing jury list was cured where jury was impaneled and sworn to try case in view of



this section [Code 1942, § 1798]. *Wells v. State*, 160 Miss. 298, 133 So. 227 (1931).

Where trial was had during second week of term, overruling defendant's motion to quash jury panel summoned for first week held harmless. *Mississippi & S.V.R.R. v. Brown*, 160 Miss. 123, 132 So. 556 (1931).

In homicide prosecution, where court ordered special venire from first district of county, refusal to order one from second district held not error, statutes being directory. *Taylor v. State*, 148 Miss. 621, 114 So. 390 (1927).

The fact that the board of supervisors failed to select the jury from the districts in proportion to the qualified persons therein does not authorize the quashing of the venire in the absence of proof that the grand jury was composed of impartial and fair men. *Atkinson v. State*, 137 Miss. 42, 101 So. 490 (1924).

In the absence of proof that the jury was not fair and impartial a mere irregularity in summoning the jury does not constitute reversible error. *Ferguson v. State*, 107 Miss. 559, 65 So. 584 (1914).

After the impaneling of a grand jury certain members having been excused, the court directed that bystanders (designating them) serve as grand jurors, though such persons were not among those listed by the supervisors for jury service and though their names were not on the venire drawn for service during the term, defendant made no direct challenge and took no exception at the time. In the absence of any showing that the grand jury was not fair and impartial, there was no ground for reversal of a conviction on an indictment found by it. *Posey v. State*, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

If an impartial jury be obtained in a murder case the defendant cannot, after conviction, predicate error of an irregularity in drawing a special venire, the statutes on the subject being directory. *Buchanan v. State*, 84 Miss. 332, 36 So. 388 (1904).

A special venire will not be quashed because the trial judge caused the sheriff to submit to him before the service of the writ the names of the deputies selected to execute it, that they might be shown to

the attorneys in the case with a view of receiving objections to them, or because on objection by the state's attorney two of the persons named were not appointed, the sheriff appointing two unobjectionable persons in their place. If such a proceeding be irregular, it is cured by this section [Code 1942, § 1798], declaring that juries irregularly summoned shall be deemed legal after being impaneled and sworn. *Lipscomb v. State*, 76 Miss. 223, 25 So. 158 (1899).

Where a special venire is ordered without application by the district attorney or defendant, it may be quashed on motion, but, after the jury is impaneled, the irregularity is cured by the statute. *Gavigan v. State*, 55 Miss. 533 (1878).

### 3. Defects and errors not cured.

Although persons over 65 years of age and persons who have served on a jury within 2 years are exempt from jury service under § 13-5-25, neither the circuit court nor the deputy circuit clerk have authority to act unilaterally and strike such persons from the jury list. Such persons are eligible for jury service and have every lawful right and authority to serve if called and selected. When their names are drawn, such persons must be summoned the same as other prospective jurors and no one has authority to exempt any such juror from service unless he or she claims the privilege and asks to be excused. Thus, a judgment of conviction and sentence was reversed where the deputy circuit clerk unilaterally struck from the jury list all persons over 65 years of age and all persons who had served on a jury within the 2 preceding years. *Adams v. State*, 537 So. 2d 891 (Miss. 1989).

Statutory provision (Code 1942, § 1794) that if at any term of court it appears that there are not a sufficient number of jurors present to make a jury, the court shall immediately cause the proper number of jurors to be drawn from the jury box and summoned, and, if there be no jury box to be drawn from, the court shall direct the requisite number of persons, qualified as jurors, to be summoned to appear, is mandatory, and is not affected by this section [Code 1942, § 1798]. *J. J.W. Sanders Cotton Mills, Inc. v. Moody*, 191 Miss. 604, 2 So. 2d 815 (1941).



Where, in a personal injury action, only twelve jurors drawn from the jury box qualified, and, though there was a jury box from which to draw talesman, the tales-jurors were summoned by the constable at the direction of the court, the panel should have been quashed on motion of the defendant. *J.W. Sanders Cotton Mills, Inc. v. Moody*, 191 Miss. 604, 2 So. 2d 815 (1941).

Where there was a total departure by the board of supervisors from the provisions of law in selecting a jury list, the jury list was illegal, and it was error, not cured by this section [Code 1942, § 1798], to make up the juries from such list. *Ellis v. State*, 142 Miss. 468, 107 So. 757 (1926).

Refusal of the court to select the special venire from the jury boxes when properly requested by the defendant, is error not cured by this section [Code 1942, § 1798]. *Lee v. State*, 138 Miss. 474, 103 So. 233 (1925).

Failure to have a jury sworn truly to try the issues between the state and the accused and render a true verdict, as distinguished from the oath on voir dire, prior to the reception of evidence, is not aided by this section [Code 1942, § 1798]. *Miller v. State*, 122 Miss. 19, 84 So. 161 (1920).

#### 4. Review.

Jury laws held directory; unless there is radical departure from statutory scheme of selecting juries, court will not reverse because trial court excused certain jurors for cause and filled their places with others. *Sullivan v. State*, 155 Miss. 629, 125 So. 115 (1929); *Harris v. State*, 155 Miss. 794, 125 So. 253 (1929).

Where unfairness in the method of securing jurors is shown, a substantial right of a litigant is invaded, and the supreme court will set aside the verdict of such a jury on timely objection being made, notwithstanding this section [Code 1942, § 1798]. *Cook v. State*, 90 Miss. 137, 43 So. 618 (1907).

If a juror on his voir dire disclose facts which render him disqualified, a defendant who declines to object to him for that cause cannot, after verdict, in view of Code 1892 § 4370, (Code 1942, § 1987), complain of the disqualification. *West v. State*, 80 Miss. 710, 32 So. 298 (1902).

The supreme court will not interfere with the discretion of the lower court in impaneling the jury unless it appear that there was a gross and injurious exercise of it. *Head v. State*, 44 Miss. 731 (1870), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Jury § 133.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers § 6:3.

## § 13-5-89. Juries in condemnation proceedings.

In all cases where a jury is required in the exercise of the right of eminent domain, the sheriff and clerks of the circuit and chancery courts shall draw eighteen names from the jury box, and the slips containing the names shall be returned to the box. The sheriff shall summon the jury thus drawn, and the jurors shall attend, under the same penalties as in the circuit court, and the penalties may be enforced therein at the next term, on complaint of the proper party or of the sheriff.

**SOURCES:** Codes, 1892, § 2390; 1906, § 2719; Hemingway's 1917, § 2212; 1930, § 2065; 1942, § 1799.

**Cross References** — Summoning and impaneling of jurors for a special court of eminent domain, see §§ 11-27-11, 11-27-13.

Summoning of jurors to assess damages in proceedings to establish landings, see § 59-19-5.

## RESEARCH REFERENCES

**ALR.** Right to view by jury in condemnation proceedings. 77 A.L.R.2d 548.

How to obtain jury trial in eminent domain: waiver. 12 A.L.R.3d 7.

**Am Jur.** 27 Am. Jur. 2d (Rev), Eminent Domain § 536, 537, 542, 543.

**CJS.** 29A C.J.S., Eminent Domain §§ 390-393 et seq.

### § 13-5-91. Jury may view the place.

When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, or the place or places at which any material fact occurred, or of any material object or thing in any way connected with the evidence in the case, the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed. After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by the court and by the representative of each side at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection. The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom. In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence.

**SOURCES:** Codes 1892, § 2391; 1906, § 2720; Hemingway's 1917, § 2213; 1930, § 2066; 1942, § 1800.

**Cross References** — Sheriffs, bailiffs, or other officers not being in room or conversing with a retired jury, see § 11-7-149.

Taking of view by jury in special court of eminent domain, see § 11-27-19.

## JUDICIAL DECISIONS

1. Validity.
2. Construction and application, generally.
3. Request for view.
4. Granting or refusing request for view.
5. Presence of accused.
6. Keeping jury together.
7. Proceedings at view.

## 8. Review.

## 1. Validity.

This section [Code 1942, § 1800] does not violate § 26 of the Constitution of 1890. *Bailey v. State*, 147 Miss. 428, 112 So. 594 (1927).

## 2. Construction and application, generally.

Statute providing for view of premises must be interpreted so that view is allowable only when the necessity therefor in order to reach ends of justice bears some fair relation by way of equivalency, in that interest, to the right which otherwise would be unhampered and unimpaired to have verdict reviewed on record evidence. *Great Atl. & Pac. Tea Co. v. Davis*, 177 Miss. 562, 171 So. 550 (1937).

This statute [Code 1942, § 1800] is in derogation of common law and must be strictly followed. *Jones v. State*, 141 Miss. 894, 107 So. 8 (1926).

A Court in viewing the place where the facts occurred must not go beyond the stipulation of the statute in moving from place to place and if it does so the presumption prevails that such conduct is harmful to defendant. *Jones v. State*, 141 Miss. 894, 107 So. 8 (1926).

The court is authorized to repair to the place of the homicide after the judge has discharged the judicial function of making the order therefor, leaving the mere mechanical or ministerial act of spreading the order on the minutes to be afterwards performed by the clerk. *McPherson v. State*, 124 Miss. 361, 86 So. 854 (1921).

## 3. Request for view.

A motion for a jury view should never have been made in the presence of the jury and the order should have been entered upon the minutes instead of merely being dictated into the record, but since no objections were made to any of the proceedings and apparently agreed thereto, there was no reversible error committed by the trial court. *Mississippi State Hwy. Comm'n v. Williamson*, 227 Miss. 580, 86 So. 2d 670 (1956).

In a murder prosecution where there was a request to permit the jury to view the scene of the homicide and this request came more than a month after the occur-

rence of the crime and there was nothing to show that the condition at the scene of the homicide remained the same, the trial court did not err in refusing the request. *Parnell v. State*, 211 Miss. 100, 50 So. 2d 925 (1951).

Where a party is about to make request for a view of premises by jury he must first request court to retire jury, and if such request is made in presence of jury judge should then and there overrule it without waiting for an objection from other side, and, if not immediately overruled, and if the other side does not immediately announce whether he will or will not join in the request, the judge should, of his own motion, retire the jury. *Poteete v. City of Water Valley*, 207 Miss. 173, 42 So. 2d 112 (1949).

Motion to view and inspect must set out the grounds therefor with opportunity to adverse party to controvert and disprove them, and the granting, over objection, of such a motion which fails to set out any grounds or reasons therefor other than "in order to reach the ends of justice," constitutes reversible error, even though prior testimony taken on the merits showed justifiable reasons for such view and inspection. *Leflore v. State*, 196 Miss. 632, 18 So. 2d 132 (1944).

Permitting counsel for plaintiff to renew motion for view of scene of accident, in jury's presence, was not reversible error, where opposing counsel had already reserved objection to such motion and hence did not have to renew objection. *Mississippi Power Co. v. McCrary*, 179 Miss. 427, 176 So. 165 (1937).

Request for view of premises may be made orally, in absence of jury, and transcribed into court reporter's record, but request must state facts which show that view would be of essential aid, and, if other party objects or challenges facts, court must hear evidence or sworn statements touching those facts which must be reported in transcript. *Great Atl. & Pac. Tea Co. v. Davis*, 177 Miss. 562, 171 So. 550 (1937).

Request that view of the premises be had by the jury should not be made in the presence of the jury. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).



Request that view of premises be had by jury made in presence of jury should be overruled without objection from opposing litigant except where opposing litigant joins in request. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

Refusal to retire jury after request whereby opposing litigant is forced to object to requirement that view of premises be had by jury is reversible error, whether or not view is made. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

#### 4. Granting or refusing request for view.

Trial judge was allowed pursuant to Miss. Code Ann. § 13-5-91 to determine at the judge's discretion whether the jury needed to view a particular crime scene — defendant's vehicle in this case — in order to reach the ends of justice; the judge decided against allowing the jury to view the truck and did so correctly. *Smith v. State*, 839 So. 2d 489 (Miss. 2003).

The trial court did not abuse its discretion in refusing to allow the jury to view the scene of the murder at issue, notwithstanding the assertion that a view was necessary for the jury to see the conditions under which a witness made her identification of the defendant; the defendant had the opportunity to cross-examine the witness about her ability to make an identification and stated at the pretrial hearing that he intended to present at least one witness who would give testimony that would contradict the witness's testimony that she was able to make an identification from the distance and under the lighting conditions that existed at the time of the crime. *Lindsey v. State*, 754 So. 2d 506 (Ct. App. 1999).

In a capital murder prosecution arising from the shooting death of a police officer, the trial court did not err in allowing the jury to view the officer's "shot-up" police vehicle where the vehicle was housed near the courthouse, the police car was in substantially the same condition as when the shooting occurred and the jury was informed of the minor differences which existed, the State justified the inspection, and it was reasonable that the inspection was an aid to the jury so that the location

of bullet holes and further damage to the vehicle could be seen, which were details that would be difficult to depict in a photograph. *Green v. State*, 614 So. 2d 926 (Miss. 1992).

Motion to view premises was properly granted and requirements of statute were followed in permitting jury to view house, construction of which was basis of contract dispute, where motion was granted for purpose of rebutting copious amounts of testimony as to defective condition of house. *Hutchins v. Page Contractors*, 513 So. 2d 944 (Miss. 1987).

Circuit Court did not abuse its discretion in refusing to allow jury to view scene of accident where scene was established by photographs, diagrams, and testimony at trial, and over 3 years had elapsed since incident had occurred, and therefore there was reasonable probability that there had been material change in physical characteristics of scene. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

A view of the scene of a railroad crossing accident held permissible under the facts disclosed by the record. *Illinois Cent. R.R. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805 (1963).

The allowance or refusal of the view by the jury is addressed to the sound discretion of the trial court. *Laurel Equip. Co. v. Matthews*, 218 Miss. 718, 67 So. 2d 258 (1953).

In a suit by property owners to recover damages against operator of an adjacent paint shop on the ground that the vegetables, flowers and shrubbery were ruined and that the odors made them sick and prevented them from enjoying the peaceful occupancy and habitation of their premises, the court did not abuse its discretion in refusing a view by the jury of the premises. *Laurel Equip. Co. v. Matthews*, 218 Miss. 718, 67 So. 2d 258 (1953).

It is within the discretion of the trial court to permit the jury to view the scene of the homicide. *Parnell v. State*, 211 Miss. 100, 50 So. 2d 925 (1951).

Permitting jury to view premises damaged by surface water allegedly diverted by city onto plaintiff's lot, over plaintiff's objection, was error under this section

[Code 1942, § 1800] where defendant made request in presence of jury, conditions had since changed, no order was entered providing for such view, no witnesses were produced at scene to make explanation to jury, and no showing was made that a view would promote ends of justice. *Poteete v. City of Water Valley*, 207 Miss. 173, 42 So. 2d 112 (1949).

Chancellor's refusal to view premises is not reversible error since this is matter of judge's discretion. *Brinkley v. Eaton*, 205 Miss. 815, 39 So. 2d 491 (1949).

Request for jury to view premises should not be granted unless it appears reasonably certain that it will be of essential aid, and not merely of some aid, to the jury in reaching a correct verdict, and that it is distinctly impracticable and inefficient to present the material elements to the jury by photographs, diagrams, maps, measurements, and the like. *Floyd v. Williams*, 198 Miss. 350, 22 So. 2d 365 (1945).

Trial court did not abuse its discretion in not permitting jury to view the premises where ornamental trees reserved in timber deed had been cut and removed from the land, in action to recover actual damages and statutory penalties therefor, where diagrams, photographs, and testimony were sufficient to enable the jury to understand the respective contentions of the parties, notwithstanding that the photographs could not accurately disclose the number of trees cut and even though the plaintiffs joined with the defendant in the request for a view. *Floyd v. Williams*, 198 Miss. 350, 22 So. 2d 365 (1945).

Granting in murder prosecution, over defendant's objection, of motion to view and inspect scenes of crime, setting out no ground or reason therefor other than "in order to reach the ends of justice," constituted reversible error, even though prior testimony taken on the merits showed justifiable reasons for such view and inspection, where scenes were about 20 miles from the courthouse and ranged over distance of quarter of mile, and evidence at scenes consisted almost entirely of appearances of nature in July whereas trial took place in September. *Leflore v. State*, 196 Miss. 632, 18 So. 2d 132 (1944).

Error, if any, in permitting the jury to view premises, and taking testimony

thereat, in a county other than that in which trial was in progress for recovery of damages resulting from a railroad's digging a ditch along its right of way and causing overflow on the lands of an adjoining owner, was not prejudicial where there was no evidence that the work done by the railroad could have been accomplished by another method, equally safe, convenient and inexpensive without damage to the adjoining landowner. *Miller v. Ervin*, 192 Miss. 712, 6 So. 2d 910 (1942).

The granting of a request for a view by the court and jury of the place at which the crime was committed, rests in the discretion of the trial judge. *Gordon v. State*, 188 Miss. 708, 196 So. 507 (1940).

Denial of a view of the scene of the crime, requested by defendant to demonstrate that deceased was not struck by a bullet from defendant's pistol, was not an abuse of discretion where such a view could not have given the jury any more definite information in the matter than did an engineer's diagram introduced in evidence. *Gordon v. State*, 188 Miss. 708, 196 So. 507 (1940).

The court did not abuse its discretion in refusing to grant a view of the defendant's plant in an action to recover damages for injury sustained from the presence of a fly in a bottle of Coca Cola, where the evidence was very full and complete of the precautions taken by defendant to prevent any contamination in the process of bottling the Coca Cola and putting it upon the market. *Meridian Coca Cola Bottling Co. v. Illges*, 187 Miss. 27, 191 So. 817 (1939).

In action for death of truck driver killed in automobile collision, permitting jury to view scene of accident was within court's discretion, notwithstanding changes in situation since time of accident, which were not such as to interfere with jury's determining at what point drivers of colliding automobiles could see each other. *Mississippi Power Co. v. McCrary*, 179 Miss. 427, 176 So. 165 (1937).

In action for personal injuries allegedly resulting from defective floor, permitting the jury to view the premises without inquiry into the facts which would disclose the necessity therefor held error. *Great Atl. & Pac. Tea Co. v. Davis*, 177 Miss. 562, 171 So. 550 (1937).



Request for view should not be granted unless it is reasonably certain that it will be of essential aid to jury in reaching correct verdict, and that it is distinctly impracticable to present material elements to jury by photographs, diagrams, and measurements. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

Upon request for view of premises by jury, considerations of inconvenience, distance, delay, and expenses are to be determined by court, although such matters may be urged in objection, because refusal of request is in trial court's discretion. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

Trial court is not required to allow view of premises by jury because both parties request it or consent to it, because refusal of request is in trial court's discretion. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

View of premises by jury should not be allowed when there have been material changes in place or premises. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

### 5. Presence of accused.

That defendant, while jury were viewing room in which homicide occurred, stood in door or hall held not in violation of constitutional right to be present. *Bailey v. State*, 147 Miss. 428, 112 So. 594 (1927).

### 6. Keeping jury together.

Inspection of court by some jurors while others remain in hall held not to be such a separation of jury as to violate defendant's rights, where the entire jury remained in the control of the bailiffs. *Bailey v. State*, 147 Miss. 428, 112 So. 594 (1927).

### 7. Proceedings at view.

In an eminent domain case, the trial court committed reversible error in allowing the jury to view the property in the absence of the judge and the court reporter, the heir being aggravated by the additional fact that the highway department engineer, while at the view, answered questions propounded to him by members of the jury. *Gunn v. Mississippi*

*State Hwy. Comm'n*, 229 So. 2d 828 (Miss. 1969).

Examination away from the courthouse under this section [Code 1942, § 1800] must be devoted to the explanation of the scene, location of distances, and such testimony as tends to make a complete map of the situation. *Jones v. State*, 141 Miss. 894, 107 So. 8 (1926).

Where the proceedings at the place of view changed from an examination of the location to an inquiry into defendant's guilt of the crime charged, timely objected to, defendant was prejudiced. *Jones v. State*, 141 Miss. 894, 107 So. 8 (1926).

### 8. Review.

Assignment of error predicated on district attorney's statement in presence of jury, upon introduction of photographs of scene of killing in murder prosecution, that he would like jury to view the premises, objection to which was made and sustained, was not sufficiently preserved for review in the absence of a motion for a mistrial; and by failing to make such a motion defendant waived the point. *Johnson v. State*, 46 So. 2d 924 (Miss. 1950).

Where order permitting jury to view premises was erroneously made and it improperly hampered appealing defendant in respect to valuable constitutional right to have verdict reviewed on assignment that it was contrary to overwhelming weight of evidence, error held reversible where such assignment, when reviewed aside from evidence taken at scene, presented serious question. *Great Atl. & Pac. Tea Co. v. Davis*, 177 Miss. 562, 171 So. 550 (1937).

Where there has been view or inspection of place or premises by jury, supreme court will not reverse on evidence, if there be any substantial testimony, delivered by sworn witnesses in support of verdict. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

Objection to request for view by jury asked for by opposing counsel did not apply to later request for view asked for by jury, so as to preserve later request for review in supreme court. *National Box Co. v. Bradley*, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).



## RESEARCH REFERENCES

**ALR.** Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case. 45 A.L.R.2d 1128.

Necessity for presence of judge at view by jury in criminal case. 47 A.L.R.2d 1227.

Prejudicial effect of indicating to the jury in a civil case the desire of a party for a view by the jury. 76 A.L.R.2d 766.

Unauthorized view of premises by juror or jury in criminal case as ground for

reversal, new trial, or mistrial. 50 A.L.R.4th 995.

**Am Jur.** 75 Am. Jur. 2d (Rev), Trial §§ 195 et seq.

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 91-95 (view by jury).

**CJS.** 88 C.J.S., Trial §§ 117-119.

**Practice References.** Young, Trial Handbook for Mississippi Lawyers §§ 21:1, 21:3, 21:4.

## § 13-5-93. Nine jurors may return a verdict in civil cases.

In the trial of all civil suits in the circuit or chancery courts of this state, nine or more jurors may agree on the verdict and return it into court as the verdict of the jury. Either party may request an instruction in writing to this effect and it shall thereupon be the duty of the trial judge to instruct the jury in writing that if nine or more jurors agree on the verdict that they may return the same into open court as the verdict of the jury.

**SOURCES:** Codes, Hemingway's 1917, § 2214; 1930, § 2067; 1942, § 1801; Laws, 1916, ch. 162.

**Cross References** — Return of verdict by nine jurors in a special court of eminent domain, see § 11-27-23.

Provision that no special form of verdict is required in criminal cases, see § 99-19-9.

Rules governing jurors, juries, and jury verdicts, see Miss. R. Civ. P. 47 and 48.

## JUDICIAL DECISIONS

### 1. In general.

It is permissible to question jurors, with respect to their verdict, as to any extraneous prejudicial information which was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *Schmiz v. Illinois Cent. G.R.R.*, 546 So. 2d 693 (Miss. 1989).

Defendant in a personal injury action did not waive his right to be tried before 12 jurors when, after the jury was reduced to 11 members, he made only a general objection and did not move for a mistrial. *Brame v. Garwood*, 339 So. 2d 978 (Miss. 1976).

Trial judge's conduct in going to jury room during deliberation and speaking to jury on inquiry by jury whether nine members of jury could sign verdict, there being no showing on what was said, is not

reversible error when an instruction had been given authorizing nine members of jury to agree upon and bring in verdict, and verdict, when brought in, was signed by all members of jury. *Stevenson v. Robinson*, 37 So. 2d 568 (Miss. 1948).

Instruction that verdict of nine jurors should be verdict of jury held harmless, where it did not appear instruction was acted on. *Reith v. Ansley*, 162 Miss. 886, 140 So. 521 (1932).

Where verdict showing ten to two for plaintiff was returned without instruction regarding agreement by nine jurors or more, court could enter judgment for plaintiff. *Ricketts v. Drew Grocery Co.*, 155 Miss. 459, 124 So. 495 (1929).

A lottery verdict cannot be amended but a new trial should be granted. *Hines v. Lockhart*, 105 So. 449 (Miss. 1925).

Finding by verdict of more than is necessary does not vitiate it, but may be disregarded as surplusage. *Hines v. Lockhart*, 105 So. 449 (Miss. 1925).

When requested the jury should be polled but if not polled before it becomes impossible to do so the court has power to render judgment on the verdict rendered. *Archer v. State*, 140 Miss. 597, 105 So. 747 (1925).

A jury is the exclusive judge of the

weight of the evidence and credibility of witnesses. *Louisville & N.R. Co. v. Jones*, 134 Miss. 53, 98 So. 230 (1923).

A nine jury verdict applies to bastardy proceedings. *Welford v. Havard*, 127 Miss. 88, 89 So. 812 (1921).

The verdict of nine jurors in a civil case becomes the verdict of the jury and is constitutional. *Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522 (1917).

## RESEARCH REFERENCES

**ALR.** Validity and effect of verdict in civil action finding defendant "not guilty." 7 A.L.R.2d 1341.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 A.L.R.3d 769.

Propriety and prejudicial effect of sending written instructions with retiring jury in civil case. 91 A.L.R.3d 336.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 A.L.R.3d 382.

Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number proportion of jurors less than that constitutionally permitted. 15 A.L.R.4th 213.

**Am Jur.** 75B Am. Jur. 2d (Rev), Trial § 1510-1513, 1516, 1518.

**CJS.** 89 C.J.S., Trials § 852-854.

**Law Reviews.** Symposium on Mississippi Rules of Civil Procedure: Juries and Jury Verdicts-Rules 38, 48-51, and 59. 52 Miss. L. J. 163, March 1982.

## § 13-5-95. Separate accommodations and bailiffs for male and female jurors.

In selecting overnight accommodations for jurors, the court shall provide separate housing for men and women jurors. Male bailiffs shall accompany the male jurors, and female bailiffs the female jurors. At least one bailiff shall accompany each group, and the court in its sound discretion shall require as many bailiffs as are necessary. Either group may be housed in private premises if necessary.

**SOURCES:** Codes, 1942, § 1762-07; Laws, 1968, ch. 337, § 1, eff. from and after passage (approved July 9, 1968).

## RESEARCH REFERENCES

**Am Jur.** 15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 208 (jurors' board bill).

## § 13-5-97. Certain jury records exempt from public access requirements.

Records in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, which are developed among juries concerning judicial decisions, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

SOURCES: Laws, 1983, ch. 424, § 11.

**Editor's Note** — "The Mississippi Public Records Act of 1983", referred to in this section, is Laws, 1983, ch. 424, §§ 1-9, which appears as §§ 25-61-1 et seq.



## CHAPTER 7

### State Grand Jury Act

- SEC.
- 13-7-1. Short title; citation of state grand juries [Repealed effective July 1, 2014].
- 13-7-3. Definitions [Repealed effective July 1, 2014].
- 13-7-5. State grand jury system established; number of jurors; meeting location; quorum [Repealed effective July 1, 2014].
- 13-7-7. Jurisdiction of state grand jury; petition to impanel state grand jury; impaneling state grand jury; powers and duties of impaneling judge [Repealed effective July 1, 2014].
- 13-7-9. Return of indictment by state grand jury; powers and duties of and law applicable to state grand juries [Repealed effective July 1, 2014].
- 13-7-11. Duties of Attorney General or designee [Repealed effective July 1, 2014].
- 13-7-13. Clerk of state grand jury; compensation [Repealed effective July 1, 2014].
- 13-7-15. Creation of list of potential jurors; selection of jurors; grounds for excusing juror from service; swearing of jurors; compensation of jurors [Repealed effective July 1, 2014].
- 13-7-17. Foreman and deputy foreman of grand jury [Repealed effective July 1, 2014].
- 13-7-19. Challenging the grand jury [Repealed effective July 1, 2014].
- 13-7-21. Subpoenas and subpoenas duces tecum; contempt [Repealed effective July 1, 2014].
- 13-7-23. Amending petition and order establishing and impaneling state grand jury [Repealed effective July 1, 2014].
- 13-7-25. Recording of proceedings of state grand jury; defendants right to review record; custody of records [Repealed effective July 1, 2014].
- 13-7-27. Administering oath to witnesses [Repealed effective July 1, 2014].
- 13-7-29. Secrecy\* of proceedings; exceptions; penalties for violation [Repealed effective July 1, 2014].
- 13-7-31. Authority of impaneling judge to hear matters arising from grand jury proceedings [Repealed effective July 1, 2014].
- 13-7-33. Attorney general or designee to coordinate scheduling activities [Repealed effective July 1, 2014].
- 13-7-35. Requirements for “True Bill” of indictment; place where indictment is to be tried [Repealed effective July 1, 2014].
- 13-7-37. Immunity or privilege given on account of testimony; waiver [Repealed effective July 1, 2014].
- 13-7-39. Sealing of records, orders and subpoenas of grand jury [Repealed effective July 1, 2014].
- 13-7-41. Space for grand jury; cooperation of Department of Public Safety and Bureau of Narcotics [Repealed effective July 1, 2014].
- 13-7-43. Authority of Supreme Court to promulgate rules for operation of grand jury system [Repealed effective July 1, 2014].
- 13-7-45. Severability provision [Repealed effective July 1, 2014].
- 13-7-47. Retroactivity of chapter [Repealed effective July 1, 2014].
- 13-7-49. Chapter does not amend, repeal or supersede other laws governing grand juries, investigations, indictments or prosecutions [Repealed effective July 1, 2014].

### § 13-7-1. Short title; citation of state grand juries [Repealed effective July 1, 2014].

This chapter may be cited as the “State Grand Jury Act,” and any state grand jury which may be convened as provided herein shall be known as “State Grand Jury of Mississippi.”

**SOURCES:** Laws, 1993, ch. 553, § 1; reenacted without change, Laws, 1998, ch. 382, § 1, reenacted without change, Laws, 1999, ch. 480, § 1; reenacted without change, Laws, 2002, ch. 471, § 1; reenacted without change, Laws, 2011, ch. 337, § 1, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**Cross References** — Rules pertaining to grand juries in circuit and county courts, see Miss. Uniform Rules of Circuit and County Court Practice 7.01 et seq.

### RESEARCH REFERENCES

**ALR.** Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639. **CJS.** 38A C.J.S. Grand Juries §§ 1-9, 90 et seq.

**Am Jur.** 38 Am. Jur. 2d Grand Jury §§ 1, 3, 5.

### § 13-7-3. Definitions [Repealed effective July 1, 2014].

For purposes of this chapter:

(a) The phrase “Attorney General or his designee” also includes:

(i) The Attorney General or his designees;

(ii) The Attorney General and his designee or designees.

(b) The term “impaneling judge” means any senior circuit court judge of any circuit court district who, upon petition by the Attorney General, impanels a state grand jury under the provisions of this chapter and shall also include any successor to such judge as provided by law.

**SOURCES:** Laws, 1993, ch. 553, § 2; reenacted without change, Laws, 1998, ch. 382, § 2, reenacted without change, Laws, 1999, ch. 480, § 2; reenacted without change, Laws, 2002, ch. 471, § 2; reenacted without change, Laws, 2011, ch. 337, § 2, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d Grand Jury  
§§ 1, 3, 5.

### § 13-7-5. State grand jury system established; number of jurors; meeting location; quorum [Repealed effective July 1, 2014].

There is established a state grand jury system. Each state grand jury shall consist of twenty (20) persons who may be impaneled and who may meet at any suitable location within the state as designated by the impaneling judge. Fifteen (15) members of a state grand jury constitute a quorum.

**SOURCES:** Laws, 1993, ch. 553, § 3; reenacted without change, Laws, 1998, ch. 382, § 3, reenacted without change, Laws, 1999, ch. 480, § 3; reenacted without change, Laws, 2002, ch. 471, § 3; reenacted without change, Laws, 2011, ch. 337, § 3, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**Am Jur.** 38 Am. Jur. 2d Grand Jury,      **CJS.** 38A C.J.S. Grand Juries § 55.  
§§ 9-12, 17.

### § 13-7-7. Jurisdiction of state grand jury; petition to impanel state grand jury; impaneling state grand jury; powers and duties of impaneling judge [Repealed effective July 1, 2014].

(1) The jurisdiction of a state grand jury impaneled under this chapter extends throughout the state. The subject matter jurisdiction of a state grand jury in all cases is limited to offenses involving any and all conduct made unlawful by the Mississippi Uniform Controlled Substances Law or any other provision of law involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a crime involving narcotics, dangerous drugs or controlled substances, and crimes involving any attempt, aiding, abetting, solicitation or conspiracy to commit any of the aforementioned crimes if the crimes occur within more than one (1) circuit court district



or have transpired or are transpiring or have significance in more than one (1) circuit court district of this state.

(2) Whenever the Attorney General considers it necessary, and normal investigative or prosecutorial procedures are not adequate, the Attorney General may petition in writing to the senior circuit court judge of any circuit court district in this state for an order impaneling a state grand jury. For the purposes of this chapter, such judge shall be referred to as the impaneling judge. The petition must allege the following:

- (a) The type of offenses to be inquired into;
- (b) That the state grand jury has jurisdiction to consider such matters;
- (c) That the offenses to be inquired into have occurred within more than one (1) circuit court district or have transpired or are transpiring or have significance in more than one (1) circuit court district of this state;

(d) That the Attorney General has conferred with the Commissioner of Public Safety and the Director of the Mississippi Bureau of Narcotics and that each of such officials join in the petition; and

(e) That the Attorney General has conferred with the appropriate district attorney for each jurisdiction in which the crime or crimes are alleged to have occurred.

(3) The impaneling judge, after due consideration of the petition, may order the impanelment of a state grand jury in accordance with the petition for a term of twelve (12) calendar months. Upon petition by the Attorney General, the impaneling judge, by order, may extend the term of that state grand jury for a period of six (6) months, but the term of that state grand jury, including any extension thereof, shall not exceed two (2) years.

(4) The impaneling judge shall preside over the state grand jury until its discharge.

(5) The impaneling judge may discharge a state grand jury prior to the end of its original term or any extensions thereof, upon a determination that its business has been completed, or upon the request of the Attorney General.

(6) If, at any time within the original term of any state grand jury or any extension thereof, the impaneling judge determines that the state grand jury is not conducting investigative activity within its jurisdiction or proper investigative activity, the impaneling judge may limit the investigations so that the investigation conforms with the jurisdiction of the state grand jury and existing law or he may discharge the state grand jury. An order issued pursuant to this subsection or under subsection (5) of this section shall not become effective less than ten (10) days after the date on which it is issued and actual notice given to the Attorney General and the foreman of the state grand jury, and may be appealed by the Attorney General to the Supreme Court. If an appeal from the order is made, the state grand jury, except as otherwise ordered by the Supreme Court, shall continue to exercise its powers pending disposition of the appeal.

**SOURCES:** Laws, 1993, ch. 553, § 4; reenacted without change, Laws, 1998, ch. 382, § 4, reenacted without change, Laws, 1999, ch. 480, § 4; reenacted

without change, Laws, 2002, ch. 471, § 4; reenacted without change, Laws, 2011, ch. 337, § 4, eff from and after July 1, 2011.

**Joint Legislative Committee Note** — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the second sentence of subsection (1), as reenacted by Laws, 2002, ch. 471, § 4. The words “Mississippi Controlled Substance Law” were changed to “Mississippi Controlled Substances Law.” The Joint Committee ratified the correction at its May 16, 2002 meeting.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**Cross References** — Use of procedures specified in this section to amend petition and order, see § 13-1-23.

Mississippi Uniform Controlled Substances Law, see §§ 41-29-101 et seq.

## RESEARCH REFERENCES

**ALR.** Jurisdiction or power of grand jury after expiration of term of court for which organized. 75 A.L.R.2d 544.

**Am Jur.** 38 Am. Jur. 2d Grand Jury §§ 13 et seq.

**CJS.** 38A C.J.S. Grand Juries §§ 1-84.

### § 13-7-9. Return of indictment by state grand jury; powers and duties of and law applicable to state grand juries [Repealed effective July 1, 2014].

A state grand jury may return indictments irrespective of the county or judicial district where the offense is committed. If an indictment is returned, it must be certified and transferred for prosecution to the county designated by the impaneling judge. The powers and duties of and the law applicable to county grand juries apply to the state grand jury, except when such powers and duties and applicable law are inconsistent with the provisions of this chapter.

**SOURCES:** Laws, 1993, ch. 553, § 5; reenacted without change, Laws, 1998, ch. 382, § 5, reenacted without change, Laws, 1999, ch. 480, § 5; reenacted without change, Laws, 2002, ch. 471, § 5; reenacted without change, Laws, 2011, ch. 337, § 5, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### § 13-7-11. Duties of Attorney General or designee [Repealed effective July 1, 2014].

The Attorney General or his designee shall attend sessions of a state grand jury and shall serve as its legal advisor. The Attorney General or his designee shall examine witnesses, present evidence, and draft indictments and reports upon the direction of a state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 6; reenacted without change, Laws, 1998, ch. 382, § 6, reenacted without change, Laws, 1999, ch. 480, § 6; reenacted without change, Laws, 2002, ch. 471, § 6; reenacted without change, Laws, 2011, ch. 337, § 6, eff from and after July 1, 2011.

**Editor's Note —** Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes —** The 2011 amendment reenacted the section without change.

### RESEARCH REFERENCES

**ALR.** Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel. 90 A.L.R.3d 1340.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

### § 13-7-13. Clerk of state grand jury; compensation [Repealed effective July 1, 2014].

The impaneling judge shall appoint a circuit clerk who shall serve as the clerk of the state grand jury. The compensation of the state grand jury clerk shall be paid out of any available funds appropriated for that purpose.

**SOURCES:** Laws, 1993, ch. 553, § 7; reenacted without change, Laws, 1998, ch. 382, § 7, reenacted without change, Laws, 1999, ch. 480, § 7; reenacted without change, Laws, 2002, ch. 471, § 7; reenacted without change, Laws, 2011, ch. 337, § 7, eff from and after July 1, 2011.

**Editor's Note —** Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes —** The 2011 amendment reenacted the section without change.



**§ 13-7-15. Creation of list of potential jurors; selection of jurors; grounds for excusing juror from service; swearing of jurors; compensation of jurors [Repealed effective July 1, 2014].**

After the impaneling judge orders a term for the state grand jury on petition of the Attorney General, the impaneling judge shall order that the circuit clerk for each county shall proceed to draw at random from the jury box as provided by Section 13-5-26, the name of one (1) voter of such county for each two thousand (2,000) voters or fraction thereof registered in such county and shall place these names on a list. The circuit clerk shall not disqualify or excuse any individual whose name is drawn. When the list is compiled, the clerk of the circuit court for each county shall forward the list to the clerk of the state grand jury. Upon receipt of all the lists from the clerks of the circuit courts, the clerk of the state grand jury shall place all the names so received upon a list which shall be known as the master list.

The impaneling judge shall order the clerk of the state grand jury to produce the master list and shall direct the random drawing of the names of one hundred (100) persons from the master list. The names drawn shall be given to the clerk of the state grand jury who shall cause each person drawn for service to be served with a summons either personally by the sheriff of the county where the juror resides or by mail, addressed to the juror at his usual residence, business or post office address, requiring him to report for state grand jury service at a specified time and place as designated by the impaneling judge. From the one hundred (100) persons summoned, a state grand jury shall be drawn for that term consisting of twenty (20) persons. State grand jurors must be drawn in the same manner as jurors are drawn for service on the county grand jury.

All qualified persons shall be liable to serve as state grand jurors, unless excused by the court for one (1) of the following causes:

(a) When the juror is ill, or when on account of serious illness in the juror's family, the presence of the juror is required at home;

(b) When the juror's attendance would cause a serious financial loss to the juror or to the juror's business; or

(c) When the juror is under an emergency, fairly equivalent to those mentioned in the foregoing paragraphs (a) and (b).

An excuse of illness under paragraph (a) may be made to the state grand jury clerk outside of open court by providing the clerk with either a certificate of a licensed physician or an affidavit of the juror, stating that the juror is ill or that there is a serious illness in the juror's family. The test of an excuse under paragraph (b) shall be whether, if the juror were incapacitated by illness or otherwise for a week, some other persons would be available or could reasonably be procured to carry on the business for the week, and the test of an excuse under paragraph (c) shall be such as to be the fair equivalent, under the circumstances of that prescribed under paragraph (b). In cases under paragraphs (b) and (c) the excuse must be made by the juror, in open court, under oath.

It shall be unlawful for any employer or other person to persuade or attempt to persuade any juror to avoid jury service, or to intimidate or to threaten any juror in that respect. So to do shall be deemed an interference with the administration of justice and a contempt of court and punishable as such.

Every citizen over sixty-five (65) years of age shall be exempt from service if he claims the privilege. No qualified juror shall be excluded because of such reason, but the same shall be a personal privilege to be claimed by any person selected for state grand jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim.

The state grand jurors shall be charged by the impaneling judge as to their authority and responsibility under the law and each juror shall be sworn pursuant to Section 13-5-45. Nothing in this section shall be construed as limiting the right of the Attorney General or his designee to request that a potential state grand juror be excused for cause. The jury selection process shall be conducted by the impaneling judge. Jurors of a state grand jury shall receive reimbursement for travel and mileage as provided for state employees by Section 25-3-41 and shall be paid per diem compensation in the amount provided by Section 25-3-69. All compensation and expenses for meals and lodging of state grand jurors shall be paid out of any available funds appropriated for that purpose.

**SOURCES:** Laws, 1993, ch. 553, § 8; reenacted without change, Laws, 1998, ch. 382, § 8, reenacted without change, Laws, 1999, ch. 480, § 8; reenacted without change, Laws, 2002, ch. 471, § 8; reenacted without change, Laws, 2011, ch. 337, § 8, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**ALR.** Law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 958.

Jury: who is lawyer or attorney disqual-

ified or exempt from service, or subject to challenge for cause. 57 A.L.R.4th 1260.

**Am Jur.** 38 Am. Jur. 2d Grand Jury, §§ 8, 17-26.

**CJS.** 38A C.J.S. Grand Juries §§ 13-21, 38-60, 85-87.

**§ 13-7-17. Foreman and deputy foreman of grand jury [Repealed effective July 1, 2014].**

The impaneling judge shall appoint one (1) of the jurors to be a foreman and another to be deputy foreman. During the absence of the foreman, the deputy foreman shall act as foreman. The foreman and deputy foreman shall be sworn pursuant to Section 13-5-45.

**SOURCES:** Laws, 1993, ch. 553, § 9; reenacted without change, Laws, 1998, ch. 382, § 9, reenacted without change, Laws, 1999, ch. 480, § 9; reenacted without change, Laws, 2002, ch. 471, § 9; reenacted without change, Laws, 2011, ch. 337, § 9, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**§ 13-7-19. Challenging the grand jury [Repealed effective July 1, 2014].**

After the state grand jurors shall have been sworn and impaneled, no objections shall be raised by plea or otherwise, to the state grand jury, but the impaneling of the state grand jury shall be conclusive evidence of its competency and qualifications. However, any party interested may challenge the jury, except to the array, for fraud.

**SOURCES:** Laws, 1993, ch. 553, § 10; reenacted without change, Laws, 1998, ch. 382, § 10, reenacted without change, Laws, 1999, ch. 480, § 10; reenacted without change, Laws, 2002, ch. 471, § 10; reenacted without change, Laws, 2011, ch. 337, § 10, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

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**Amendment Notes** — The 2011 amendment reenacted the section without change.

**RESEARCH REFERENCES**

**Am Jur.** 38 Am. Jur. 2d Grand Jury, §§ 27-32. **CJS.** 38A C.J.S. Grand Juries §§ 28-30, 65-72.



**§ 13-7-21. Subpoenas and subpoenas duces tecum; contempt [Repealed effective July 1, 2014].**

The clerk of the state grand jury, upon request of the Attorney General or his designee, shall issue subpoenas, or subpoenas duces tecum to compel individuals, documents or other materials to be brought from anywhere in the state or another state to a state grand jury. In addition, a state grand jury may proceed in the same manner as is provided for by law in relation to the issuance of subpoenas and subpoenas duces tecum; however, the provisions of such law shall not be considered a limitation upon this section, but shall be supplemental thereto. The subpoenas and subpoenas duces tecum may be for investigative purposes and for the retention of documents or other materials so subpoenaed for proper criminal proceedings. Any investigator employed by the Attorney General or any law enforcement officer with appropriate jurisdiction is empowered to serve such subpoenas and subpoenas duces tecum and receive such documents and other materials for return to a state grand jury. Any person violating a subpoena or subpoena duces tecum issued pursuant to this chapter, or who fails to fully answer all questions put to him before proceedings of the state grand jury whenever the response thereto is not privileged or otherwise protected by law, including the granting of immunity as authorized by this chapter, or any other law, may be punished by the impaneling judge for contempt provided the response is not privileged or otherwise protected by law. The Attorney General or his designee may petition the impaneling judge to compel compliance by the person alleged to have committed the violation or who has failed to answer. If the impaneling judge considers compliance is warranted, he may order compliance and may punish the individual for contempt, as provided in Section 9-1-17, where the compliance does not occur. The clerk of the state grand jury may also issue subpoenas and subpoenas duces tecum to compel individuals, documents or other materials to be brought from anywhere in the state to the trial of any indictment returned by a state grand jury or the trial of any civil forfeiture action arising out of an investigation conducted by a state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 11; reenacted without change, Laws, 1998, ch. 382, § 11, reenacted without change, Laws, 1999, ch. 480, § 11; reenacted without change, Laws, 2002, ch. 471, § 11; reenacted without change, Laws, 2011, ch. 337, § 11, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**ALR.** Validity of indictment where grand jury heard incompetent witness. 39 A.L.R.3d 1064.

Power of court to control evidence or witnesses going before grand jury. 52 A.L.R.3d 1316.

Refusal to answer questions before state grand jury as direct contempt of court. 69 A.L.R.3d 501.

Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel. 90 A.L.R.3d 1340.

Privilege of news gatherer against disclosure of confidential sources or information. 99 A.L.R.3d 37.

Failure to swear or irregularity in swearing witnesses appearing before

grand jury as ground for dismissal of indictment. 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

Individual's right to present complaint or evidence of criminal offense to grand jury. 24 A.L.R.4th 316.

Rights and remedies of financial institution customer in relation to subpoena duces tecum exception to general prohibition of state right to financial privacy statute. 43 A.L.R.4th 1157.

**Am Jur.** 38 Am. Jur. 2d Grand Jury §§ 2, 3, 33-37.

### § 13-7-23. Amending petition and order establishing and impaneling state grand jury [Repealed effective July 1, 2014].

Once a state grand jury has entered into a term, the petition and order establishing and impaneling the state grand jury may be amended as often as necessary and appropriate so as to expand the areas of inquiry authorized by the order or to add additional areas of inquiry thereto, consistent with the provisions of this chapter. The procedures for amending this authority are the same as those for filing the original petition and order.

**SOURCES:** Laws, 1993, ch. 553, § 12; reenacted without change, Laws, 1998, ch. 382, § 12, reenacted without change, Laws, 1999, ch. 480, § 12; reenacted without change,\* Laws, 2002, ch. 471, § 12; reenacted without change, Laws, 2011, ch. 337, § 12, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

"SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014."

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**Cross References** — Procedures for filing original order and petition, see § 13-7-7.

### § 13-7-25. Recording of proceedings of state grand jury; defendants right to review record; custody of records [Repealed effective July 1, 2014].

A court reporter shall record either stenographically or by use of an electronic recording device, all state grand jury proceedings except when the state grand jury is deliberating or voting. Subject to the limitations of Section

13-7-29 and any rule of court, a defendant has the right to review and to reproduce the stenographically or electronically recorded materials. Transcripts of the recorded testimony or proceedings must be made when requested by the Attorney General or his designee. An unintentional failure of any recording to reproduce all or any portion of the testimony or proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom and all books, papers, records and correspondence produced before the state grand jury shall remain in the custody and control of the Attorney General or his designee unless otherwise ordered by the court in a particular case.

**SOURCES:** Laws, 1993, ch. 553, § 13; reenacted without change, Laws, 1998, ch. 382, § 13, reenacted without change, Laws, 1999, ch. 480, § 13; reenacted without change, Laws, 2002, ch. 471, § 13; reenacted without change, Laws, 2011, ch. 337, § 13, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**ALR.** Accused's right to inspect minutes of state grand jury. 20 A.L.R.3d 7.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury. 69 A.L.R.4th 298.

**Am Jur.** 38 Am. Jur. 2d Grand Jury § 46.

**CJS.** 38A C.J.S. Grand Juries §§ 113, 134, 201-223.

## § 13-7-27. Administering oath to witnesses [Repealed effective July 1, 2014].

The foreman shall administer an oath or affirmation in the manner prescribed by law to any witness who testifies before a state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 14; reenacted without change, Laws, 1998, ch. 382, § 14, reenacted without change, Laws, 1999, ch. 480, § 14; reenacted without change, Laws, 2002, ch. 471, § 14; reenacted without change, Laws, 2011, ch. 337, § 14, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.



## RESEARCH REFERENCES

**ALR.** Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 A.L.R.4th 154.

**Am Jur.** 38 Am. Jur. 2d Grand Jury §§ 7, 39, 41, 43 et seq.

**CJS.** 38A C.J.S. Grand Juries §§ 114, 123-126, 135-196.

**§ 13-7-29. Secrecy of proceedings; exceptions; penalties for violation [Repealed effective July 1, 2014].**

(1) State grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations or vote of the state grand jury. The only persons who may be present in the state grand jury room when a state grand jury is in session, except for deliberations and voting, are the state grand jurors, the Attorney General or his designees, an interpreter if necessary and the witness testifying. A state grand juror, the Attorney General or his designees, any interpreter used and any person to whom disclosure is made pursuant to subsection (2)(b) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court in any subsequent criminal proceedings;

(b) Determining whether the witness is guilty of perjury;

(c) Assisting local, state or federal law enforcement or investigating agencies, including another grand jury, in investigating crimes under their investigative jurisdiction;

(d) Providing the defendant the materials to which he is entitled pursuant to Section 13-7-25; or

(e) Complying with constitutional, statutory or other legal requirements or to further justice.

If the court orders disclosure of matters occurring before a state grand jury, the disclosure shall be made in that manner, at that time, and under those conditions as the court directs.

(2) In addition, disclosure of testimony of a witness examined before a state grand jury or other evidence received by it may be made without being directed by a court to:

(a) The Attorney General or his designees for use in the performance of their duties; or

(b) Those governmental personnel, including personnel of the state or its political subdivisions, as are considered necessary by the Attorney General or his designee to assist in the performance of their duties to enforce the criminal laws of the state; however, any person to whom matters are disclosed under this paragraph (b) shall not utilize the state grand jury material for purposes other than assisting the Attorney General or his designee in the performance of their duties to enforce the criminal laws of this state. The Attorney General or his designees shall promptly provide the impaneling judge the names of the persons to whom the disclosure has been

made and shall certify that he has advised these persons of their obligations of secrecy under this section.

(3) Nothing in this section affects the attorney-client relationship. A client has the right to communicate to his attorney any testimony given by the client to a state grand jury, any matters involving the client discussed in the client's presence before a state grand jury and evidence involving the client received by a proffer to a state grand jury in the client's presence.

(4) Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding Five Thousand Dollars (\$5,000.00), or by a term of imprisonment not exceeding one (1) year, or by both such fine and imprisonment.

(5) State grand jurors, the Attorney General and his designee, any interpreter used and the clerk of the state grand jury shall be sworn to secrecy and also may be punished for criminal contempt for violations of this section.

**SOURCES:** Laws, 1993, ch. 553, § 15; reenacted without change, Laws, 1998, ch. 382, § 15, reenacted without change, Laws, 1999, ch. 480, § 15; reenacted without change, Laws, 2002, ch. 471, § 15; reenacted without change, Laws, 2011, ch. 337, § 15, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**Cross References** — Right of defendant to review records of grand jury proceedings, subject to limitations of this section, see § 13-7-25.

## RESEARCH REFERENCES

**ALR.** Accused's right to inspect minutes of state grand jury. 20 A.L.R.3d 7.

Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel. 90 A.L.R.3d 1340.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury. 69 A.L.R.4th 298.

**Am Jur.** 38 Am. Jur. 2d Grand Jury §§ 53-56.

**CJS.** 38A C.J.S. Grand Juries §§ 207-223.

## § 13-7-31. Authority of impaneling judge to hear matters arising from grand jury proceedings [Repealed effective July 1, 2014].

Except for the prosecution of cases arising from indictments issued by the state grand jury, the impaneling judge has jurisdiction to hear all matters arising from the proceedings of a state grand jury, including, but not limited to, matters related to the impanelment or removal of state grand jurors, the quashing of subpoenas and the punishment for contempt.

**SOURCES:** Laws, 1993, ch. 553, § 16; reenacted without change, Laws, 1998, ch. 382, § 16, reenacted without change, Laws, 1999, ch. 480, § 16; reenacted without change, Laws, 2002, ch. 471, § 16; reenacted without change, Laws, 2011, ch. 337, § 16, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### **§ 13-7-33. Attorney general or designee to coordinate scheduling activities [Repealed effective July 1, 2014].**

The Attorney General or his designee shall coordinate the scheduling of activities of any state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 17; reenacted without change, Laws, 1998, ch. 382, § 17, reenacted without change, Laws, 1999, ch. 480, § 17; reenacted without change, Laws, 2002, ch. 471, § 17; reenacted without change, Laws, 2011, ch. 337, § 17, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### **§ 13-7-35. Requirements for “True Bill” of indictment; place where indictment is to be tried [Repealed effective July 1, 2014].**

(1) In order to return a “True Bill” of indictment, twelve (12) or more state grand jurors must find that probable cause exists for the indictment and vote in favor of the indictment. Upon indictment by a state grand jury, the indictment shall be returned to the impaneling judge. If the impaneling judge considers the indictment to be within the authority of the state grand jury and otherwise in accordance with the provisions of this chapter, he shall order the clerk of the state grand jury to certify the indictment and return the indictment to the county designated by the impaneling judge as the county in which the indictment shall be tried.

(2) Indictments returned by a state grand jury are properly triable in any county of the state where any of the alleged conduct occurred. The impaneling judge to whom the indictment is returned shall designate the county in which the indictment shall be tried. If a multicount indictment returned by a state



grand jury is properly triable in a single proceeding as otherwise provided by law, all counts may be tried in the county designated by the impaneling judge notwithstanding the fact that different counts may have occurred in more than one (1) county.

(3) In determining the venue for indictments returned by a state grand jury, the impaneling judge shall select the county in which the state and defendant may receive a fair trial before an impartial jury taking into consideration the totality of the circumstances of each case.

(4) When the indictment has been returned to the circuit clerk of the county designated by the impaneling judge, the capias shall be issued as otherwise provided by law. The indictment shall be kept secret until the defendant is in custody or has been released pending trial.

**SOURCES:** Laws, 1993, ch. 553, § 18; reenacted without change, Laws, 1998, ch. 382, § 18, reenacted without change, Laws, 1999, ch. 480, § 18; reenacted without change, Laws, 2002, ch. 471, § 18; reenacted without change, Laws, 2011, ch. 337, § 18, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### **§ 13-7-37. Immunity or privilege given on account of testimony; waiver [Repealed effective July 1, 2014].**

If any person asks to be excused from testifying before a state grand jury or from producing any books, papers, records, correspondence or other documents before a state grand jury on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty or forfeiture and such person, notwithstanding such ground, is directed by the impaneling judge to give the testimony or produce the evidence, he shall comply with this direction, but no testimony so given or evidence produced may be received against him in any criminal action, investigation or criminal proceeding. No individual testifying or producing evidence or documents is exempt from prosecution or punishment for any perjury committed by him while so testifying, and the testimony or evidence given or produced is admissible against him upon any criminal action, criminal investigation or criminal proceeding concerning this perjury; however, any individual may execute, acknowledge and file a statement with the appropriate court expressly waiving immunity or privilege in respect to any testimony given or produced and thereupon the testimony or evidence given or produced may be received or produced before any judge or justice, court tribunal, grand jury or otherwise, and if so received or produced, the individual is not entitled to any

immunity or privilege on account of any testimony he may give or evidence produced.

**SOURCES:** Laws, 1993, ch. 553, § 19; reenacted without change, Laws, 1998, ch. 382, § 19, reenacted without change, Laws, 1999, ch. 480, § 19; reenacted without change, Laws, 2002, ch. 471, § 19; reenacted without change, Laws, 2011, ch. 337, § 19, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**ALR.** Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity. 62 A.L.R.3d 1145.

Refusal to answer questions before state grand jury as direct contempt of court. 69 A.L.R.3d 501.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege. 92 A.L.R.3d 1138.

Privilege of news gatherer against disclosure of confidential sources or information. 99 A.L.R.3d 37.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family. 88 A.L.R.3d 304.

Propriety of blanket or per se rule prohibiting federal grand jury from indicting witness who has previously testified before same grand jury under grant of use immunity. 139 A.L.R. Fed. 489.

**Am Jur.** 38 Am. Jur. 2d Grand Jury § 51.

**Lawyers' Edition.** Supreme Court's views as to application of Fifth Amendment privilege against self-incrimination to compulsory production of documents. 48 L. Ed. 2d 852.

## § 13-7-39. Sealing of records, orders and subpoenas of grand jury [Repealed effective July 1, 2014].

Records, orders and subpoenas related to state grand jury proceedings shall be kept under seal to the extent and for the time that is necessary to prevent disclosure of matters occurring before a state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 20; reenacted without change, Laws, 1998, ch. 382, § 20, reenacted without change, Laws, 1999, ch. 480, § 20; reenacted without change, Laws, 2002, ch. 471, § 20; reenacted without change, Laws, 2011, ch. 337, § 20, eff from and after July 1, 2011.

**Editor's Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471,

§ 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

## RESEARCH REFERENCES

**Am Jur.** 38 **Am. Jur.** 2d **Grand Jury**  
§§ 53-56.

### § 13-7-41. Space for grand jury; cooperation of Department of Public Safety and Bureau of Narcotics [Repealed effective July 1, 2014].

The Attorney General shall make available suitable space for state grand juries to meet. The Mississippi Department of Public Safety and the Mississippi Bureau of Narcotics may provide such services as required by the Attorney General and the state grand juries.

**SOURCES:** Laws, 1993, ch. 553, § 21; reenacted without change, Laws, 1998, ch. 382, § 21, reenacted without change, Laws, 1999, ch. 480, § 21; reenacted without change, Laws, 2002, ch. 471, § 21; reenacted without change, Laws, 2011, ch. 337, § 21, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### § 13-7-43. Authority of Supreme Court to promulgate rules for operation of grand jury system [Repealed effective July 1, 2014].

The Supreme Court may promulgate rules as are necessary for the operation of the state grand jury system established by this chapter.

**SOURCES:** Laws, 1993, ch. 553, § 23; reenacted without change, Laws, 1998, ch. 382, § 22, reenacted without change, Laws, 1999, ch. 480, § 22; reenacted without change, Laws, 2002, ch. 471, § 22; reenacted without change, Laws, 2011, ch. 337, § 22, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:



“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### **§ 13-7-45. Severability provision [Repealed effective July 1, 2014].**

If any part of this chapter is declared invalid, unenforceable or unconstitutional by a court of competent jurisdiction, that part shall be severable from the remaining portions of this chapter, which portions shall remain in full force and effect as if the invalid, unenforceable or unconstitutional portion were omitted.

**SOURCES:** Laws, 1993, ch. 553, § 24; reenacted without change, Laws, 1998, ch. 382, § 23, reenacted without change, Laws, 1999, ch. 480, § 23; reenacted without change, Laws, 2002, ch. 471, § 23; reenacted without change, Laws, 2011, ch. 337, § 23, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

### **§ 13-7-47. Retroactivity of chapter [Repealed effective July 1, 2014].**

This chapter applies to offenses committed both before and after its effective date.

**SOURCES:** Laws, 1993, ch. 553, § 25; reenacted without change, Laws, 1998, ch. 382, § 24, reenacted without change, Laws, 1999, ch. 480, § 24; reenacted without change, Laws, 2002, ch. 471, § 24; reenacted without change, Laws, 2011, ch. 337, § 24, eff from and after July 1, 2011.

**Editor’s Note** — Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes** — The 2011 amendment reenacted the section without change.

**§ 13-7-49. Chapter does not amend, repeal or supersede other laws governing grand juries, investigations, indictments or prosecutions [Repealed effective July 1, 2014].**

Nothing in this chapter shall be construed as amending, repealing or superseding any other law of this state governing the powers and duties of county grand jurors, district attorneys or law enforcement agencies or other officials with regard to their authority to investigate, indict or prosecute offenses that are prescribed by this chapter as within the jurisdiction of the state grand jury.

**SOURCES:** Laws, 1993, ch. 553, § 26; reenacted without change, Laws, 1998, ch. 382, § 25, reenacted without change, Laws, 1999, ch. 480, § 25; reenacted without change, Laws, 2002, ch. 471, § 25; reenacted without change, Laws, 2011, ch. 337, § 25, eff from and after July 1, 2011.

**Editor's Note —** Laws of 1993, ch. 553, § 27, as amended by Laws of 1998, ch. 382 § 27, as amended by Laws of 1999, ch. 480, § 27, as amended by Laws of 2002, ch. 471, § 27, as amended by Laws of 2005, ch. 506, § 2, and as amended by Laws of 2011, ch. 337, § 27, provides:

“SECTION 27. This act shall take effect and be in forces from and after its passage, and, with the exception of Section 22 [codified as Section 99-11-3], shall stand repealed from and after July 1, 2014.”

**Amendment Notes —** The 2011 amendment reenacted the section without change.

# TITLE 15

## LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS

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### CHAPTER 1

#### Limitation of Actions

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### § 15-1-1. Application of chapter.

The provisions of this chapter shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter time than is prescribed in this chapter, and such suit shall be brought within the time that may be limited by such statute.

**SOURCES:** Codes, 1857, ch. 57, art. 24; 1871, § 2168; 1880, § 2689; 1892, § 2763a; 1906, § 3126; Hemingway's 1917, § 2490; 1930, § 2293; 1942, § 723.

**Editor's Note** — Laws of 2005, 5th Ex Sess, ch. 8, § 1, provides as follows:

"SECTION 1. (1) As a result of the catastrophic impact of Hurricane Katrina, the statute of limitations applicable to any action not filed in any state or federal court or administrative forum as of August 29, 2005, for which venue was proper in a county located in the Second (Southern) Supreme Court District as defined by Section 9-3-1, Mississippi Code of 1972, is extended as follows:

"(1)(a) If the statute of limitations expired on or after Monday, August 29, 2005, but before the effective date of this act, then the time for filing a claim shall be extended to Friday, December 30, 2005.

"(1)(b) If the statute of limitations expires on or after the effective date of this act, but before Tuesday, November 29, 2005, then the time for filing a claim shall be extended to Friday, December 30, 2005.

"(2) For any action not filed in any state or federal court or administrative forum as of August 29, 2005, in which venue was proper only in a county located in either the First (Central) or Third (Northern) Supreme Court Districts as defined by Section 9-3-1, Mississippi Code of 1972, the plaintiff may file a motion asserting that, but for the catastrophic effects of Hurricane Katrina, the action would have been timely filed. If the court or administrative hearing officer grants the motion, the statute of limitations applicable to that action is extended as follows:

"(2)(a) If the statute of limitations expired on or after Monday, August 29, 2005, but before the effective date of this act, then the time for filing a claim shall be extended to Friday, December 30, 2005.

"(2)(b) If the statute of limitations expires on or after the effective date of this act, but before Tuesday, November 29, 2005, then the time for filing a claim shall be extended to Friday, December 30, 2005.

“(3) For purposes of the motion referred to in subsection (2), the plaintiff shall have the burden of proof.”

**Cross References** — Actions to recover confiscated property, see § 25-1-51.

Actions by State Tax Commission, see § 27-3-41.

Actions by state to recover gasoline taxes, see § 27-55-37.

Actions to recover taxes on motor fuels other than gasoline, see § 27-55-545.

Actions to recover taxes on lubricating oils, see § 27-57-25.

Actions to recover taxes on liquified compressed gasses, see § 27-59-25.

Action on sales contracts, see § 75-2-725.

Effect of bank's customer to discover and report forgery or alteration of item, see § 75-4-406.

Actions for violations of the business tender offer law, see § 75-72-119.

Suits to annul marriages, see § 93-7-3.

Suit for trespass, see § 95-5-29.

Proceeding for relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-5.

## JUDICIAL DECISIONS

### 1. In general.

Pursuant to Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, and Miss. Code Ann. § 15-1-1, Miss. Code Ann. § 15-1-69 did not apply to the MTCA, and it is worth noting that non-tort claims act cases are not controlling as to the applicability of § 15-1-69, and because the MTCA has a one-year statute of limitation that is significantly shorter than the catchall three-year statute of limitation, the one-year statute of limitation found in Miss. Code Ann. § 11-46-11 is controlling; thus, the court re-

jected the parents' claim that Miss. Code Ann. § 15-1-69 applied to the MTCA to toll the statute of limitations under Miss. Code Ann. § 11-46-11. *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2003).

In view of the provisions of this section [Code 1942, § 723] as contained in Code 1906, § 3126, § 3127 [Code 1942, § 724] does not repeal or nullify the statutory provision forbidding any stipulation or condition in an insurance contract limiting the time within which a suit may be commenced to less than one year after loss or injury. *Taylor v. Farmers' Fire Ins. Co.*, 101 Miss. 480, 58 So. 353 (1912).

## RESEARCH REFERENCES

**ALR.** Inclusion or exclusion of first and last day for purposes of statute of limitations. 20 A.L.R.2d 1249.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no

condition or definite time for repayment. 14 A.L.R.4th 1385.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 A.L.R.4th 840.

Time limits for salvage suits under 46 USCS § 730. 56 A.L.R. Fed. 542.

### § 15-1-3. Completion of limitation extinguishes right; partial payment.

(1) The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.

(2) In any case founded on a debt, when any part of the debt shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made, the statute of limitations not having run, an action may be brought in such case within the period prescribed for the same, with the said period to begin after such payment, acknowledgment or promise.

**SOURCES:** Codes, 1880, § 2685; 1892, § 2755; 1906, § 3115; Hemingway's 1917, § 2479; 1930, § 2313; 1942, § 743; Laws, 2005, ch. 417, § 1, eff from and after July 1, 2005.

**Cross References** — Revival of remedies barred by lapse of time or statutes of limitation, see Miss. Const. Art. 4, § 97.

Barring of equity remedy on mortgage where remedy at law to recover debt is barred, see § 15-1-21.

Effect of action being barred in another jurisdiction, see § 15-1-65.

Limitation of setoff, see § 15-1-71.

Requirement that new promise be in writing, see § 15-1-73.

Application of statute of limitations in cases of joint interests, see § 15-1-75.

Apparent barring of lien on real or personal property, see § 89-5-19.

## JUDICIAL DECISIONS

1. In general.
2. Extinguishment, effect of.
3. New promise.
4. Actions on mortgages and deeds of trust.

### 1. In general.

Prenuptial agreements were enforced by the State but the agreement had to be in writing; however, although the oral agreement between the husband and wife could not be enforced as a valid prenuptial agreement, it was not entirely meaningless as, whether intentionally or unintentionally fraudulent, it had to be considered by the chancellor when determining the equities of the case. *Hankins v. Hankins*, 866 So. 2d 508 (Miss. Ct. App. 2004).

Loans that were the subject of the individuals' complaint were all made in or before 1994, and yet the individuals filed suit on February 2, 2002, well over three years after the date of the last loan to any of the individuals, in violation of Miss. Code Ann. § 15-1-3. The individuals' causes of action did not survive because the individuals failed to identify any fraudulent concealment by a bank employee which, had it occurred and been proven, could have defeated the time bar, pursuant to Miss. Code Ann. § 15-1-67.

*Stacher v. Am. Gen. Fin., Inc.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 18713 (S.D. Miss. Mar. 7, 2003).

The 2-year statute of limitations set forth in § 15-1-36, rather than the general 6-year limitation period of § 15-1-49, applied to a medical malpractice action against a nurse and a company that supplied nursing personnel, where the company's sole basis for liability was the fact that it was the nurse's employer; since § 15-1-36 specifically names nurses among those covered and the company's liability was predicated solely upon the doctrine of respondeat superior, the bar of the suit against the nurse likewise barred the action as to the company. Under § 15-1-3, § 15-1-36 barred both the right of action against the nurse and the company and also barred any remedy against both parties. *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778 (Miss. 1991).

The doctrine of forum non conveniens will never be applied to dismiss a case if it is barred elsewhere by a statute of limitations, unless or until the defendant is willing to stipulate that he or she will waive the statute of limitations defense. *Shewbrooks v. A.C. & S., Inc.*, 529 So. 2d 557 (Miss. 1988).



A garnishee which failed to file an answer to a writ of garnishment as required by § 11-35-25 and instead paid \$10 per week of the judgment debtor's salary directly to the attorney for the judgment holder was liable to the debtor for monies wrongfully withheld after expiration of the judgment where, although the judgment and execution thereon had expired after seven years as provided in §§ 15-1-3, 15-1-43 and although the judgment holder had failed to file another suit on the judgment prior to the expiration of the seven years as required by § 15-1-47 to extend the judgment lien, the garnishee continued to pay the \$10 per week to the judgment holder for two years after the judgment had lapsed. *Anderson-Tully Co. v. Brown*, 383 So. 2d 1389 (Miss. 1980).

Where the assignment of a life insurance policy, as security for an indebtedness on the part of the insured to the assignee, stated that the assignment was to secure such indebtedness as might exist at the time of a settlement under the policy under Code 1942, § 743, which barred the right as well as the remedy, there was no indebtedness existing at the time of the insured's death, the debt being barred by the statute of limitations, and the assignee had no right to any of the policy proceeds. *Hawkins v. Southern Pipe & Supply Co.*, 259 So. 2d 696 (Miss. 1972).

When secured debt is barred both the right and remedy are extinguished. *McDaniel v. Short*, 127 Miss. 520, 90 So. 186 (1921).

The limitation pertaining to actions against executors and administrators may be invoked in an insolvency proceeding before the chancellor involving an insolvent estate, especially in view of the provisions of this section [Code 1942, § 743] declaring that when the remedy is barred the right also is barred. *Rogers v. Rosenstock*, 117 Miss. 144, 77 So. 958 (1918).

The effect of the statute is not only to deny the remedy and bar the action, but to extinguish the right itself upon the completion of the period of limitation. *Proctor v. Hart*, 72 Miss. 288, 16 So. 595 (1895).

## 2. Extinguishment, effect of.

Substitution of a son as the party in a wrongful death case was improper be-

cause a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. *Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo*, 987 So. 2d 989 (Miss. Ct. App. 2007).

In an action by a debtor against a bank to cancel the principal and interest in a promissory note and a deed of trust securing the note, the trial court properly considered a defunct judgment which had been obtained by the bank against the debtor and her husband in determining the debtor's liability to the bank where the defunct judgment was a sufficient basis to form the consideration for a component part of a new obligation entered into by the debtor; however, the trial court erred in computing the amount of consideration to include interest on the principal of the judgment debt beyond the seven years after the rendition of the judgment as provided in § 15-1-43. Under the provisions of § 75-17-7 interest should have been charged at the rate of eight percent per year for seven years to determine the amount of the former legal obligation where the note leading to the earlier judgment had provided for interest of eight percent per year. *Keller v. Citizens Bank*, 399 So. 2d 1332 (Miss. 1981).

Where a deed conveyed a depot site to a railroad company and contained a covenant running with the land that a public roadway should be kept open to the depot grounds for public convenience at and around the station, and the railroad failed for a period of more than 40 years to maintain a station on the conveyed property, the covenant was barred by the statute of limitations. *White v. Mississippi Power & Light Co.*, 196 So. 2d 343, 30 A.L.R.3d 754 (Miss. 1967).

Three-year statute barring open accounts destroys right as well as remedy; debt of child to father, barred by statute before his death, cannot be set off against child's share in estate; where only remedy is barred by statute of limitations, and debt is unaffected, debt of child to father, although barred by limitations, may be set

off against child's share in father's estate. *Greene v. Greene*, 145 Miss. 87, 110 So. 218, 49 A.L.R. 565 (1926).

Wholly distinct cause of action cannot be set up in amended bill where bar of limitations has become complete between filing of original and amended bill. *Cox v. American Freehold & Land Mtg. Co.*, 88 Miss. 88, 40 So. 739 (1906).

Under this section [Code 1942, § 743], a claim against a municipality, barred by limitation, ceases to be a debt, notwithstanding the provision of the statute that the former legal obligation shall be a sufficient consideration to uphold a new promise. It is the duty of municipal authorities to avail of the statute as a defense to demands on the municipal treasury. *Trowbridge v. Schmidt*, 82 Miss. 475, 34 So. 84 (1903).

The allowance by municipal authorities of a demand barred by limitation is without consideration, and ultra vires, and mandamus will not lie to enforce the issuance of a warrant or to complete an imperfect one on such an allowance. *Trowbridge v. Schmidt*, 82 Miss. 475, 34 So. 84 (1903).

Where a note for rent in which a vendor's lien is reserved is barred, giving a new note does not renew the lien or create a new one, but merely amounts to a new contract, with personal liability only. *Proctor v. Hart*, 72 Miss. 288, 16 So. 595 (1895).

### 3. New promise.

An agreement indorsed on the back of a promissory note payable in full on a certain date, and signed by the maker, by the terms of which the maker agreed to pay the obligation in monthly instalments until the whole obligation plus interest had been paid, converted the note into an instalment note, and the statute of limitations began to run as to each instalment from the time it fell due. *Freeman v. Truitt*, 238 Miss. 623, 119 So. 2d 765 (1960).

Where a second deed was executed to correct a former warranty deed for a recited consideration in the same amount as that recited in the first deed, and such consideration so recited in the second deed was unpaid, the six-year statute against action on the warranty began to run from

the date on which the second deed was made, the second deed being a new promise of warranty based upon a former valid consideration. *Wade v. Barlow*, 99 Miss. 33, 54 So. 662 (1911).

### 4. Actions on mortgages and deeds of trust.

The running of limitation extinguishes both the note and the deed of trust securing it. *Temples v. First Nat'l Bank*, 239 Miss. 446, 123 So. 2d 852 (1960).

The execution of a renewal note after the statute of limitations has run does not operate to revive a deed of trust securing it. *Temples v. First Nat'l Bank*, 239 Miss. 446, 123 So. 2d 852 (1960).

In deciding whether the landowner is estopped to plead or obtain the benefit of the statute of limitations as a defense to an action to foreclose a deed of trust the question is resolved by the conduct of the landowner rather than the conduct of the grantee of deed of trust. *Payne v. Smith*, 221 Miss. 138, 72 So. 2d 234 (1954).

Where grantee of a trust deed which was given as security for a debt, purchased at a foreclosure sale but never was in possession of the land, the grantee could not invoke the rule that a mortgagee in possession under void foreclosure sale may retain possession until the mortgage is paid despite the fact that the statute of limitations has run against the debt. *Payne v. Smith*, 221 Miss. 138, 72 So. 2d 234 (1954).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Section 722, Code of 1942, providing for six-year limitation period when no other period is prescribed, § 719, Code of 1942, barring action on mortgage when debt it secures is barred, and this section [Code 1942, § 743], operate to extinguish on September 1, 1935, deed of trust given to secure note falling due on September 1, 1929, and, in absence of renewal, or institution of foreclosure proceedings, power of sale and all other rights conferred by deed



of trust are utterly destroyed on that date. *Perkins v. White*, 208 Miss. 157, 43 So. 2d 897 (1950).

Statute covers "proceeding" to foreclose trust deed by exercise of power of sale contained in deed. *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (1936).

Where neither notes nor mortgage were renewed until notes were barred, rights and remedies as to both notes and mort-

gage were barred and could not be revived. *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933).

Where senior mortgage barred, junior mortgagee and claimant under him were not bound to know facts not of record, nor estopped to claim priority and set up that attempted revival of senior mortgage was void. *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933).

## RESEARCH REFERENCES

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 21, 191.

17 Am. Jur. Pl & Pr Forms (Rev), Limitation of Actions, Form 11.1 (reply —

allegation — statute of limitations invalid as violating right to due process).

**CJS.** 54 C.J.S., Limitations of Actions § 16.

## § 15-1-5. Period of limitations shall not be changed by contract.

The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.

**SOURCES:** Codes, 1906, § 3127; Hemingway's 1917, § 2491; 1930, § 2294; 1942, § 724.

## JUDICIAL DECISIONS

1. Contracts with carriers.
2. Contracts with telegraph companies.
3. Insurance contracts.
4. —Time for bringing suit.
5. —Requirement of notice.
6. —Contracts made or to be performed in other states.
7. Miscellaneous.
8. Home inspection contracts.

### 1. Contracts with carriers.

46 USCS § 183b does not preempt Mississippi's prohibition against contractually shortening limitations periods (§ 15-1-5); thus, a 6-month time-to-sue provision in passengers' tickets was invalid. *Johnson v. Commodore Cruise Lines*, 897 F. Supp. 740 (S.D.N.Y. 1995), reconsideration denied, 897 F. Supp. 746 (S.D.N.Y. 1995).

Stipulation in bill of lading for shipment of oxen that claim for loss must be verified

and presented within 10 days, is invalid. *Illinois Cent. R.R. v. Jordan*, 108 Miss. 140, 66 So. 406 (1914).

Time limit in shipping contract against suit for loss of goods must be reasonable and carrier must promptly deny liability. *Lasky v. Southern Express Co.*, 92 Miss. 268, 45 So. 869 (1908).

### 2. Contracts with telegraph companies.

Stipulation in contract with telegraph company exempting it from liability for errors or delays unless claim presented in writing within 60 days after message filed for transmission, is invalid. *Dodson v. Western Union Tel. Co.*, 97 Miss. 104, 52 So. 693 (1910).

### 3. Insurance contracts.

This section [Code 1942, § 724] does not make insurance clause providing for dis-



ability benefits on proof of disability furnished company before anniversary date of policy nearest insured's attained age of sixty years invalid as changing by contract statute of limitations since this clause of contract prescribes condition upon which liability may arise and does not prescribe a time when suit may be brought after liability accrues. *Cox v. Lamar Life Ins. Co.*, 208 Miss. 146, 43 So. 2d 884 (1950).

This section [Code 1942, § 724] was not violated by a holding that a cause of action for permanent disability benefits under a group insurance policy did not arise until due proof thereof, as required in the policy for payment of permanent disability benefits, was made. *Metropolitan Life Ins. Co. v. Lindsey*, 184 Miss. 359, 185 So. 573 (1939).

This section [Code 1942, § 724] has no application to provisions of a life insurance policy for return of premiums. *Mutual Life Ins. Co. v. Hebron*, 166 Miss. 145, 146 So. 445 (1933).

This section [Code 1942, § 724] has no application to provision of life policy fixing conditions precedent to liability for payment of disability benefits. *Mutual Life Ins. Co. v. Hebron*, 166 Miss. 145, 146 So. 445 (1933).

This section [Code 1942, § 724] did not prevent life insurer from making proof of disability of condition precedent to waiver of premiums. *Berry v. Lamar Life Ins. Co.*, 165 Miss. 405, 142 So. 445 (1932), adhered to, 165 Miss. 417, 145 So. 887 (1933).

#### 4. —Time for bringing suit.

Arbitration agreement was not invalid merely because it attempted to shorten the limitation period provided in Miss. Code Ann. § 15-1-5; the court could have stricken that portion of the agreement and the remainder of the arbitration provision would have remained valid. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002).

The provisions of a fidelity bond to the effect that the action thereon must be commenced within one year from the date when the insured discovers a loss are violative of this section [Code 1942, § 724] and null and void. *Latham v. United States Fid. & Guar. Co.*, 267 So. 2d 895 (Miss. 1972).

Provision in fidelity bond limiting liability to losses discovered within certain period held not invalid as changing statutory limitation period for bringing suit. *Webster v. United States Fid. & Guar. Co.*, 169 Miss. 472, 153 So. 159 (1934).

Stipulation that suit on policy must be brought within 12 months after loss held void. *Stuyvesant Ins. Co. v. A.C. Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575 (1924).

Provision in new constitution of insurance company limiting time for suit held void. *Sovereign Camp, Woodmen of the World v. Miller*, 125 Miss. 502, 87 So. 892 (1921).

This section [Code 1942, § 724] does not repeal or nullify Code 1906 § 2575 forbidding any stipulation in an insurance contract limiting the time within which a suit may be commenced to less than one year after loss or injury, in view of Code 1906, § 3126 [Code 1942, § 723]. *Taylor v. Farmers' Fire Ins. Co.*, 101 Miss. 480, 58 So. 353 (1912).

#### 5. —Requirement of notice.

An insurer which issued a medical malpractice policy to certain doctors on a "claims made basis" was not liable to an injured patient who had not, as required by the policy, made a timely claim against the doctor where such policy limitations were valid conditions precedent to the insurer's liability and were not impermissible attempts to shorten the applicable six-year statute of limitations. *Brander v. Nabors*, 443 F. Supp. 764 (N.D. Miss. 1978), *aff'd*, 579 F.2d 888 (5th Cir. 1978).

Provisions of physician's liability policy requiring physician to give notice of claim for malpractice, to forward to insurer process served on physician, and to co-operate with insurer held not violative of statute prohibiting contractual changes in statutory periods of limitation, since provisions related to conditions precedent to liability on policy. *Aetna Life Ins. Co. v. Walley*, 174 Miss. 365, 164 So. 16 (1935).

Under this statute [Code 1930, § 2294] accident policy provision requiring written notice within twenty days after accident held void. *National Cas. Co. v. Mitchell*, 162 Miss. 197, 138 So. 808 (1932).

Provision in accident policy requiring written notice to insurer within 15 days

after accident, is void. *Standard Acc. Ins. Co. v. Broom*, 111 Miss. 409, 71 So. 653 (1916).

#### **6. —Contracts made or to be performed in other states.**

Where on former appeals, terminating in a decision by the Federal Supreme Court, the point raised by demurrer to insurer's plea involved the question whether a provision in a fidelity bond requiring any claim thereunder to be made within 15 months after the termination of the suretyship was subject to the law of Tennessee where the contract was made at a time when the insured was then located in Tennessee, or subject to the laws of Mississippi, to which insured had removed and where the defalcation occurred, and resulted in a determination that the laws of Tennessee governed, such determination did not preclude subsequent litigation as to the effect of such provision under Tennessee decisions as being a condition precedent to liability of the insurer or merely a postponement of the right to sue. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 189 Miss. 496, 195 So. 667 (1940), cert. denied, appeal dismissed, 311 U.S. 610, 61 S. Ct. 25, 85 L. Ed. 387 (1940).

Group policy which was performable and was delivered in Alabama was governed by Alabama laws, notwithstanding that insured employee was a resident of Mississippi, had never been in Alabama, and insured employer operated its buses only in Mississippi, and notwithstanding statute requiring court to solve interpretation of contract of insurance according to the laws of Mississippi, since a contrary construction would result in the denial of due process. *Protective Life Ins. Co. v. Lamarque*, 180 Miss. 243, 177 So. 15 (1937).

Appellant was deprived of due process when lower court held that indemnity bond, contracted for in Tennessee, being insurance contract, was solvable under laws of Mississippi in determining liability for loss in Mississippi, as regards construction of provision respecting time for making claim. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92

A.L.R. 928 (1934), reh'g denied, 292 U.S. 607, 54 S. Ct. 772, 78 L. Ed. 1468 (1934).

This statute [Code 1930, § 2294] may not constitutionally be applied to employee's fidelity insurance contract entered into in another state, although the default occurred after the removal of the insured and his employee to the state. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934), reh'g denied, 292 U.S. 607, 54 S. Ct. 772, 78 L. Ed. 1468 (1934).

#### **7. Miscellaneous.**

In a dispute involving a promissory note, the plain language of the note did not operate to excuse a creditor from asserting legal rights in a timely manner; moreover, Miss. Code Ann. § 15-1-5 rendered any changes to the statute of limitations in the promissory note null and void. *Chimento v. Fuller*, 965 So. 2d 668 (Miss. 2007).

Mississippi Supreme Court would not enforce a contractually created time limitation on suits, as modifications to the statute of limitations could not be accomplished by contract, and any attempt to do so would be void; accordingly, the admissions contract between the decedent and nursing home which attempted to modify the statute of limitations was properly struck as unconscionable. *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007).

Provision of contract for extermination of pests which limited homeowner's remedy for breach of express warranty to reinspection and refumigation in event of reinfestation, was enforceable under Mississippi law. Facts did not fall within protections afforded by §§ 11-7-18 or 75-2-315.1, and litigation not involve claim for breach of implied warranties. Moreover, even if defendant had attempted to limit implied warranties, plaintiff did not seek remedies based thereon. In addition, contract was one primarily for service, whereas prohibition on limitation of express warranties applies only to manufacturer of consumer goods, thus there was nothing in Mississippi statutes forbidding limitation of remedies for breach of express warranty provided in service contract. *Smith v. Orkin Exterminating Co.*,



791 F. Supp. 1137 (S.D. Miss. 1990), *aff'd*, 943 F.2d 1314 (5th Cir. 1991).

Provision in contract for extermination of pets establishing one-year period of limitations, in violation of § 15-1-5, did not render contract's limitation of liability clause unenforceable where clauses were not mutually dependent and allegedly unenforceable clause could be easily severed from remainder of contract without reforming substance of contract. *Smith v. Orkin Exterminating Co.*, 791 F. Supp. 1137 (S.D. Miss. 1990), *aff'd*, 943 F.2d 1314 (5th Cir. 1991).

## 8. Home inspection contracts.

Home inspector overreached in his attempt to contractually create a private statute of limitations with two home buyers as the three-year statute of limitations under Miss. Code Ann. § 15-1-49 could not be changed by contract; the attempt to change the statute of limitations was void under Miss. Code Ann. § 15-1-5 and was substantively unconscionable. *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005).

## ATTORNEY GENERAL OPINIONS

Any attempt to require contract terms seeking to limit the liability of a private vendor or specifying a limitation period different than the general limitations pe-

riod prescribed for contractual claims would be unenforceable. *Thomas*, Dec. 2, 2003, A.G. Op. 03-0629.

## RESEARCH REFERENCES

**ALR.** Validity of contractual waiver of statute of limitations. 1 A.L.R.2d 1445.

Waiver or tolling of statute of limitations by executor or administrator. 8 A.L.R.2d 660.

Validity of contractual time period, shorter than statute of limitations, for bringing action. 6 A.L.R.3d 1197.

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations. 84 A.L.R.3d 1172.

Validity, construction, and application, in nonstatutory personal injury actions, of

state statute providing for borrowing of statute of limitations of another state. 41 A.L.R.4th 1025.

Insurer's waiver of defense of statute of limitations. 104 A.L.R.5th 331.

**Am Jur.** 51 Am. Jur. 2d, Limitations of Actions §§ 79 et seq.

7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 13.1 (answer — defense — statute of limitations).

12 Am. Jur. Legal Forms 2d, Limitation of Actions § 167:18 (statutory limitation period to govern should contractual period be prohibited).

## § 15-1-7. Limitations applicable to actions to recover land.

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time



within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, arts. 1 (1), 6 (1); 1857, ch. 57, art. 1; 1871, § 2147; 1880, § 2664; 1892, § 2730; 1906, § 3090; Hemingway's 1917, § 2454; 1930, § 2285; 1942, § 709.

**Cross References** — Legislature's power to revive barred actions, see Miss. Const. Art. 4, § 97.

Running of statutes of limitation against state or subdivision thereof, see Miss. Const. Art. 4, § 104.

Confirmation of title to land and removal of clouds upon titles, see §§ 11-17-29, 11-17-31.

Ejectment, see §§ 11-19-1 through 11-19-105.

Statute of limitations in cases of unlawful entry and detainer, see § 11-25-1.

Limitation of actions arising from easements for highway purposes, see § 65-1-49.

Conveyance of land generally, see §§ 89-1-1 through 89-1-45.

## JUDICIAL DECISIONS

1. In general.
2. Application.
3. Equitable actions.
4. Adverse possession.
5. —Duration of possession.
6. —Tacking.
7. Color of title.
8. Interests acquired; easements.
9. Persons affected in general.
10. —Remaindermen.
11. —Persons under disability.
12. Mortgages and deeds of trust.
13. When limitation period runs, generally.
14. —Particular cases.
15. Pleading.

### 1. In general.

Since accrued royalties were personal property and not an interest in land, Miss. Code Ann. § 15-1-7 was inapplicable; there being no specific statute of limitations for actions seeking recovery of accrued royalties, the general, three-year statute of Miss. Code Ann. § 15-1-49(1) required the trustee to bring the action

against the oil companies within three years next after the cause of such action accrued. *Nygaard v. Getty Oil Co.*, 918 So. 2d 1237 (Miss. 2005).

Statute of limitations argument was waived on appeal because it was not raised in the answer; the bank customers' possession of the property was never adverse to that of the bank's lien interest at any time prior to the 1997 renewal, and the bank did not seek reformation of the 1988 deed of trust, but rather the 1997 deed of trust, such that there would be no statute of limitations issue even if the defense had been raised. *Whitefoot v. BancorpSouth Bank*, 856 So. 2d 639 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 148, 160 L. Ed. 2d 52 (2004).

Ten-year statute of limitation for actions to recover land did not start to run when the beneficiary took possession of the elderly widow's property in 1982 as part of his long-term plan and scheme to obtain her property through fraud and undue influence, but instead began to run

when the elderly widow's heirs had notice of the existence of an attempted deed, which did not occur until 1997 when the widow died, especially since the widow was not in possession in the interim. *Cupit v. Pluskat* (In re Estate of Reid), — So. 2d —, 2001 Miss. LEXIS 320 (Miss. Dec. 13, 2001), opinion withdrawn by, substituted opinion at 825 So. 2d 1, 2002 Miss. LEXIS 182 (Miss. 2002).

The 10-year limitation provided for in the statute did not apply to an action by a judgment creditor in which it alleged that the judgment debtor fraudulently conveyed real property to his son as the judgment creditor had no possessory interest in the subject property. *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869 (Miss. 2001).

Miss. Code Annotated § 15-1-59 does not place maximum durational limit on savings provision of § 15-1-7, as had Mississippi Legislature intended for savings clause in § 15-1-7 to have maximum duration it would have included such limit in § 15-1-7, as Legislature has in other statutes of limitations provisions, and further, § 15-1-59 is not statute of limitations. *Talbert v. Henderson*, 688 F. Supp. 250 (S.D. Miss. 1987).

In an action to quiet title based on a 1934 deed, the statute of limitations was properly invoked in defense to a cross-bill seeking to cancel the claim for failure of consideration because the conveyance was at most voidable and actions to set aside voidable conveyances are subject to limitation. *Covington v. Butler*, 242 So. 2d 444 (Miss. 1970).

A conveyance of land executed to a corporation in violation of the Mississippi Blue Sky Law (Laws 1916, Ch 97) was utterly void and imparted no notice to subsequent purchasers, nor did it set in motion the running of the 10-year statute of limitations. *Mississippi State Hwy. Comm'n v. Smith*, 197 So. 2d 212 (Miss. 1967).

This section [Code 1942, § 709] and Code 1942, § 710 are to be considered together. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

The statute requiring commencement of action to recover land ten years after right to do so accrues, did not apply to a suit to

cancel as cloud on title claim asserted by husband who pleaded guilty to manslaughter in the death of his wife. *Henry v. Toney*, 217 Miss. 716, 64 So. 2d 904 (1953).

Purpose and intent of Code 1942, §§ 710 and 711, and this section [Code 1942, § 709], is to guarantee good title to one purchasing land in good faith from another, where such other went into possession under recorded deed, valid on its face, and continued in uninterrupted possession for period of 31 years or more. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Save as to easements, licenses or mere equities, abandonment is not effective to divest title to real estate, and fee simple titles are lost only by estoppel or by adverse possession or by maintainable tax sale. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

The principle upon which the statute rests is not that the party in whose favor it is evoked has set up an adverse claim for the period prescribed, but that the adverse claim is accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. *Magee v. Magee*, 37 Miss. 138 (1859).

## 2. Application.

Mortgagor's wrongful foreclosure claim was time-barred under Miss. Code Ann. § 15-1-49 as it was filed 10 years after the foreclosure; Miss. Code Ann. § 15-1-7 applied to actions to recover land, not to actions for wrongful foreclosure. *Tenn. Props. Inc. v. Gillentine*, 66 So. 3d 695 (Miss. Ct. App. 2011).

Chancellor did not err in dismissing a nephew's case against his uncles on the ground that his claim was time-barred pursuant to Miss. Code Ann. § 91-7-309 because the ten-year statute of limitations contained in Miss. Code Ann. § 15-1-7 did not apply because the case was not an action to recover land; the nephew's claim was an attempt to reopen a decedent's estate because his arguments were an attempt to attack and falsify the final accounting of the decedent's estate. *Walton v. Walton*, 52 So. 3d 468 (Miss. Ct. App. 2011).

Summary judgment was properly granted to a trustee in a prior owner's action to set aside a warranty deed trans-



fer and a trust six years later because the three-year statute of limitations in Miss. Code Ann. § 15-1-49 applied, rather than the ten-year period in Miss. Code Ann. § 15-1-7. Concealed fraud did not toll the limitations period since the instrument here was recorded as a matter of public record. *McWilliams v. McWilliams*, 970 So. 2d 200 (Miss. Ct. App. 2007).

### 3. Equitable actions.

In an action by a widow to recover 50 percent of various mineral rights purchased by her deceased husband in a joint venture with defendant's deceased husband in which the theory of recovery was an implied trust or right to a partnership accounting, the chancery court erroneously granted judgment for plaintiff, where the cause of action was barred by the applicable ten year statutes of limitation at least as early as 1962, which was 10 years after the death of defendant's husband. *Stebbins v. Hayes*, 379 So. 2d 898 (Miss. 1980).

Action by the successors of royalty deed grantor to cancel the claims of the grantees' successors to any interest in the mineral estate exceeding  $\frac{3}{16}$ ths of  $\frac{1}{8}$ th of the whole of all minerals, except sulphur, was not barred by the statute of limitations where the grantees' successors had neither title nor possession of any interest in excess of the  $\frac{3}{16}$ ths of the  $\frac{1}{8}$ th of the whole. *Payne v. Campbell*, 250 Miss. 227, 164 So. 2d 780 (1964).

Suit to cancel quitclaim deed given without consideration, twelve years after death of grantee and after title to mineral rights had passed to innocent purchasers, held barred. *Williams v. Phoenix Minerals Corp.*, 247 Miss. 697, 158 So. 2d 51 (1963).

Where there was a suit to cancel and remove some alleged clouds from the title of property which was sold under a bond mortgage to satisfy an indebtedness owing to a Louisiana corporation, in liquidation, the fact that the suit was filed just two days before the completion of the bar of ten-year statute of limitations, should not bar the action because of laches. *Enochs v. Mississippi Tower Bldg.*, 210 Miss. 676, 50 So. 2d 551 (1951).

This section [Code 1942, § 709] applies to a bill to set aside a deed and to hold grantee as trustee of the land for benefit of

complainants, neither the three-year limitation period of Code 1942, § 729 nor the six-year period of Code 1942, § 722 being applicable when accounting feature contained in bill is merely incidental. *Burton v. Gibbes*, 204 Miss. 248, 37 So. 2d 285 (1948).

Statutory limitation on equity suit to recover land held not to apply to suit to reform deed by person whose possession and payment of taxes through predecessors in title exceeds forty-five years. *Newman v. J.J. White Lumber Co.*, 162 Miss. 581, 139 So. 838 (1932).

This section [Code 1942, § 709] applies to a suit to cancel, as a cloud, a title acquired through sale under partition proceedings, neither the two-year statute of limitations (§ 2693, Code of 1880), nor Code 1880, § 2568, establishing the effect of a final decree in partition proceedings being applicable. *Foster v. Gulf Coast Canning Co.*, 71 Miss. 624, 15 So. 931 (1894).

### 4. Adverse possession.

Adverse possession was established by evidence that possessors cleared land and planted grass, grazed cattle on land, repaired damage caused by hurricane, built and repaired fish pond, paid taxes in all but 2 years, frequently visited property, and made other improvements; titleholder's nonpayment of taxes coupled with awareness that grass was planted and cattle were grazed on pastures gave rise to notice of adverse claim. *Ramsey v. Copiah Bank*, 678 So. 2d 637 (Miss. 1996).

Adverse possession does not operate to vest title while the city holds a tax title to the land. *Grayson v. Robinson*, 240 Miss. 59, 126 So. 2d 247 (1961).

Insufficiency of a line fence to turn stock does not affect its operation as notice of adverse possession. *Grayson v. Robinson*, 240 Miss. 59, 126 So. 2d 247 (1961).

This section [Code 1942, § 709] and Code 1942, § 710 are limitation statutes which may be used defensively only, as distinguished from Code 1942, § 711, which provides that 10 years' adverse possession vests full title, and which accordingly may be used affirmatively and defensively. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).



This provision [Code 1942, § 709] does not apply except where the person invoking it has been in adverse possession of land against the true owner. *Continental Oil Co. v. Walker*, 238 Miss. 21, 117 So. 2d 333 (1960).

Where minerals had been severed from the surface, and defendants, claiming under color of title of a void tax deed, although exercising acts of ownership of which the surface was susceptible, had never taken actual possession of any of the minerals, they did not acquire rights to the minerals by adverse possession, so that plaintiffs, who held mineral rights to the land through inheritance from the grantor of the surface rights, did not lose their rights to the minerals by limitations or laches. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

The statutes of limitation do not begin to run against one in actual or constructive possession of lands until an adverse entry has been made. *Leech v. Masonite Corp.*, 219 Miss. 176, 68 So. 2d 297 (1953).

To acquire land by adverse possession, for possession must not only continue for the statutory period but it must be exclusive and hostile. *Grantham v. Masonite Corp.*, 218 Miss. 745, 67 So. 2d 727 (1953).

To acquire land by adverse possession, the adverse possessor must have had the intention to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. *Grantham v. Masonite Corp.*, 218 Miss. 745, 67 So. 2d 727 (1953).

When it is clear that there is no intention to claim against the true owner, the possession will not be adverse, and however long continued will not bar his right of entry. *Grantham v. Masonite Corp.*, 218 Miss. 745, 67 So. 2d 727 (1953).

In application of this section [Code 1942, § 709], mere lapse of time does not suffice, but possession relied upon by claimant of land must exist to support plea of limitation the same as if he were claiming land under and by virtue of possession held under Code 1942, § 711. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Complainant entering under invalid tax deed failed to meet burden of proof to

establish ten years adverse possession where evidence disclosed that no use was made of the land after tax sale except cultivation of small patches, that land was unimproved, and that there was no actual occupancy of the land by anyone. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Where the description of land sold at a tax sale did not cover all of the land on which the taxes had been levied, a purchaser from the state, who occupied the entire tract had no valid claim, as against the original owners, to that portion of the land not included in such description, and title thereto would not be lost to the original owner through any doctrine of laches short of the ten-year statute of limitations. *Johnson v. Carter*, 193 Miss. 781, 11 So. 2d 196 (1943).

Title need not be recorded to bind bona fide purchasers from the original owner; purchaser from record owner must ascertain existence of adverse possession hostile thereto. *Lowi v. David*, 134 Miss. 296, 98 So. 684 (1924).

Defense of adverse possession held sufficient, although occupation was under erroneous survey. *Evans v. Harrison*, 130 Miss. 157, 93 So. 737 (1922); *Schuler v. McGee*, 127 Miss. 873, 90 So. 713 (1922); *Greer v. Pickett*, 127 Miss. 739, 90 So. 449 (1921).

Title by adverse possession is a perfect title and may be used both offensively and defensively. *Scottish Am. Mtg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C, 1236 (1911).

Actual, open, and notorious possession may be shown by the acts of the occupant to have been adverse. *Davis v. Bowmar*, 55 Miss. 671 (1878).

The adverse possession, to be available, must have been continuous. *Nixon v. Porter*, 38 Miss. 401 (1860); *Tegarden v. Carpenter*, 36 Miss. 404 (1858).

What constitutes adverse possession is a question of law, but the intention of the possessor, which is always material in determining, is a fact to be ascertained by the jury. *Magee v. Magee*, 37 Miss. 138 (1859).

Visible and notorious occupation, with intent to claim against the world, constitutes adverse possession. So will any vis-

ible acts of ownership exercised over land, which, from their nature, indicate notorious claim of property in it, if continued for a long time, with the knowledge of the owner, and without interruption or adverse entry by him. Neither actual occupation, residence, nor cultivation is necessary to constitute adverse possession, where the property is so situated as not to admit of any permanent useful improvement. *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137 (1858).

### 5. —Duration of possession.

Ten years' possession by purchaser on foreclosure of trust deed and successors held, notwithstanding deed on foreclosure was not given, to give title as against grantor of trust deed. *American Petrofina, Inc. v. Warren*, 247 Miss. 552, 156 So. 2d 729 (1963).

Evidence showing that complainants entered into possession of parcel of land in 1942, under color of title by virtue of deed executed to them by a bank, and that complainants remained in possession of the land, claiming it as their own, and exercised acts of ownership on the land by cutting timber and pasturing cattle on the land, keeping the fences in state of repair, and paying taxes on the land for a period of 19 years, established complainants' title by adverse possession. *Bickham v. Bates*, 246 Miss. 171, 150 So. 2d 138 (1963).

The grantees in a deed and their successors in title who had been in actual adverse possession of the entire interest in tract of land for more than ten years acquired title by adverse possession. *Farmer v. Runnels*, 244 Miss. 525, 142 So. 2d 198 (1962).

Husband of tenant in common taking possession of land under purchase at a void judicial sale and holding with those under him for 10 years divests cotenants of title. *Stewart v. Foxworth*, 95 Miss. 442, 52 So. 354 (1910).

Adverse possession for 10 years will defeat suit to set aside occupant's deed, on record for that length of time, on the ground that it was executed to defeat creditors. *Gordon v. Anderson*, 90 Miss. 677, 44 So. 67 (1907).

Where one claimed the land involved as sole owner, mortgaged it to another who

thereafter foreclosed it, and he and his devisees were in possession adversely for more than ten years, suit of persons claiming under precedent outstanding titles was barred. *Dunbar v. Aldrich*, 79 Miss. 698, 31 So. 341 (1902).

Adverse possession, though under a parol gift, if it continue for ten years, confers a perfect title. *Davis v. Davis*, 68 Miss. 478, 10 So. 70 (1891).

### 6. —Tacking.

Period of adverse possession by remainderpersons could begin running against interests of third parties prior to date outstanding life estate on property was removed; life tenant's possession was hostile as to third parties and could be tacked on to remainderperson's interest. *Ramsey v. Copiah Bank*, 678 So. 2d 637 (Miss. 1996).

Where there was privity between appellees and their predecessor in title, appellees are entitled to tack their possession to that of their predecessor and to acquire title by adverse possession to small strip of land between an old fence line and the true boundary line although appellees were not themselves in possession for ten years. *Ricketts v. Simmons*, 44 So. 2d 537 (Miss. 1950).

It is competent to join one adverse possession to another in order to make the bar effectual, if the possession be continued, uninterrupted, and adverse during the whole period. *Benson v. Stewart*, 30 Miss. 49 (1855).

### 7. Color of title.

In an action to establish ownership of, or a leasehold interest in oil, gas and other minerals in certain land, and for cancellation of defendant's tax deed, plaintiffs were not entitled to relief, even if the buyer at the tax sale had not obtained good title, where the record showed that with the tax sale and subsequent tax deed, all of record, the purchaser had color of title, that she had entered the land personally and by authorized representation, and had occupied the same in the manner described in this section for longer than the requisite ten years. *Clement v. R.L. Burns Corp.*, 373 So. 2d 790 (Miss. 1979).



Where minerals had been severed from the surface, and defendants, claiming under color of title of a void tax deed, although exercising acts of ownership of which the surface was susceptible, had never taken actual possession of any of the minerals, they did not acquire rights to the minerals by adverse possession, so that plaintiffs, who held mineral rights to the land through inheritance from the grantor of the surface rights, did not lose their rights to the minerals by limitations or laches. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

Widow's act in recording deed, valid on its face, to her from purchaser of her deceased husband's land at foreclosure sale, gave notice to world that she claimed to be owner of land and that act was act of ouster as against anyone else claiming the land, including her six children, whose ages ranged from 1 to 12 years, and warranty deed by her after she had been in uninterrupted possession under this recorded deed for more than 34 years conveyed good title. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Generally, tax deed gives color of title although it is invalid or even where absolutely void, providing description of the property is legally sufficient. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Statutes of limitation do not run in favor of the holder of the tax deed void on its face. *Meyerkort v. Warrington*, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

Void tax deed is good color of title to support adverse possession. *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466 (1911).

A void deed is sufficient to constitute color of title. One who enters under color of title and holds adversely may extend his possession to the whole land embraced in his deed. But a mere intruder can extend his possession only to the extent of his actual occupancy. *Ryan v. Mississippi V. & S.I.R.R.*, 62 Miss. 162 (1884); *Welborn v. Anderson*, 37 Miss. 155 (1859).

#### 8. Interests acquired; easements.

Grantee of alley easement is barred from obtaining relief against adverse possessor for more than 13 years. *Cummins v. Dumas*, 147 Miss. 215, 113 So. 332 (1927).

Right, granted in letter, to build house on lot and occupy same so long as it is used for publishing newspaper, where acted upon was assignable, and assignee holding for 10 years acquired an easement. *Frederic v. Mayers*, 89 Miss. 127, 43 So. 677 (1907).

#### 9. Persons affected in general.

Denial of the mother's claim of right to the marital home was appropriate because the father's parents had the legal right to dispossess the father of his enjoyment of the home, and that right would continue for the statutory period of ten years under Miss. Code Ann. § 15-1-7; thus, the father's continued presence at the marital home was not one of right, but a continuing gift to the father by his parents. *Jordan v. Jordan*, 963 So. 2d 1235 (Miss. Ct. App. 2007).

A mineral deed to homestead which was not signed by the wife of the owner, being void, did not carry with it constructive possession, and therefore the ten-year statute of limitations was inapplicable to an action brought some 31 years after the conveyance to cancel the deed. Furthermore, since their possession of the homestead had not been disturbed or invaded, the husband and wife were not required to take any steps to cancel the deed prior to the institution of the present suit. *Travis v. Dantzler*, 244 Miss. 360, 141 So. 2d 556 (1962).

Statute held to bar suit to remove, as alleged cloud on title, a deed executed upon a sale for purposes of partition some forty years before, on ground that all parties in interest were not served and that land was not shown therein to be incapable of partition in kind. *Hollingsworth v. Central Oil Co.*, 236 Miss. 779, 112 So. 2d 518 (1959).

Suit by heirs of an incompetent grantor to set aside a deed the recording of which in the grantor's lifetime was constructive notice to them, is barred by the running of the statutory period since his death. *Aultman v. Kelly*, 236 Miss. 1, 109 So. 2d 344 (1959).

A son of intestate could not claim title to land by adverse possession against a widow who had not claimed any interest in the property because of mistaken idea of invalidity of her marriage and where



the son kept the property under the idea that his stepmother had no interest. *Bonds v. Bonds*, 226 Miss. 348, 84 So. 2d 397 (1956).

Ordinarily ignorance of his or her legal rights by a person against whom land is claimed by adverse possession is no defense against the running of the statutes of limitations. *Bonds v. Bonds*, 226 Miss. 348, 84 So. 2d 397 (1956).

Possession of land by owner and mortgagor, or his grantees, during life of deed of trust, cannot form basis of claim to adverse possession by him, since mortgagor has right to retain possession of property until foreclosure sale under deed of trust. *Duncan v. Mars*, 44 So. 2d 529 (Miss. 1950).

Where land was sold under a decree in partition, the possession of the interests of two of the owners, who were not parties to the proceeding, remained in them by constructive operation of law as long as possession was not taken by someone in hostility to their interests, unless divested by or as a result of the partition proceedings, and limitation would not affect them even if they let the land lie unoccupied and idle for fifty years or more. *Taylor v. Twiner*, 193 Miss. 410, 9 So. 2d 644 (1942).

#### 10. —Remaindermen.

Grantee of life tenant, holding over after life tenant's death, could not set up hostile claim against remaindermen based simply on possession. *Thomasson v. Kinard*, 153 Miss. 398, 121 So. 109 (1929).

Grantee of widower's dower interest in land does not hold adversely to remainderman until widow's death. *Anglin v. Broadnax*, 97 Miss. 514, 52 So. 865 (1910).

Tenant in remainder cannot bring suit for partition, nor will ejectment lie until his right of possession accrues. *Shipp v. McKee*, 80 Miss. 741, 31 So. 197, 92 Am. St. R. 616 (1902).

The statute does not run against an action of ejectment by a remainderman until the determination of the particular estate. *Hoskins v. Ames*, 78 Miss. 986, 29 So. 828 (1901).

Although one is in possession of land, claiming adversely under a void tax deed, his purchase of a life estate therein will render such possession lawful thereafter as against remaindermen and estop the

running of the statute as against them. *Jones v. Merrill*, 69 Miss. 747, 11 So. 23 (1892).

#### 11. —Persons under disability.

Statute of limitations in § 15-1-7 applies to action alleging that deed of trust and its foreclosure were invalid because mortgagor was mentally incompetent, where statute contained savings provision in favor of those under disability of infancy or unsoundness of mind; durational limitation of § 15-1-59 does not apply to § 15-1-7, where § 15-1-7 contains its own savings provision, and where other statutes containing savings provisions in favor of persons under disability provide for maximum duration for savings provisions. *Talbert v. Henderson*, 688 F. Supp. 250 (S.D. Miss. 1987).

A complaint seeking to set aside a deed is not demurrable as stating a cause of action barred by limitations where it alleges that the deed was obtained by fraud and duress, and while complainant was unable to attend to her affairs, due to mental impairment. *McMahon v. McMahon*, 243 Miss. 89, 137 So. 2d 520 (1962).

Children, whose ages ranged from 1 to 12 years at time of death of their father, who lived on land during lifetime of father and knew that after his death mother claimed it, who knew mother sold land, and who neither inquired nor discovered their interest in land until youngest child was 47 years of age, exercised such complete indifference to, and disregard of, their rights that they should not, in equity and good conscience, be permitted to prevail over purchaser in good faith, for sufficient consideration. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Heir 15 years old when interest of dowress ceased on her death in 1893, not barred by 10-year statute from suing for partition in December 1907. *Anglin v. Broadnax*, 97 Miss. 514, 52 So. 865 (1910).

Infant old enough to deceive person of ordinary prudence and receiving benefit of contract with a party whom he deceived as to his age is estopped to disaffirm the contract where he was guilty of wilful fraud and misrepresentation. *Lake v. Perry*, 95 Miss. 550, 49 So. 569 (1909).

A grantor may disaffirm a deed executed during infancy and bring suit to

recover it at any time within ten years after becoming an adult. *Shipp v. McKee*, 80 Miss. 741, 31 So. 197, 92 Am. St. R. 616 (1902).

## 12. Mortgages and deeds of trust.

Statute (Laws 1934, ch 250) providing that all mortgagors of real estate located within the state who might have the right to set aside any title to such real estate by reason of the neglect of any trustee to insert in a notice of sale of such real estate, the name of said mortgagor, should commence suit 12 months from the passage of such act, and upon the failure of such mortgagor or other person to commence suit within such time, the right to bring such suit, and the remedy to enforce such right of action should be deemed thereafter to be completely extinguished, if applied so as to restrict the application of the general ten year statute, made applicable by statute (Code 1942, § 888) regulating the sale of lands under mortgages and deeds of trust, was not invalid as being an impairment of contract or as class or private legislation, since the right to sue is distinct from the right sought to be enforced and is remedial in character. *Barbour v. Williams*, 196 Miss. 409, 17 So. 2d 604 (1944).

Only 10-year statute applies in case of deed of trust on homestead void because wife did not join. *Woods v. Campbell*, 87 Miss. 782, 40 So. 874 (1906).

## 13. When limitation period runs, generally.

Limitations do not run against a widow's right to claim homestead as against the owner of mineral rights conveyed by her husband's deed, while she remains in undisturbed possession of the land. *Biglane v. Rawls*, 247 Miss. 226, 153 So. 2d 665 (1963).

This section [Code 1942, § 709] and Code 1942, § 710 do not begin against a person who has good title and actual or constructive possession of lands, until an adverse entry. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

The limitation period begins to run against a right of action to set aside a mineral deed procured by representing it to be only a lease, from the time when it

was put on record. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

Filing for record a deed sought to be set aside as fraudulent set the statute of limitations running. *Ayers v. Davidson*, 285 F.2d 137 (5th Cir. 1960).

The statute begins to run against a cause of action for failure to deliver a deed on a certain date, on the day following. *Rankin v. Mark*, 238 Miss. 858, 120 So. 2d 435 (1960).

An action in the nature of a suit to remove as clouds from title a claim to one-half oil, gas and mineral interest in land was barred where more than 10 years had been permitted to run before the institution of the action. *Gandy v. Burke*, 236 Miss. 241, 109 So. 2d 926 (1959).

Generally, statutes of limitation begin to run as soon as there is a cause of action. *Aultman v. Kelly*, 236 Miss. 1, 109 So. 2d 344 (1959).

The statutes of limitation do not begin to run against persons in actual or constructive possession of lands until an adverse entry has been made. *Trigg v. Trigg*, 233 Miss. 84, 101 So. 2d 507 (1958).

Suit for reconveyance of land based upon purchaser's agreement to reconvey when purchaser abandoned plant expected to be erected on land must be brought within ten years from date of abandonment of plant so erected, and is barred by limitations when brought after ten-year period. *Krohn v. L.N. Dantzler Lumber Co.*, 208 Miss. 691, 45 So. 2d 276 (1950).

Right of action against grantee in deed to set aside deed and hold grantee as trustee of land for benefit of complainants accrues at the time the grantee obtains deed to land. *Burton v. Gibbes*, 204 Miss. 248, 37 So. 2d 285 (1948).

Where the title to land is made to vest in a donee upon the happening of a future event, the statute will not run until the event happens. *Millsaps v. Shotwell*, 76 Miss. 923, 25 So. 359 (1899).

The statute does not run against the right to enforce a legacy charged upon the estate of the testator as to land held by a transfer from the heir or devisee pending administration and before settlement. *Peebles v. Acker*, 70 Miss. 356, 12 So. 248 (1892).



Where the right of action was descended from one dying under disability to another resting under disability, ten years only is given from the death of the first person within which the second may sue. *Watts v. Gunn*, 53 Miss. 502 (1876).

The statute commences to run from the time plaintiff's cause of action accrued, and not from the date the title vests in him. *Shaw v. Alexander*, 32 Miss. 229 (1856).

#### 14. —Particular cases.

Where a law student developed a relationship with the deceased, had her adopt him, and then helped her compose a holographic will devising all of her property to him, the statute of limitation did not begin to run against a deed objector until the deceased died. *Cupit v. Pluskat*, 825 So. 2d 1 (Miss. 2002).

In an action to cancel as a cloud on title a sale of property to the state in 1948 for 1947 taxes on minerals, the chancellor properly overruled the state's demurrer where the demurrer admitted the complainant's allegation that the 1948 tax sale had been invalid for failure to comply with the predecessor statute of § 27-41-59 requiring that the tax collector first offer the property in 40-acre tracts. In addition, where the demurrer admitted the allegation that the state had not been in possession of the property since the tax sale, the chancellor properly overruled the special demurrer that the action was barred by the limitations in §§ 15-1-7, 15-1-9, and 15-1-17 since possession is required to start any of the three statutes into operation. *Pittman v. Currie*, 391 So. 2d 654 (Miss. 1980).

In an action to establish title to land that had in 1907 been granted to a railroad with a possibility of reverter if the grantee ever abandoned the depot to be built on the land, the trial court erred in concluding that abandonment had occurred, if at all, not later than 1965, and that the action was thus barred by this section; since the grantee and its successor had been in continuous substantial compliance with the 1907 deed, plaintiffs had no reason to enter the land and this section was never set in motion or waived. *Hathorn v. Illinois Cent. Gulf R. Co.*, 374 So. 2d 813 (Miss. 1979).

In an action by landowners to cancel certain mineral interest conveyances, the 10-year statutes of limitation on actions at law and in equity to recover lands did not run from the date of the alleged conveyance of the mineral rights where the plaintiffs were in open and full possession of the land at the time of the purported conveyance and where the claimants to the mineral rights never took actual possession of the minerals at issue. *Bowen v. Bianchi*, 359 So. 2d 758 (Miss. 1978).

Where a mineral interest is included in a deed by mutual mistake and the grantee does not claim such interest or intend to own or possess it, the grantee does not have constructive possession, and the statute of limitations in a suit for reformation will not begin to run against the grantor until he has notice of some adverse claim thereto or his possession is disturbed in some manner. *Searcy v. Tomlinson Interests, Inc.*, 358 So. 2d 373 (Miss. 1978).

Landowner's suit to cancel defendant's mineral deed on grounds of fraud was barred by the 10 year statute of limitations where, after landowner received actual notice of deed, he waited for more than 10 years to file suit. *Hood v. Marshall*, 326 So. 2d 320 (Miss. 1976).

Where a deed conveyed a depot site to a railroad company and contained a covenant running with the land that a public roadway should be kept open to the depot grounds for public convenience at and around the station, and the railroad failed for a period of more than 40 years to maintain a station on the conveyed property, the covenant was barred by the statute of limitations. *White v. Mississippi Power & Light Co.*, 196 So. 2d 343, 30 A.L.R.3d 754 (Miss. 1967).

Where the father remained in possession of land, which he had conveyed by warranty deed to a son in 1937 allegedly as security for an indebtedness, and exercised complete dominion over the land until his death, and thereafter the father's heirs retained possession of the land and dealt with it as part of the father's estate until 1951, an action by the heirs in 1956 against the son to establish a resulting trust for the benefit of the heirs was not barred by the statutory limitations im-



posed by this section [Code 1942, § 709] and §§ 718 and 719 Code of 1942. Trigg v. Trigg, 233 Miss. 84, 101 So. 2d 507 (1958).

Where the landowner had actual knowledge for ten years prior to the commencement of a suit, or by the use of reasonable prudence would have known, that the instrument she executed was a mineral deed rather than a royalty deed, and she could have brought action at any time within the ten-year period and obtained process upon the nonresident defendant, by publication, the landowner's action was barred by this section [Code 1942, § 709]. King v. Childress, 232 Miss. 766, 100 So. 2d 578 (1958).

Statute of limitations begins to run against vendee's action to recover purchase money paid under insufficient oral contract for sale of land from date vendor declines to execute agreement, or takes affirmative action equivalent to repudiation of parol contract. Krohn v. L.N. Dantzer Lumber Co., 208 Miss. 691, 45 So. 2d 276 (1950).

Tax title purchaser claiming ten years' adverse possession between April 7, 1930, and June 12, 1945, who leased land for oil and gas in 1940, whose claim to land was open and notorious in community, who rented land to various tenants from 1935 to 1948, with exception of period from 1938 to 1943, there being breaks in occupancy of land between tenants who cultivated small patches of open land, and who did not improve land, fence it, or cut timber, failed to show continuous use of land for statutory period required. Walker v. Polk, 208 Miss. 389, 44 So. 2d 477 (1950).

The right to bring suit to establish a resulting trust arising out of the conveyance of land to a third party pursuant to an oral agreement whereby one person was to advance all funds necessary to purchase the land and another was to repay to him half of the amount, each to acquire an undivided one-half interest, with an understanding that the deed would be executed to such third party to be held by her until the loan was repaid, did not accrue until such half of the funds advanced had been repaid. Shepherd v. Johnston, 201 Miss. 99, 28 So. 2d 661 (1947); Traweek v. Kelly, 60 Miss. 652

(1882); Dixon v. Cook, 47 Miss. 220 (1872); Wiggle v. Owen, 45 Miss. 691 (1871).

Ten-year statute against suits to recover land ran against state from November 1, 1857, to January 24, 1877 (see Code 1857, ch. 57 arts. 1, 2, 3, 4 and Code 1871 §§ 2147, 2148, 2149, 2150, and Laws 1877 ch. 49), except when suspended during Civil War between December 31, 1862, and April 2, 1867. Southern Pine Co. v. Pigott, 93 Miss. 281, 47 So. 381 (1908).

### 15. Pleading.

Where a law student developed a relationship with the deceased, had her adopt him, and then helped her compose a holographic will devising all of her property to him, the statute of limitation did not begin to run against a deed objector until the deceased died. Cupit v. Pluskat, 825 So. 2d 1 (Miss. 2002).

In an action regarding a mineral interest deed claimants who had made an adverse entry onto the property could not utilize the statutes of limitations, Code §§ 15-1-7, 15-1-9, against others who had taken constructive possession of the property. Mills v. Damson Oil Corp., 686 F.2d 1096 (5th Cir. 1982), reh'g denied, 691 F.2d 715 (5th Cir. 1982), certified question answered, 437 So. 2d 1005 (Miss. 1983), answer to certified question conformed to, 720 F.2d 874 (5th Cir. 1983).

A party who pled the ten-year statute of limitations in § 15-1-7 could not thereafter on appeal claim that she had sufficiently raised the general limitation statute of six years set forth in § 15-1-49. Watson v. Miller, 409 So. 2d 715 (Miss. 1982).

A complaint seeking to set aside a deed is not demurrable as stating a cause of action barred by limitations where it alleges that the deed was obtained by fraud and duress, and while complainant was unable to attend to her affairs. McMahon v. McMahon, 243 Miss. 89, 137 So. 2d 520 (1962).

Where the complaint in a proceeding to vacate a partition sale and decree thereunder was wholly silent upon the matter of possession, and it was reasonable to infer that the purchasers never went into possession, the defendants, in order to sustain their special demurrers raising the affirmative defense of the ten-year

and two-year statutes of limitations, were not entitled to an inference that the purchaser had gone into possession. *Taylor v. Twiner*, 193 Miss. 410, 9 So. 2d 644 (1942).

Statute of limitations must be specifically pleaded. *Yazoo & Miss. V. Ry. v. Kirk*, 102 Miss. 41, 58 So. 710, Am. Ann. Cas. 1914C, 968 (1912), suggestion of error sustained, 102 Miss. 56, 58 So. 834, Am. Ann. Cas. 1914C, 968 (1912).

Amended declaration not barred by limitation where original filed in time. *Yazoo & Miss. V. Ry. v. Rivers*, 93 Miss. 557, 46 So. 705 (1908).

## RESEARCH REFERENCES

**ALR.** When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction. 5 A.L.R.2d 302.

Adverse possession: mortgagee's possession before foreclosure as barring right of redemption. 7 A.L.R.2d 1131.

Change in party after statute of limitations has run. 8 A.L.R.2d 6.

Title by adverse possession as affected by recording statutes. 9 A.L.R.2d 850.

Inclusion or exclusion of first and last day for purposes of statute of limitations. 20 A.L.R.2d 1249.

Entry or indorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the statute of limitations. 23 A.L.R.2d 1331.

Statute of limitations applicable to action for encroachment. 24 A.L.R.2d 903.

Estoppel to rely on statute of limitations. 24 A.L.R.2d 1413.

Authority of agent to make payment on behalf of principal, as regards statute of limitations. 31 A.L.R.2d 139.

What statute of limitation applies to an action, based on duress, to recover money or property. 77 A.L.R.2d 821.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period. 79 A.L.R.2d 1080.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Statute permitting new action after failure of original action commenced within

New parties made defendants in equity by amended bill charging that they claim an interest in the land, cannot plead a statute of limitations not fully run when the suit was begun, if they acquired their interest pending the suit from original defendant. *State v. Woodruff*, 81 Miss. 456, 33 So. 78 (1902).

Unless the declaration shows the character of defendant's possession and the length of time he has so occupied the premises, the bar of the statute cannot be raised by demurrer. *Tush-ho-yo-Tubby v. Barr*, 41 Miss. 52 (1866).

period of limitation, as applicable in cases where original action failed for lack of jurisdiction. 6 A.L.R.3d 1043.

Validity of contractual time period, shorter than statute of limitations, for bringing action. 6 A.L.R.3d 1197.

What statute of limitations governs action for malicious use of process or abuse of process, in the absence of an express provision for such tort. 10 A.L.R.3d 533.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another. 12 A.L.R.3d 1265.

Period of limitations or laches to be applied under 29 USCS §§ 185, 187, in action for breach of labor contract or damages from unfair labor practice. 19 A.L.R.3d 1034.

Settlement negotiations as estopping reliance on statute of limitations. 39 A.L.R.3d 127.

Agreement of parties as estopping reliance on statute of limitations. 43 A.L.R.3d 756.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations. 44 A.L.R.3d 760.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possessing. 76 A.L.R.3d 1202.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land

without the institution or conclusion of formal proceedings against specific owner. 26 A.L.R.4th 68.

When statute of limitations begins to run upon action against attorney for malpractice. 32 A.L.R.4th 260.

What gives rise to right of rescission under state blue sky laws. 52 A.L.R.5th 491.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 111, 195.

17 Am. Jur. Pl & Pr Forms (Rev), Limitation of Actions, Form 61 (allegation of complaint, petition, or declaration that infancy tolled statute); Form 62 (affidavit showing suspension of limitations by in-

fancy); Form 71 (allegation of complaint, petition, or declaration that mental incapacity of person executing deed has tolled statute); Form 169 (instructions to jury as to mental incapacity as tolling statute).

13 Am. Jur. Pl & Pr Forms, Forms 13:434, 13:445-13:447 (proceedings to avoid statute).

4 Am. Jur. Trials, Statutes of Limitation § 24.

**CJS.** 54 C.J.S., Limitations of Actions §§ 57 et seq., 131 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Property. 50 Miss. L. J. 111, March 1979.

## § 15-1-9. Limitations applicable to suits in equity to recover land.

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of Section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (2); 1857, ch. 57, art. 2; 1871, § 2148; 1880, § 2665; 1892, § 2731; 1906, § 3091; Hemingway's 1917, § 2455; 1930, § 2286; 1942, § 710.

**Cross References** — Venue of actions, see §§ 11-5-1 et seq.

Suits in chancery courts in regard to land titles, see §§ 11-17-1 through 11-17-37.

Effect of concurrent jurisdiction between chancery courts and courts of common law, see § 15-1-77.

## JUDICIAL DECISIONS

1. In general.
2. Adverse possession.
3. Persons affected.
4. Laches.
5. Equitable relief.
6. Running of limitations period, generally.
7. —Mineral rights involved.
8. —Particular cases.
9. —Concealed fraud.

10. Pleading.

### 1. In general.

In an action to quiet title based on a 1934 deed to a one-fourth mineral interest, the statute of limitations was properly invoked in defense to a cross bill seeking to cancel the claim for failure of consideration, for the deed was at most voidable and action to set aside such a deed must



be brought within 10 years. *Covington v. Butler*, 242 So. 2d 444 (Miss. 1970).

Code 1942, § 709 and this section [Code 1942, § 710] are to be considered together. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

The statutes of limitation do not begin to run against one in actual or constructive possession of lands until an adverse entry has been made. *Leech v. Masonite Corp.*, 219 Miss. 176, 68 So. 2d 297 (1953).

Purpose and intent of Code 1942, §§ 709 and 711, and this section [Code 1942, § 710], is to guarantee good title to one purchasing land in good faith from another, where such other went into possession under recorded deed, valid on its face, and continued in uninterrupted possession for period of 31 years or more. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

The statute [Code 1930, § 2286] applies to a suit in equity to recover land in possession of the defendant, and not to a suit in equity by a complainant in the possession and enjoyment of the land for the purpose of perfecting his title thereto. *Newman v. J.J. White Lumber Co.*, 162 Miss. 581, 139 So. 838 (1932).

Statutory limitation on equity suit to recover land held not to apply to suit to reform deed by person whose possession and payment of taxes through predecessors in title exceeds forty-five years. *Newman v. J.J. White Lumber Co.*, 162 Miss. 581, 139 So. 838 (1932).

## 2. Adverse possession.

Residents of Italy, cotenants of real property located in Mississippi, were not given actual notice or the equivalent thereof of claims adverse to theirs by the filing of pleadings and deeds in the chancery clerk's office. *Guiseppe v. Cozzani*, 193 So. 2d 549 (Miss. 1966).

Evidence showing that complainants entered into possession of parcel of land in 1942, under color of title by virtue of deed executed to them by a bank, and that complainants remained in possession of the land, claiming it as their own, and exercised acts of ownership on the land by cutting timber and pasturing cattle on the land, keeping the fences in state of repair, and paying taxes on the land for a period of 19 years, established complainants' ti-

tle by adverse possession. *Bickham v. Bates*, 246 Miss. 171, 150 So. 2d 138 (1963).

The grantees in a deed and their successors in title who had been in actual adverse possession of the entire interest in tract of land for more than ten years acquired title by adverse possession. *Farmer v. Runnels*, 244 Miss. 525, 142 So. 2d 198 (1962).

Code 1942, § 709 and this section [Code 1942, § 710] are limitation statutes which may be used defensively only, as distinguished from Code 1942, § 711, which provides that 10 years' adverse possession vests full title, and which accordingly may be used affirmatively and defensively. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

This provision does not apply except where the person invoking it has been in adverse possession of land against the true owner. *Continental Oil Co. v. Walker*, 238 Miss. 21, 117 So. 2d 333 (1960).

Widow's act in recording deed, valid on its face, to her from purchaser of her deceased husband's land at foreclosure sale, gave notice to world that she claimed to be owner of land and that act was act of ouster as against anyone else claiming the land, including her six children, whose ages ranged from 1 to 12 years, and warranty deed by her after she had been in uninterrupted possession under this recorded deed for more than 34 years conveyed good title. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Grantee of life tenant could not maintain suit to quiet title to the land involved based on deed from life tenant and adverse possession, since his holding over after death of the life tenant made him a tenant at sufferance of the remaindermen, and was consistent with their title as such; and he could not, as against them, invoke the ten-year statute of limitations so as to defeat their right to possession of, and title to, the land. *Thomasson v. Kinard*, 153 Miss. 398, 121 So. 109 (1929).

Adverse possession for 10 years will defeat suit to set aside occupant's deed, on record for that time, on the ground it was executed to defeat creditors. *Gordon v. Anderson*, 90 Miss. 677, 44 So. 67 (1907).

Where a bill to avoid a foreclosure sale was brought more than ten years after the

sale, and after the purchaser had taken notorious and adverse possession, and there was no allegation that complainants were ignorant of any of the proceedings leading up to the sale or of the claim of the purchaser, nor that the alleged fraud in the sale had been concealed or was unknown to them, the cause of action was barred by limitation. *Alabama & V. Ry. Co. v. Thomas*, 86 Miss. 27, 38 So. 770 (1905).

### 3. Persons affected.

Suit to cancel quitclaim deed given without consideration, twelve years after death of grantee and after title to mineral rights had passed to innocent purchasers, held barred. *Williams v. Phoenix Minerals Corp.*, 247 Miss. 697, 158 So. 2d 51 (1963).

A mineral deed to homestead which was not signed by the wife of the owner, being void, did not carry with it constructive possession, and therefore the ten years statute of limitations was inapplicable to an action by the husband and wife to cancel the deed brought some 21 years after the conveyance. *Travis v. Dantzler*, 244 Miss. 360, 141 So. 2d 556 (1962).

Children, whose ages ranged from 1 to 12 years at time of death of their father, who lived on land during lifetime of father and knew that after his death mother claimed it, who knew mother sold land, and who neither inquired nor discovered their interest in land until youngest child was 47 years of age, exercised such complete indifference to, and disregard of, their rights that they should not, in equity and good conscience, be permitted to prevail over purchaser in good faith, for sufficient consideration. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Where land was sold under a decree in partition, the possession of the interests of two of the owners, who were not parties to the proceeding, remained in them by constructive operation of law as long as possession was not taken by someone in hostility to their interests, unless divested by or as a result of the partition proceedings, and limitation would not affect them even if they let the land lie unoccupied and idle for fifty years or more. *Taylor v. Twiner*, 193 Miss. 410, 9 So. 2d 644 (1942).

The statute [Code 1930, § 2286] does not apply to a suit brought by a person in possession of land, and, therefore, person

in possession need not bring suit to perfect his title thereto until his title is menaced by the adverse claim of another. *Newman v. J.J. White Lumber Co.*, 162 Miss. 581, 139 So. 838 (1932).

Grantee of life tenant could not maintain suit to quiet title to the land involved based on deed from life tenant and adverse possession, since his holding over after death of the life tenant made him a tenant at sufferance of the remaindermen, and was consistent with their title as such; and he could not as against them invoke the ten-year statute of limitations so as to defeat their right to possession of, and title to, the land. *Thomasson v. Kinard*, 153 Miss. 398, 121 So. 109 (1929).

### 4. Laches.

A mineral deed to homestead which was not signed by the wife of the owner, being void, did not carry with it constructive possession, and therefore the ten-year statute of limitations was inapplicable to an action brought some 31 years after the conveyance to cancel the deed. Furthermore, since their possession of the homestead had not been disturbed or invaded, the husband and wife were not required to take any steps to cancel the deed prior to the institution of the present suit. *Travis v. Dantzler*, 244 Miss. 360, 141 So. 2d 556 (1962).

Where there was a suit to cancel and remove some alleged clouds from the title of property which was sold under a bond mortgage to satisfy an indebtedness owing to a Louisiana corporation, in liquidation, the fact that the suit was filed just two days before the completion of the bar of ten-year statute of limitations, should not bar the action because of laches. *Enochs v. Mississippi Tower Bldg.*, 210 Miss. 676, 50 So. 2d 551 (1951).

Where the description of land sold at a tax sale did not cover all of the land on which the taxes had been levied, a purchaser from the state, who occupied the entire tract, had no valid claim, as against the original owners, to that portion of the land not included in such description, and title thereto would not be lost to the original owner through any doctrine of laches short of the ten-year statute of limitations. *Johnson v. Carter*, 193 Miss. 781, 11 So. 2d 196 (1943).



No claim under this statute [Code 1892, § 2731] is barred until the limitation has attached, and laches is no defense if proceedings are instituted within the time. *Hill v. Nash*, 73 Miss. 849, 19 So. 707 (1896).

### 5. Equitable relief.

One entering under a contract of conveyance cannot maintain a bill to cancel the claim of his vendor, or his heirs, although they are barred by lapse of time from recovering either the land or the purchase price, unless he offers to pay the balance of the purchase money and interest. *Nolan v. Snodgrass*, 70 Miss. 794, 12 So. 583 (1893).

### 6. Running of limitations period, generally.

Ten years' possession by purchaser on foreclosure of trust deed and successors held, notwithstanding deed on foreclosure was not given, to give title as against grantor of trust deed. *American Petrofina, Inc. v. Warren*, 247 Miss. 552, 156 So. 2d 729 (1963).

Code 1942, § 709 and this section [Code 1942, § 710] do not begin against a person who has good title and actual or constructive possession of lands, until an adverse entry. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

Filing for record a deed sought to be set aside as fraudulent set the statute of limitations to run. *Ayers v. Davidson*, 285 F.2d 137 (5th Cir. 1960).

An action is barred, concealed frauds excepted, in ten years after the right of action accrued, whether defendant has or has not been in the adverse possession of the land. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

### 7. —Mineral rights involved.

In an action to cancel as a cloud on title a sale of property to the state in 1948 for 1947 taxes on minerals, the chancellor properly overruled the state's demurrer where the demurrer admitted the complainant's allegation that the 1948 tax sale had been invalid for failure to comply with the predecessor statute of § 27-41-59 requiring that the tax collector first offer the property in 40-acre tracts. In addition, where the demurrer admitted the allega-

tion that the state had not been in possession of the property since the tax sale, the chancellor properly overruled the special demurrer that the action was barred by the limitations in §§ 15-1-7, 15-1-9, and 15-1-17 since possession is required to start any of the three statutes into operation. *Pittman v. Currie*, 391 So. 2d 654 (Miss. 1980).

In an action by a widow to recover 50 percent of various mineral rights purchased by her deceased husband in a joint venture with defendant's deceased husband in which the theory of recovery was an implied trust or right to a partnership accounting, the chancery court erroneously granted judgment for plaintiff, where the cause of action was barred by the applicable ten year statutes of limitation at least as early as 1962, which was 10 years after the death of defendant's husband. *Stebbins v. Hayes*, 379 So. 2d 898 (Miss. 1980).

In an action by landowners to cancel certain mineral interest conveyances, the 10-year statutes of limitation on actions at law and in equity to recover lands did not run from the date of the alleged conveyance of the mineral rights where the plaintiffs were in open and full possession of the land at the time of the purported conveyance and where the claimants to the mineral rights never took actual possession of the minerals at issue. *Bowen v. Bianchi*, 359 So. 2d 758 (Miss. 1978).

Where a mineral interest is included in a deed by mutual mistake and the grantee does not claim such interest or intend to own or possess it, the grantee does not have constructive possession, and the statute of limitations in a suit for reformation will not begin to run against the grantor until he has notice of some adverse claim thereto or his possession is disturbed in some manner. *Searcy v. Tomlinson Interests, Inc.*, 358 So. 2d 373 (Miss. 1978).

Landowner's suit to cancel defendant's mineral deed on grounds of fraud was barred by the 10 year statute of limitations where, after landowner received actual notice of deed, he waited for more than 10 years to file suit. *Hood v. Marshall*, 326 So. 2d 320 (Miss. 1976).

Limitations do not run against a widow's right to claim homestead as against



the owner of mineral rights conveyed by her husband's deed, while she remains in undisturbed possession of the land. *Biglane v. Rawls*, 247 Miss. 226, 153 So. 2d 665 (1963).

The limitation period begins to run against a right of action to set aside a mineral deed procured by representing it to be only a lease, from the time when it was put on record. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

An action in the nature of a suit to remove as clouds from title a claim to one-half oil, gas and mineral interest in land was barred where more than 10 years had been permitted to run before the institution of the action. *Gandy v. Burke*, 236 Miss. 241, 109 So. 2d 926 (1959).

#### 8. —Particular cases.

Statute of limitation defense did not apply to action by wife to set aside a conveyance of property by her husband to his father since the limitation period never began to run, as the conveyance was void because of Miss. Code Ann. § 89-1-29 and the conveyance was made without the wife's knowledge or consent. *Snoddy v. Snoddy*, 791 So. 2d 333 (Miss. Ct. App. 2001).

Where a deed conveyed a depot site to a railroad company and contained a covenant running with the land that a public roadway should be kept open to the depot grounds for public convenience at and around the station, and the railroad failed for a period of more than 40 years to maintain a station on the conveyed property, the covenant was barred by the statute of limitations. *White v. Mississippi Power & Light Co.*, 196 So. 2d 343, 30 A.L.R.3d 754 (Miss. 1967).

Statute held to bar suit to remove as alleged cloud on title, a deed executed upon a sale for purposes of partition some forty years before, on ground that all parties in interest were not served and that land was not shown therein to be incapable of partition in kind. *Hollingsworth v. Central Oil Co.*, 236 Miss. 779, 112 So. 2d 518 (1959).

Suit by heirs of an incompetent grantor to set aside a deed the recording of which in the grantor's lifetime was constructive notice to them, is barred by the running of

the statutory period since his death. *Aultman v. Kelly*, 236 Miss. 1, 109 So. 2d 344 (1959).

Action to establish a trust in land against defendant who had taken title thereto in his own name in violation of an oral agreement to take title in the names of both complainant's decedent and defendant was not barred by the ten-year statute of limitations, where under the Soldiers' and Sailors' Civil Relief Act the statute was suspended during decedent's military service. *Chichester v. Chichester*, 209 Miss. 628, 48 So. 2d 123 (1950).

Suit for reconveyance of land based upon purchaser's agreement to reconvey when purchaser abandoned plant expected to be erected on land must be brought within ten years from date of abandonment of plant so erected, and is barred by limitations when brought after ten-year period. *Krohn v. L.N. Dantzler Lumber Co.*, 208 Miss. 691, 45 So. 2d 276 (1950).

#### 9. —Concealed fraud.

Concealed fraud precluded the running of limitations for claiming land in equity where the grantee held the deed from his father without recording it, all the while representing to his family that the land was owned by all of his father's heirs, and the fraud could not have been discovered with reasonable diligence before the son recorded the deed and contracted for the sale and harvest of timber on the land. *Greenlee v. Mitchell*, 607 So. 2d 97 (Miss. 1992).

Testator, an Italian immigrant, after providing a life estate for his widow, devised vested remainder interest in bulk of his property to a sister and his nieces and nephews in equal shares. Where, upon death of widow, her administrator stated in sworn petition filed in court that testator's sister was dead, that there were no nieces or nephews of testator in Italy, and that administrator's mother was testator's sole heir, when in fact he and the widow knew other relatives existed in Italy entitled to share as tenants in common in testator's estate; such false representations constituted concealed fraud upon court and relatives, and relatives were not barred by adverse possession but were entitled to recover in equity their

interests in testator's property, and for an accounting of rents and profits. *Guiseppe v. Cozzani*, 193 So. 2d 549 (Miss. 1966).

Concealed fraud, tolling limitations, may not be predicated on the obtaining of a deed which was duly put on record. *McMahon v. McMahon*, 247 Miss. 822, 157 So. 2d 494 (1963).

Fraud upon an equitable owner in the giving of a deed to a third person by the holder of the title is not concealed, so as to preclude the running of limitations, where the deed is placed on record. *Rankin v. Mark*, 238 Miss. 858, 120 So. 2d 435 (1960).

This clause was held inapplicable to a situation where pursuant to an agreement to exchange lands one of the parties to the agreement went into possession although the other party failed to execute the agreement, in view of the fact that under the statute establishing title by adverse possession of ten years' knowledge of an open, notorious and adverse possession may be presumed. *Leggett v. Norman*, 192 Miss. 494, 6 So. 2d 578 (1942).

To prevent the running of the statute on the ground of concealed fraud, complainant must allege and prove, first, the fraud and the act or acts constituting it; second, that such acts of fraud were committed by the defendant or someone in privity with him; third, that they were concealed from complainant by defendant or someone in privity with him; fourth, that complainant did not discover or know of the fraud over ten years before instituting suit; and fifth, that reasonable diligence was exercised to discover it sooner, or that complainant could not, by the exercise of reasonable diligence, have discovered it sooner. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

Filing a bill to cancel a deed to land is not such constructive notice of the fraud charged as will put in operation the statute in cases of concealed frauds, before service of summons on or a publication for a defendant who has no actual notice thereof. *North Am. Trust Co. v. Lanier*, 78 Miss. 418, 28 So. 804, 84 Am. St. R. 635 (1900).

## 10. Pleading.

In an action regarding a mineral interest deed claimants who had made an adverse entry onto the property could not

utilize the statutes of limitations, Code §§ 15-1-7, 15-1-9, against others who had taken constructive possession of the property. *Mills v. Damson Oil Corp.*, 686 F.2d 1096 (5th Cir. 1982), reh'g denied, 691 F.2d 715 (5th Cir. 1982), certified question answered, 437 So. 2d 1005 (Miss. 1983), answer to certified question conformed to, 720 F.2d 874 (5th Cir. 1983).

A complaint seeking to set aside a deed is not demurrable as stating a cause of action barred by limitations where it alleges that the deed was obtained by fraud and duress, and while complainant was unable to attend to her affairs. *McMahon v. McMahon*, 243 Miss. 89, 137 So. 2d 520 (1962).

Adverse possession must be pleaded and proved by party relying thereon. *White v. Turner*, 197 Miss. 265, 19 So. 2d 825 (1944).

Bill to establish and quiet title to undivided interest in realty was not subject to special demurrer raising statute of limitations of ten years under this section [Code 1942, § 710], where, although admitting that holders under mesne conveyance from the other heirs of original owner are or have been in possession, the bill alleged that all such holders had notice of the outstanding interest of plaintiffs' ancestor, that they held permissibly as tenants in common, that they have never asserted any claim of ownership in the entire interest in the land, and that there never has been any ouster of plaintiffs for adverse holding as against them. *White v. Turner*, 197 Miss. 265, 19 So. 2d 825 (1944).

Where the complaint in a proceeding to vacate a partition sale and decree thereunder was wholly silent upon the matter of possession, and it was reasonable to infer that the purchasers never went into possession, the defendants, in order to sustain their special demurrers raising the affirmative defense of the ten-year and two-year statutes of limitations, were not entitled to an inference that the purchaser had gone into possession. *Taylor v. Twiner*, 193 Miss. 410, 9 So. 2d 644 (1942).

Complainant need not set out in bill facts showing what diligence exercised to discover fraud. *Nestor v. Davis*, 100 Miss. 199, 56 So. 347 (1911).

Bill in equity on its face barred by limitation is demurrable, complainants



suing by next friend not averring that they are infants. *Thames v. Mangum*, 87 Miss. 575, 40 So. 327 (1906).

Where a bill in equity failed to aver that defendants or any of their privies committed the alleged acts of fraud relied upon to

extend the period of limitation, and the particular acts which constituted the fraud were indicated by mere vague, indefinite, general and uncertain averments, the bill was demurrable. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905).

### RESEARCH REFERENCES

**Am Jur.** 27A Am. Jur. 2d, Equity §§ 21 et seq., 161 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 60, 61, 218 et seq.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Property. 50 Miss. L. J. 111, March 1979.

## § 15-1-11. Limitations applicable to actions to recover land for defect in instrument.

Any person who has a right of action for the recovery of land because of any one or more of the following enumerated defects in any instrument, shall institute his suit therefor not later than 10 years next after the date when such instrument has been actually recorded in the office of the clerk of the chancery court of the county in which such real estate is situated and not afterwards:

- (1) where it has not been signed by the proper officer of any corporation;
- (2) where the corporate seal of the corporation has not been impressed on such instrument;

- (3) where the record does not show such corporate seal;

- (4) because the record does not show authority therefor by the board of directors and stockholders (or either of them) of a corporation;

- (5) where such instrument was executed and delivered by a corporation which had been dissolved or whose charter had expired, or whose corporate franchise had been cancelled, withdrawn or forfeited;

- (6) where the executor, administrator, guardian, assignee, receiver, master in chancery, agent or trustee, or other agency making such instrument, signed or acknowledged the same individually instead of in his representative or official capacity;

- (7) where such instrument is executed by a trustee without record of judicial or other ascertainment of the authority of such trustee or of the verity of the facts therein recited;

- (8) where the officer taking the acknowledgment of such instrument having an official seal did not affix the same to the certificate of acknowledgment;

- (9) where the notarial seal is not shown of record;

- (10) where the wording of the consideration may or might create an implied lien in favor of the grantor (by this is not meant an express vendor's lien retained).

If, at the time at which the right of any person to bring an action for the recovery of land because of any such defects, shall have first accrued, such persons shall have been under the disability of infancy or unsoundness of



mind, then such person or the person claiming through him, may, notwithstanding that the period of limitations hereinbefore provided for shall have expired, bring an action to recover the land at any time within the period of limitations provided herein next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability no time to bring an action to recover the land beyond the period of limitations provided herein next after the time at which such persons shall have died, shall be allowed by reason of the disability of any other person. Moreover, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

This section shall not, however, apply to forged instruments.

**SOURCES:** Codes, 1942, §§ 712, 714; Laws, 1942, ch. 300.

**Cross References** — Proceedings to confirm title to land, see §§ 11-17-1 to 11-17-37.

Proceedings for unlawful entry and detainer subsequent to sales for unpaid taxes, see §§ 11-25-3, 11-25-103.

Form of conveyance at tax sales, see § 27-45-23.

## JUDICIAL DECISIONS

1. In general.

1. In general.

### 1. In general.

#### 1. In general.

Mortgagor's claims that an assignee of a mortgage failed to conduct a foreclosure sale by public outcry in compliance with the deed of trust and that the 10-year statute of limitations for defective instru-

ments under Miss. Code Ann. § 15-1-11 applied could not be resolved as the record did not contain the substituted trustee's deed. *Tenn. Props. Inc. v. Gillentine*, 66 So. 3d 695 (Miss. Ct. App. 2011).

Section 15-1-11 was inapplicable to an action for recovery of land based on fraud rather than a defect in an instrument. *Greenlee v. Mitchell*, 607 So. 2d 97 (Miss. 1992).

## RESEARCH REFERENCES

**ALR.** Res judicata as affected by limitation of jurisdiction of court which rendered judgment. 83 A.L.R.2d 977.

Appointment of guardian for incompe-

tent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

## § 15-1-13. Ten years' adverse possession gives title; exceptions.

(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual

occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

(2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (3); 1857, ch. 57, art. 3; 1871, § 2149; 1880, § 2668; 1892, § 2734; 1906, § 3094; Hemingway's 1917, § 2458; 1930, § 2287; 1942, § 711; Laws, 1998, ch. 504, § 1, eff from and after July 1, 1998, and shall apply to claims arising on or after July 1, 1998.

**Cross References** — Powers and duties of Secretary of State, see § 7-11-11.

Bill in chancery to confirm and quiet title, see § 11-17-29.

Suits for ejectment, see §§ 11-19-1 through 11-19-105.

Recovery by land commissioner of public lands adversely held, see § 29-1-19.

Adverse possession of sixteenth sections or lieu lands, see § 29-3-7.

Effect on deed of adverse possession, see § 89-1-1.

Necessity of writing to convey land, see § 89-1-3.

## JUDICIAL DECISIONS

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### 1. Possession in general.

In dispute among a brother, a sister-in-law, and another brother who was the husband of the sister-in-law, the chancery court did not err in its decision that use of 2.6 acres by one of the brothers was permissive, the permission was never termi-

nated, and the use never became adverse. *Cleveland v. Killen*, 966 So. 2d 848 (Miss. Ct. App. 2007).

Award of two properties to adverse possessors by adverse possession was proper where their occupancy was more than sporadic or intermittent and was easily seen by the true owners. *Buford v. Logue*, 832 So. 2d 594 (Miss. Ct. App. 2002).

Heirs at law did not establish title to a disputed 40-acre tract of land by adverse possession as the possessory acts relied upon by the would be adverse possessors were insufficient to place the record title holder on notice that the lands were under an adverse claim of ownership; while each element of adverse possession was ultimately shown over a 60-year period, the heirs at law failed to prove that all of the elements to claim the property by adverse possession during any continuous 10-year period, as was required under Miss. Code Ann. 15-1-13. *Cotton v. Cuba Timber Co.*, 825 So. 2d 669 (Miss. Ct. App. 2002).

In order to show adverse possession, a party must show possession, which is open notorious and visible, hostile, under claim of ownership, exclusive, peaceful, and continuous and uninterrupted for a period of 10 years. The existence of a fence around property for a period of at least 55 years offers a substantial basis for establishing adverse possession. *Roy v. Kayser*, 501 So. 2d 1110 (Miss. 1987).

In an action to quiet title, the chancellor was justified in rejecting the permissive use theory, where plaintiff, claiming ownership against an adverse possessor, constructed a fence which he thereafter regarded as the boundary line of his property, operated his dairy business only on the property to the west of the fence he had constructed, pointed out the fence line to a surveyor as the western boundary of his property, and mortgaged all three tracts of his property on three separate occasions and none of the descriptions contained in those deeds of trust included the property claimed by the adverse possessor; thus, the chancellor was not manifestly wrong in finding that the property had been adversely possessed for the period prescribed in § 15-1-13. *Hewlett v. Henderson*, 431 So. 2d 449 (Miss. 1983).

Ten years' possession by purchaser on foreclosure of trust deed and successors

held, notwithstanding deed on foreclosure was not given, to give title as against grantor of trust deed. *American Petrofina, Inc. v. Warren*, 247 Miss. 552, 156 So. 2d 729 (1963).

Where there has been a severance of minerals by an adverse possessor, the continued adverse possession of the surface by the severor or severees inures to the benefit of the severed mineral estate as against a true owner. *Carlisle v. Federal Land Bank*, 217 Miss. 289, 64 So. 2d 142 (1953).

In a proceeding by alleged realty owners to be declared true owners of certain realty, where road running through the land in question has been maintained for twelve years or more, and the road has been regarded as a public one and traveled by many persons, a decree enjoining realty possessors from using the road was erroneous, despite the fact that evidence was insufficient to establish claim of ownership of realty by adverse possession. *Ball v. Martin*, 217 Miss. 221, 63 So. 2d 833 (1953).

Purpose and intent of §§ 709 and 710, Code of 1942, and this section [Code 1942, § 711] is to guarantee good title to one purchasing land in good faith from another, where such other went into possession under recorded deed, valid on its face, and continued in uninterrupted possession for period of 31 years or more. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Save as to easements, licenses or mere equities, abandonment is not effective to divest title to real estate, and fee simple titles are lost only by estoppel or by adverse possession or by maintainable tax sale. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Statute (Laws 1934, ch 250) providing that all mortgagors of real estate located within the state who might have the right to set aside any title to such real estate by reason of the neglect of any trustee to insert it in a notice of sale of such real estate, the name of said mortgagor, should commence suit within 12 months from the passage of such act, and upon the failure of such mortgagor or other person to commence suit within such time, the right to bring such suit, and the remedy to enforce



such right of action should be deemed thereafter to be completely extinguished, if applied so as to restrict the application of the general ten-year statute, made applicable by provision of statute (Code 1942, § 888), regulating the sale of lands under mortgages and deeds of trust, was not invalid as being an impairment of contract or as class or private legislation, since the right to sue is distinct from the right sought to be enforced and is remedial in character. *Barbour v. Williams*, 196 Miss. 409, 17 So. 2d 604 (1944).

This section [Code 1942, § 711] does not require an enclosure as an essential to adverse possession. *Snowden & McSweeney Co. v. Hanley*, 195 Miss. 682, 16 So. 2d 24 (1943).

A county taking a fifty-foot right of way about twenty-six miles long and constructing a concrete sea wall on the south fifteen feet thereof and an earthen fill on the remaining thirty-five feet acquired title by adverse possession under the ten-year statute. *Henritzy v. Harrison County*, 180 Miss. 675, 178 So. 322 (1938).

Mere claim of title unaccompanied by adverse possession will not bar true owner. *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660 (1914).

Where adverse occupant conveyed land to another but shortly thereafter resumed possession, sale being verbally rescinded, there was no break in adverse possession so as to render it unavailing against one claiming under verbally rescinded title of vendee. *Southern Pine Co. v. Pigott*, 93 Miss. 281, 47 So. 381 (1908).

Adverse possession for 10 years will defeat suit to set aside occupant's deed on ground it was executed to defeat creditors. *Gordon v. Anderson*, 90 Miss. 677, 44 So. 67 (1907).

A mere scrambling possession is not sufficient under this section [Code 1942, § 711]. *Mitchell v. Bond* (1904) 84 Miss 72, 36 So 148. *Cohn v. Smith*, 94 Miss. 517, 49 So. 611 (1909); *Mitchell v. Bond*, 84 Miss. 72, 36 So. 148 (1904).

## 2. —Nature of possession, generally.

In an action to quiet title on the basis of adverse possession, plaintiffs' predecessor in title held peaceful occupation of the land because there was no evidence establishing that he and defendants ever had

any conflict regarding use or ownership of the land at issue. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

In an action to quiet title on the basis of adverse possession, the possessory acts of plaintiffs' predecessor in title in bushhogging a field road, leasing the property to others, walking and driving on the road, and using the field road for all farming operations for 50 years were sufficient to establish title by adverse possession where defendants' use of the roadway was scant at best. It was immaterial that the predecessor in title granted an easement on the property, as possession could be exclusive notwithstanding the land being subject to rights that are no more than mere easements. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

In an action to quiet title on the basis of adverse possession, the possessory acts of plaintiffs' predecessor in title in bushhogging a field road, leasing the property to others, walking and driving on the road, and using the field road for all farming operations were sufficient to establish that the use was open, notorious, and visible. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

In an action to quiet title on the basis of adverse possession, the possessory acts of plaintiffs' predecessor in title in bushhogging a field road, leasing the property to others, and walking and driving on the road were sufficient to establish the actual or hostile element of adverse possession. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

In an action to quiet title on the basis of adverse possession, plaintiffs' predecessor in title asserted a claim of ownership by erecting a fence that limited use of the field road and established a claim of right through planting and harvesting trees, leasing the land to others, and bushhogging the field road continuously. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct.

App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

Lawyer admitted that in 1971, he thought his new building had been built on the adjacent property owner's lot. He then set out in a deliberate attempt to adversely possess the 17 foot strip of land belonging to the out-of-state property owner, by building a fence, quitclaiming the property to his wife, and vice versa, and utilizing a false survey, before finally contacting the property owner in 1998 regarding his claim of adverse possession; because the lawyer knew he did not own the strip he had no claim of ownership at the beginning of the statutory period and, thus, he could not gain title to the property through adverse possession. *Blackburn v. Wong*, 904 So. 2d 134 (Miss. 2004).

Award of two properties to adverse possessors by adverse possession was proper where their occupancy was more than sporadic or intermittent and was easily seen by the true owners. *Buford v. Logue*, 832 So. 2d 594 (Miss. Ct. App. 2002).

The character of the land determines the type of possession necessary to acquire title by adverse possession. *Holliman v. Charles L. Cherry & Assocs.*, 569 So. 2d 1139 (Miss. 1990).

Where an occupant of land in good faith, though mistakenly, thinks the land lies within the calls of his own deed, when in fact it actually lies within the calls of his adversary's deed, he acquires title to that land by adverse possession for statutory period. *Alexander v. Hyland*, 214 Miss. 348, 58 So. 2d 826 (1952).

It is the rule that less notorious and obvious acts upon the land are essential to vest title in what are known as wild lands than lands suitable to occupancy by residing thereon and putting them to husbandry and farming. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

To acquire title by adverse possession, occupancy must be hostile from the inception of the period claimed, and entry upon land under grant of permissive use is not adverse or hostile to owner. *Eddy v. Clayton*, 44 So. 2d 395 (Miss. 1950).

Possession of the mortgagee is not considered hostile to the interest of a mortgagor during the continuance of the rela-

tionship of mortgagor and mortgagee. *Heidelberg v. Duckworth*, 206 Miss. 388, 40 So. 2d 179 (1949).

No adverse user can arise from a use permissive in its inception until a distinct and positive assertion of a right hostile to the owner had been brought home to him. *Williams v. Patterson*, 198 Miss. 120, 21 So. 2d 477 (1945).

Possession attributable to an easement will not be regarded as adverse to the fee owner until there is notice of a hostile claim to the fee. *Williams v. Patterson*, 198 Miss. 120, 21 So. 2d 477 (1945).

The character and type of "adverse possession" required under Code 1942, § 717, limiting the time for attacking validity of tax sale to the state, is that pertaining to ten years adverse possession, and not that under Code 1942, § 716 respecting three years actual occupation under a tax title. *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

When a fence, or a hedge-row, or the like, is relied upon to delineate the boundary of an adverse claim, the applicable rule is whether the enclosure, like other acts of possession, is sufficient to fly the flag over the land, and put the true owner upon notice that his land is held under an adverse claim of ownership. *Snowden & McSweeney Co. v. Hanley*, 195 Miss. 682, 16 So. 2d 24 (1943).

While, under the ten-year adverse possession statute one may acquire title to land without actually occupying it, either himself or by tenant, but by merely cultivating, pasturing, cutting and selling timber, and other acts of ownership and control over the same, under the three-year statute it is required that there be actual occupancy for three years, and not the mere exercise of acts of ownership and control such as would give title by adverse possession without actual occupation. *Smith v. Anderson*, 193 Miss. 161, 8 So. 2d 251 (1942).

In ejectment, instruction that if defendant's occupancy and claim of title had been questioned or disputed defendant could not have verdict held erroneous as injecting element not required by adverse possession statute. *May v. Culpepper*, 177 Miss. 811, 172 So. 336 (1937).

Uninterrupted possession of land for statutory period will not vest title unless



open, notorious, and exclusive. *Staton v. Henry*, 130 Miss. 372, 94 So. 237 (1922).

Possession must be adverse. *Jackson Naval Stores Co. v. Tootle*, 96 Miss. 486, 51 So. 801 (1910).

A hostile, actual, open and notorious, exclusive and continuous occupancy for the statutory period is essential to constitute effective adverse possession. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1905).

A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1905).

### 3. — —Separate estate in minerals.

The prior owner of a tract of land did not acquire ownership of a disputed one-quarter mineral interest by adverse possession where he had entered into possession of the tract believing that he only owned one-quarter of the minerals and had made statements over the years to that effect and where he had admitted in a settlement agreement that a mutual mistake had occurred when he acquired the land and that he had never had actual or constructive possession of the disputed mineral interest. *Florida Gas Exploration Co. v. Searcy*, 385 So. 2d 1293 (Miss. 1980).

Adverse possession of the surface without active production and appropriation of materials, is not adverse possession of severed mineral rights. *Moffett v. International Paper Co.*, 243 Miss. 562, 139 So. 2d 655 (1962).

After title to the surface estate has been severed from title to the underlying mineral estate, title to the minerals cannot be acquired by adverse possession of the surface alone. *Huddleston v. Peel*, 238 Miss. 798, 119 So. 2d 921 (1960), error overruled, 238 Miss. 803, 120 So. 2d 776 (1960).

Adverse possession of the surface will not operate as an adverse possession of a separated estate in the minerals. *Lee v. Lee*, 236 Miss. 260, 109 So. 2d 870 (1959).

Possession of surface is not adverse to ownership of minerals. *Aultman v. Kelly*, 236 Miss. 1, 109 So. 2d 344 (1959).

Where minerals had been severed from the surface and defendants, claiming under a color of title of a void tax deed,

although exercising acts of ownership of which the surface was susceptible, had never taken actual possession of any of the minerals, they did not acquire rights to the minerals by adverse possession, so that plaintiffs who held mineral rights to the land through inheritance from the grantor of the surface rights did not lose their rights to the minerals by limitations or laches. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

Where grantor did not sign a deed to the bank and where later the bank conveyed surface and one-half mineral interest to grantee but the bank reserved one-half mineral interest in the possession of bank and possession was open, continuous and adverse more than ten years, this possession of the grantee inured to the benefit of the bank as against heirs of original grantor and the bank had good title to the one-half mineral interest reserve. *Carlisle v. Federal Land Bank*, 217 Miss. 289, 64 So. 2d 142 (1953).

### 4. — —Particular cases.

Award of title to a disputed tract of land to the adjoining landowners by virtue of adverse possession proper, in part because evidence that those landowners had constructed a barbed-wire fence encompassing the disputed property some 60 years ago was compelling evidence of adverse possession; the landowners had also planted crops and continually harvested timber. *Apperson v. White*, 950 So. 2d 1113 (Miss. Ct. App. 2007).

If a public road runs through the property of one and deadends on the property of another, and for 10 years the latter landowner (and persons acting on his behalf and with his permission) are the only ones to use the road, no abandonment occurs. It is not necessary that interlopers or sightseers or persons without any ownership interest or business on the latter's property use the road, for the owner of the land on whose property the road deadends is, as much as any other, a member of the general public, and as able in law to interrupt the period of prescription. *McNeely v. Jacks*, 526 So. 2d 541 (Miss. 1988).

Chancellor's order confirming and quieting title in landowner was proper where landowner's mother had claimed disputed



property from 1945 until she deeded it to landowner in 1973; use of this property was exclusive and peaceful, continuous for 41 years, actual, open, and notorious, and under claim of right; evidence showed that disputed property was under fence for purpose of grazing cows from 1942 until mid-1960's, and fence remained in repair well enough to keep cattle until at least 1972; it does not matter whether land claimed under adverse possession is within "call of the title deeds," or is in same quarter section or section as land lies which is described in deed; since requirements of adverse possession had been established by fence around disputed property and continued use of property for more than 40 years, once title ripened by adverse possession it was not necessary that fence be standing, or even in existence, when suit was filed. *Pieper v. Pontiff*, 513 So. 2d 591 (Miss. 1987).

Acquisition of one-half interest in property by adverse possession was not established where former wife's occupancy of premises was not exclusive, being shared with husband; interest of former wife in property was at best homestead interest, her legal relationship with husband regarding title being analogous to that of cotenants, which would have required effective communication of intent and legal ouster of husband from one-half interest in question, neither of which was shown. *Davis v. Davis*, 508 So. 2d 1062 (Miss. 1987).

Grantor does not reacquire title by adverse possession as against grantee where although, subsequent to conveyance to grantee, grantor keeps land conveyed under fence and marked with posted signs, grantor's use is with permission of grantee. *Johnson v. Black*, 469 So. 2d 88 (Miss. 1985).

Three years actual occupancy by the complainants' predecessor was sufficient to begin the running of the statute, and possession was not lost by the adverse claimant when he moved from the land but was continued by his payment of taxes each year either by himself or his descendants, and where the defendants had only slight and sporadic possession of the land and did not protest payments of taxes or possession, title vested in the complain-

ants by the continuous adverse possession subsequent to the ouster of the cotenants. *Hardy v. Lynch*, 258 So. 2d 414 (Miss. 1972).

While it was undisputed that a person claiming title to a three-acre tract was in continuous, open, and exclusive possession of it for more than 40 years, having fenced it during that time and used it as a garden and for fruit trees, and where he testified that he entered possession without the permission of the corporate landowner, and the landowner's chairman, although invited to say that he gave the possessor permission to enter the land, declined to say so, title by adverse possession was established, and conversations taking place years after the statutory period of 10 years had elapsed between the chairman and the possessor about the possible buying or swapping some of the possessor's land for some of the corporation's land, were insufficient to prevent adverse possession on the theory of permissive use. *McSwain v. B.M. Stevens Co.*, 247 So. 2d 707 (Miss. 1971).

Land used as a parking area could not be the subject of a right of occupancy by adverse possession where the evidence was clear that, while the plaintiff's tenants used this parking area from time to time, the tenants of the defendant and its predecessor in title also used the area for parking, so that the use was joint and not exclusive. *Fant v. Standard Oil Co.*, 247 So. 2d 132 (Miss. 1971).

A son of intestate could not claim title to land by adverse possession against a widow who had not claimed any interest in the property because of mistaken idea of invalidity of her marriage and where the son kept the property under the idea that his stepmother had no interest. *Bonds v. Bonds*, 226 Miss. 348, 84 So. 2d 397 (1956).

Where claimant executed a lease on lot 1 of block 4 of an addition, the lease did not constitute adverse possession of lot 8 of block 3 of addition, and adverse possession does not begin to run until there was actual occupancy of lot 8. *Caillouet v. Martin*, 210 Miss. 632, 50 So. 2d 351 (1951).

In an action by the record owner of land to remove defendant's claim thereto as a

cloud upon its title, wherein defendant by cross bill asserted title to the land by adverse possession, the burden was upon the defendant to show that he was vested with title by adverse possession to the disputed area, and to do so it was necessary for him to show that he alone, or he and his predecessors in title together, had had actual open, hostile, peaceable, exclusive, continuous possession of the land for ten years, under claim of ownership thereto. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

Only statute which purchaser at void tax sale could invoke in owner's suit was the 10-year statute of adverse possession, and this only as to land actually occupied by the purchaser and not to the calls of the deed. *Meyerkort v. Warrington*, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

Where bank and predecessors had open, peaceable possession of land for forty-five years, exercising ordinary acts of ownership and paying taxes, conclusive presumption obtained that bank had perfect title, and it could not be held liable to subsequent purchaser under warranty deed for expense of procuring new patent from State, as quitclaim deed, because forfeited tax land patents of predecessor of bank were void. *Presley v. Haynes*, 182 Miss. 44, 180 So. 71 (1938).

Where there has been open, continuous occupancy, possession and use of land for more than forty-five years under void forfeited tax land patent, State receiving taxes from possessor, title will be deemed as perfect as under ten-year statute against private owner. *Presley v. Haynes*, 182 Miss. 44, 180 So. 71 (1938).

Plaintiff holding lands for statutory period under belief that it was within the calls of his deed obtained title by adverse possession, where he was in actual open, continuous, exclusive possession for such period. *Schuler v. McGee*, 127 Miss. 873, 90 So. 713 (1922).

Merely cutting rails, boards, etc., and posting land against trespassers is insufficient to establish adverse possession. *A.W. Stevens Lumber Co. v. Hughes*, 38 So. 769 (Miss. 1905).

## 5. —Payment of taxes.

Evidence that the father of adverse claimant, with the permission of the then owner of the land, had built a fence around the disputed acreage in 1907, while title thereto was in the State, and for some time afterwards the fence was not kept in good repair so that neighborhood cattle grazed at will thereon after crops were gathered, and claimant had failed to have the property assessed for taxes, did not show exclusive possession in the adverse claimant as against the rights of purchaser under a valid tax sale. *Harmon v. Buckwalter*, 233 Miss. 761, 102 So. 2d 895 (1958).

As a defense to an action by a successor in title to redeem encumbered land from the holder of a trust deed who had purportedly purchased the encumbered land at an invalid trustee's foreclosure sale, and had taken possession of the land and paid the taxes thereon for 24 years, the holder of the trust deed could rely on either this section [Code 1942, § 711] or Code 1942, § 718, as a mortgagee in possession after a condition broken, notwithstanding Code 1942, § 888, providing in part that an error in the mode of sale such as makes a sale void would not be cured by any statute of limitations, except after the 10-year statute of adverse possession. *Gulfport Farm & Pasture Co. v. Hancock Bank*, 232 Miss. 289, 98 So. 2d 862 (1957), appeal dismissed, cert. denied, 358 U.S. 67, 79 S. Ct. 122, 3 L. Ed. 2d 106 (1958).

Even if a tax deed had been defective or void for failure to advertise the tax sale or to give the land owner notice as to redemption, it would still have operated as color of title and formed a sufficient basis upon which adverse possession would ripen into title, and since defendants had admittedly deprived the complainant of possession of land for considerably more than ten years prior to the complainant's action for confirmation of his title, the complainant could not prevail. *Trotter v. Roper*, 229 Miss. 784, 92 So. 2d 230 (1957).

Where minerals had been severed from the surface, and defendants, claiming under a color of title of a void tax deed, although exercising acts of ownership of which the surface was susceptible, had never taken actual possession of any of



the minerals, they did not acquire rights to the minerals by adverse possession, so that plaintiffs who held mineral rights to the land through inheritance from the grantor of the surface rights did not lose their rights to the minerals by limitations or laches. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

Where owner inquired from time to time as to whether taxes were being paid, mortgagee in possession had the duty to inform the owner that he was claiming the land as his own. *Heidelberg v. Duckworth*, 206 Miss. 388, 40 So. 2d 179 (1949).

Where there has been open, continuous occupancy, possession and use of land for more than forty-five years under void forfeited tax land patent, State receiving taxes from possessor, title will be deemed as perfect as under ten-year statute against private owner. *Presley v. Haynes*, 182 Miss. 44, 180 So. 71 (1938).

One holding land for more than 10 years is entitled to ejectment against one taking possession on ground his grantors paid taxes thereon. *Moore v. Neill*, 117 Miss. 862, 78 So. 774 (1918).

Payment of taxes will not render defective possession sufficient to ripen into title; at most mere evidence of claim of ownership. *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660 (1914).

With respect to wild land not susceptible of occupancy, improvement or cultivation, paying taxes for a long term of years, the former owner neither paying nor asserting any claim, using the timber with the knowledge of the former owner, placing mortgages of record and offering the land for sale, evidence adverse possession. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1905).

#### 6. —Wild land.

Neither actual occupation, cultivation, nor residence are necessary to constitute actual possession when the property is so situated as not to admit any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

With respect to wild land not susceptible of occupancy, improvement or cultivation, paying taxes for a long term of years, the former owner neither paying nor asserting any claim, using the timber with the knowledge of the former owner, placing mortgages of record and offering the land for sale, evidence adverse possession. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1905).

Where the land will not admit of permanent useful improvement and the continued claim of possession is evidenced by public acts of ownership, actual occupation, cultivation and residence are unnecessary. *McCaughn v. Young*, 85 Miss. 277, 37 So. 839 (1905).

#### 7. Color of title, generally.

Where a party enters into possession of land under color of title, he is not considered as the mere disseizor, and confined to the part of premises in his actual occupancy, but his claim extends to all the lands embraced in the deed which he claims. *Smith v. Cook*, 213 Miss. 876, 58 So. 2d 27 (1952).

Color of title, coupled with actual possession of a part of the land constitutes constructive possession of the whole, and the adverse possession runs to the whole tract. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).

Where one enters without color of title, his title by adverse possession, if any, runs only to such part of the land as was actually held by him in possession or enclosed or otherwise actually and continuously occupied by him for the statutory period of ten years. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).

Adverse claimants and predecessors in title, who were without color of title by parol gift, deed or other writing to any part of the disputed tract, could claim title by adverse possession to such portion only as was actually and continuously used, cultivated or occupied, adversely to the owner of the record title. *Kersh v. Lyons*, 195 Miss. 598, 15 So. 2d 768 (1943).

Color of title to whole tract coupled with actual possession of part constitutes constructive possession of whole. *Native Lumber Co. v. Elmer*, 117 Miss. 720, 78 So. 703 (1918).



Color of title cannot be created by parol grant so as to establish adverse possession; parol color of title applies only in favor of vendee against vendor and persons claiming under him. *Brooks-Scanlon Co. v. Childs*, 113 Miss. 246, 74 So. 147, 2 A.L.R. 1453 (1917).

Without color of title adverse possession gives title only to land actually and continuously occupied. *Dedeaux v. Bayou Delisle Lumber Co.*, 112 Miss. 325, 73 So. 53 (1916).

#### 8.—What constitutes.

A warranty deed to the right of redemption and the forfeited tax land patent issued by the state, constituted a color of title. *Jones v. Jones*, 226 Miss. 378, 84 So. 2d 414 (1956).

Generally, tax deed gives color of title although it is invalid or even where absolutely void, providing description of the property is legally sufficient. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Entry into possession of land under a parol gift from another, who had no title by record or otherwise, does not constitute color of title. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).

Instrument containing granting clause purporting to "convey and warrant at my death" to a named person in consideration of love and affection constituted sufficient color of title to support claim of adverse possession, regardless of its legal character as testamentary or otherwise. *Downing v. Starnes*, 35 So. 2d 536 (Miss. 1948).

A trustee's deed executed to the purchaser at foreclosure sale is sufficient to constitute color of title even though the trust deed is foreclosed by the original trustee named after the appointment of a substituted trustee as a matter of record. *Douglas v. Skelly Oil Co.*, 201 Miss. 23, 28 So. 2d 227 (1946).

Regardless of whether a wife may be permitted to acquire, as against her husband, title to the homestead by the mere assertion of title or other act in pais, it is settled that, where the wife holds the homestead under color of title arising from a recorded conveyance in her name, and evinces her claim by acts of ownership and control, all to the knowledge of the husband, she may acquire complete title thereto by adverse possession for the stat-

utory period. *Lincoln v. Mills*, 191 Miss. 512, 2 So. 2d 809 (1941), error overruled, 191 Miss. 522, 3 So. 2d 835 (1941).

Void tax deed good color of title on which to base adverse possession. *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466 (1911).

#### 9.—Particular cases.

Former wife cannot claim title by adverse possession where no deed purports to convey any interest in property to her, although such claim would be recognized where one enters into possession under mistaken belief that land in question lies within calls of deed. *Davis v. Davis*, 508 So. 2d 1062 (Miss. 1987).

Widow's act in recording deed, valid on its face, to her from purchaser of her deceased husband's land at foreclosure sale, gave notice to world that she claimed to be owner of land and that act was act of ouster as against anyone else claiming the land, including her six children, whose ages ranged from 1 to 12 years, and warranty deed by her after she had been in uninterrupted possession under this recorded deed for more than 34 years conveyed good title. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

The execution and recording of a warranty deed by several cotenants of land to a stranger to the title set in motion an adverse claim against a cotenant who had not signed the deed, which was thereupon made available to the grantee, who, by implementing such claim by adverse possession through himself and his successors in title for a period beyond the statutory limitation, matured the disseisin into complete ownership. *Davis v. Gulf Ref. Co.*, 202 Miss. 808, 32 So. 2d 133 (1947), error overruled, 202 Miss. 817, 34 So. 2d 731 (1948).

The fact that another occupies land for several months as a tenant at will of one having color of title, pending execution of a lease between them, is not a break in the character of adverse possession claimed by the holder of color of title. *Douglas v. Skelly Oil Co.*, 201 Miss. 23, 28 So. 2d 227 (1946).

#### 10. Parol conveyance.

Claim of title to land under parol gift, accompanied by entry and adverse hold-

ing for 10 years, ripens into good title. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

For parol gift of land, accompanied by entry and adverse possession, to ripen into good title, the clearest and most satisfactory evidence is required as to fact of gift, identity of land, and exclusiveness of possession. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

Execution of oil and gas deed by widow of one claiming land under parol gift is evidence of ouster, and, combined with payment of taxes and acts of ownership over land thenceforth, made issue as to whether or not title ripened into good title. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

It is settled law in this state that a parol gift of land where the donee goes into possession, accompanied by 10 years' adverse possession, will vest the title in the donee. *Elmer v. Holmes*, 189 Miss. 785, 199 So. 84 (1940).

A pleading which shows a parol exchange of lands, followed by continuous actual adverse possession and claim of ownership for more than ten years sufficiently manifests title against all persons not under disability. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910 (1902).

Adverse possession, though under a parol gift, if it continue for ten years, confers a perfect title. *Davis v. Davis*, 68 Miss. 478, 10 So. 70 (1891).

### 11. Tax sales.

Title ad ownership of land does not depend upon the validity or invalidity of the tax sales and the Forfeited Tax Land Patents which were subsequently acquired since if the sales were legally and validly made then the titles that are derived through the Forfeited Tax Land Patents are good under § 15-1-15 and, on the other hand, if one or more of the tax sales was invalid or illegal then title to the lands in question remained in individuals and thereby was subject to acquisition by purchasers through adverse possession under § 15-1-13. *United States v. 613.86 Acres of Land*, 507 F. Supp. 327 (N.D. Miss. 1980).

Decree in a confirmation suit adjudicating the validity of a patent from the state to tax forfeited land, which did not pur-

port to affect claims of defendant in a subsequent quiet title action either by adverse possession or under a quitclaim deed from the owner at the time of the tax sale, does not preclude such defendant from asserting adverse possession or invalidity of the tax sale. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

Claimant acquired title under § 717, Code of 1942, the two-year tax statute of limitations, where there was an invalid tax sale to the state of three parcels of land which were adjoining and constituted and should have been sold as one tract, but where the claimant exercised ownership over the property, paid taxes, gave a turpentine lease under which visible acts upon trees performed by the lessee, and where the claimant developed a program of reforestation. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

Sale of land to the state for taxes does not break the continuity of adverse possession if the tax sale is redeemed within the time required by law. *Douglas v. Skelly Oil Co.*, 201 Miss. 23, 28 So. 2d 227 (1946).

Title by adverse possession disclosed against original owner of land disappeared when the land was sold for taxes under which the purchaser obtained the land free from the claim of adverse possession. *Hall v. State*, 17 So. 2d 325 (Miss. 1944).

### 12. Property held adversely.

In a suit to quiet title against property owners who held title to the disputed land, the adjoining landowners acquired title through adverse possession where they inherited land from their uncle, the uncle had long believed that the northern property line of his land was established by a fence line, and the uncle had openly and conspicuously used the property south of that fence line under a claim of ownership for more than 10 years. The uncle's mistaken believe that the fence was the northern boundary line of the property was sufficient to establish adverse possession, and there was substantial evidence to support the chancellor's finding that the uncle claimed ownership beginning in 1952 when he acquired the



property. *Webb v. Drewrey*, 4 So. 3d 1078 (Miss. Ct. App. 2009).

Appellate court affirmed an award of an easement to the property owners pursuant to Miss. Code Ann. § 15-1-13 as the property owners established that they had used the gravel road that crossed the landowners' property from 1956 to 2002, that they made improvements on the land, and the use of the land was hostile. *Griffin v. Brian Dev. Co.*, 938 So. 2d 337 (Miss. Ct. App. 2006).

Finding in favor of a property owner in his action seeking to enjoin another from trespassing on the property owner's property was appropriate because he owned the property as the record title holder; alternatively, he had met the elements of adverse possession, including claiming ownership for a period well in excess of the 10-year period for adverse possession contained in Miss. Code Ann. § 15-1-13(1). *Wicker v. Harvey*, 937 So. 2d 983 (Miss. Ct. App. 2006).

Plaintiff's possession of land was adverse, notwithstanding defendants' assertion that they were aware that the plaintiff was occupying and farming the land but, because she was a member of the family, they had never complained and permitted her to continue; the plaintiff never requested permission to use the land, she and her former husband farmed it and used it as pasture land, they cut timber from a portion of the disputed land and kept all the proceeds, and the defendants never sought any of the proceeds, and the plaintiff also leased the property and received all rental income, and again, the defendants never complained nor did they seek a portion of the rents. *Peagler v. Measells*, 743 So. 2d 389 (Miss. Ct. App. 1999).

A church was bound by a covenant in a deed giving it property for as long as a church should be maintained there and could not obtain title by adverse possession of the land used by a church but located in a quarter section not set forth in the deed, where the deed to the acreage upon which the church was built described the wrong quarter section but referred specifically to other land of the grantor. *Wortman & Mann Ins. Agency v. Ivey*, 222 So. 2d 137 (Miss. 1969).

So long as a grantee occupies property by virtue of a covenant in a deed, his possession is not adverse to the grantor, and until the grantee brings to the attention of the landowner some notice that the grantee claims the land in a method hostile and adverse to the covenant, adverse possession is not established. *Wortman & Mann Ins. Agency v. Ivey*, 222 So. 2d 137 (Miss. 1969).

A reservation of timber in a conveyance of land does not prevent persons claiming under foreclosure of a deed of trust executed by the grantee without excepting the timber, and under a tax sale, from acquiring title to the timber by adverse possession. *Manar v. Smith*, 236 Miss. 192, 109 So. 2d 652 (1959).

Even though it was assumed that a lumber company, which acquired a warranty deed to land from the father and brother in which the children had an interest, became a tenant in common with the children, evidence showing that the lumber company upon acquiring the deed went into immediate possession of the land enclosed it with a fence, had land assessed and paid taxes thereon, had a caretaker to look after it, cut timber thereon, and claimed the land openly as its own, and the children for at least 18 years after they became of age came back and forth to their father's old homestead just across the highway from the land, indicated that the children knew that the lumber company was in actual possession of the land and claiming full title thereto for a longer period than ten years. *Avera v. Turner Lumber Co.*, 230 Miss. 123, 92 So. 2d 458 (1957).

In order to show adverse possession, there is a necessity for unequivocal acts showing an occupancy which is actual, continuous, and hostile, especially where such occupancy is by a member of a family against another. *Coleman v. L. & M. Land & Mineral Corp.*, 54 So. 2d 213 (Miss. 1951).

Person in adverse possession of land for more than ten years becomes owner of land in his possession, though not in calls of his deed. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

In suit to confirm title to land in which answer sets up ownership by defendants



of part of land by adverse possession, proof by defendants as to land adversely possessed by them is admissible and proper description thereof can be obtained by survey. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

Where the description of land sold at a tax sale did not cover all of the land on which the taxes had been levied, a purchaser from the state, who occupied the entire tract had no valid claim, as against the original owners, to that portion of the land not included in such description, and title thereto would not be lost to the original owner through any doctrine of laches short of the ten-year statute of limitations. *Johnson v. Carter*, 193 Miss. 781, 11 So. 2d 196 (1943).

Where one of the parties to an agreement for the exchange of land failed to execute a deed to the property he exchanged, but the other party and her son moved thereon, the son continuing to occupy the land thereafter for many years and until the heirs of the first mentioned party brought an action in ejectment, the statute postponing the running of limitations until after the actual or constructive knowledge of concealed fraud was inapplicable, and would be inconsistent with the ten-year statute establishing title by adverse possession, since under the latter statute knowledge of an open, notorious and adverse possession may be presumed. *Leggett v. Norman*, 192 Miss. 494, 6 So. 2d 578 (1942).

### 13. —Adjoining tract.

Where the landowners sought to remove a quitclaim deed from the record as a cloud upon their title, the quitclaim deed listed an old fence line, which was an old barbed wire fence, and the chancellor ruled in favor of landowners, the chancellor did not err in finding that the neighbors had not acquired the property by adverse possession. *Ellison v. Meek*, 820 So. 2d 730 (Miss. Ct. App. 2002).

Adverse possession was established by evidence showing possessors enjoyed complete and total possession of tract for 14 years and, during that 14 years period, the possessors maintained a fence, planted a garden, raised crops, pastured cattle and cut timber upon their holdings.

*Roy v. Kayser*, 501 So. 2d 1110 (Miss. 1987).

Witnesses' testimony as to predecessor-in-title's total dominion and control over a 4 acre tract south of a boundary-line fence established that he had acquired title to the property by adverse possession. Shows *v. Watkins*, 485 So. 2d 288 (Miss. 1986).

School's possession of land adjoining land deeded to school trustees is shown to be adverse and under claim of ownership within limitations of deed to school by evidence that it has been enclosed by wire fence and line of white-washed trees for more than fifteen years; that school children have used it for playground and basketball court; that grantor pointed this land out as being included in deed and assisted in building new school building partly on it. *Kelly v. Wilson*, 204 Miss. 56, 36 So. 2d 817 (1948).

In boundary line suit defendant's claim of adverse possession beyond line of her original tract should not be ignored. *Gillespie v. Magruder*, 92 Miss. 511, 46 So. 77 (1908).

Adverse possession for ten years of a part of an adjoining tract, though claimed under the mistaken belief that it was within the calls of his own deed, gives title. *Jones v. Gaddis*, 67 Miss. 761, 7 So. 489 (1890).

### 14. —Part of tract.

Pursuant to Miss. Code Ann. § 15-1-13(1), the neighbor's father's act of erecting a fence did not establish that the property was exclusive to the neighbor; the neighbor's act of cutting and planting pine trees on a portion of the property resulted in adverse possession, but where she did not cut or plant trees, she did not adversely possess that property. *Cook v. Robinson*, 924 So. 2d 592 (Miss. Ct. App. 2006).

A chancellor's decision that the defendants in a quiet title action failed to establish adverse possession of commercial property would be affirmed with the exception of a strip of the property on which a warehouse had been used exclusively during at least a 10-year period. *West v. Brewer*, 579 So. 2d 1261 (Miss. 1991).

Person in adverse possession of land can claim title by adverse possession to such portion only as is actually and con-

tinuously used, cultivated or occupied adversely to owner of record title. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

Where one enters land without color of title, his title by adverse possession, if any, runs only to such part of the land as was actually held by him in possession or enclosed or otherwise actually and continuously occupied by him for the statutory period of ten years. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).

If the title was void as to a part of the land conveyed, the occupation of that part to which grantee had title would not give the grantee constructive possession of other land included in deed but not owned by grantor. *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660 (1914).

Cultivation of a part of a tract and acts of ownership over the remaining unenclosed portion without hindrance for ten years gives title to all. *Gathings v. Miller*, 76 Miss. 651, 24 So. 964 (1899).

#### 15. —Railroad right of way.

Where right of way for railroad purposes only was not abandoned until railroad sold its rights therein to plaintiff within ten years of suit to confirm his title to the land covered by such right of way, predicated on adverse possession, chancery court correctly sustained demurrers to the bill. *Williams v. Patterson*, 198 Miss. 120, 21 So. 2d 477 (1945).

User of railroad right of way and cultivation as garden under claim of title gives title after 10 years. *Mobile & O.R. Co. v. Strain*, 125 Miss. 697, 88 So. 274 (1921).

Title may be obtained to part of railroad right of way not necessary to business as common carrier. *Mobile & O.R. Co. v. Strain*, 125 Miss. 697, 88 So. 274 (1921).

Running of trains over railroad held use of entire right of way in absence of inclosure by adverse claimant and adverse use. *Alabama & V. Ry. Co. v. Joseph*, 125 Miss. 454, 87 So. 421 (1921).

To defeat the easement of a railroad company in lands in its right of way the possession must be distinctly hostile, and so manifested by acts inconsistent with the occupancy of the company, as fencing, etc. *Wilmot v. Yazoo & Miss. V. Ry.*, 76 Miss. 374, 24 So. 701 (1899).

One obtaining adverse possession of a part of a railroad company's right of way and excluding the company therefrom for ten years acquires title. *Paxton v. Yazoo & Miss. V.R. Co.*, 76 Miss. 536, 24 So. 536 (1899).

#### 16. —Sixteenth section lands.

The statute of limitations does not run against the reversion in a sixteenth section during the existence of a lease thereof. *Weiler v. Monroe County*, 76 Miss. 492, 25 So. 352 (1899).

The sale in fee of sixteenth sections has never been authorized by law in this state. *Weiler v. Monroe County*, 76 Miss. 492, 25 So. 352 (1899).

#### 17. Persons entitled to claim adversely.

One who relies upon a conveyance by deed is not precluded from claiming adversely possessed land even though the land description in the deed does not include contiguous land adversely possessed by the predecessor in title. *Stallings v. Bailey*, 558 So. 2d 858 (Miss. 1990).

Levee board's claim of profit a'prendre which amounts to right of complete control of property is actually claim of title of land in fee, such that board must have complied with requirements of adverse possession, however, as board does not claim ownership to subject property, nor does board have statutory power to acquire title to land and therefore could not acquire fee title by adverse possession. *McDonald v. Board of Miss. Levee Comm'rs*, 646 F. Supp. 449 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987).

A grantor may acquire title to land by adverse possession against his grantee providing the adverse possession is in such manner as to notify the grantee of the adverse possession. *Walker v. International Paper Co.*, 230 Miss. 95, 92 So. 2d 445 (1957).

Children, whose ages ranged from 1 to 12 years at time of death of their father, who lived on land during lifetime of father and knew that after his death mother claimed it, who knew mother sold land, and who neither inquired nor discovered their interest in land until youngest child was 47 years of age, exercised such complete indifference to, and disregard of,



their rights that they should not, in equity and good conscience, be permitted to prevail over purchaser in good faith, for sufficient consideration. *Boyd v. Entrekin*, 209 Miss. 51, 45 So. 2d 848 (1950).

Possession of land by owner and mortgagor, or his grantees, during life of deed of trust, cannot form basis of claim to adverse possession by him, since mortgagor has right to retain possession of property until foreclosure sale under deed of trust. *Duncan v. Mars*, 44 So. 2d 529 (Miss. 1950).

Repeated requests made by person in possession to owner for purchase of land is answer to any contention of adverse claim, since it is an acknowledgment of superior title and claim of owner. *Eddy v. Clayton*, 44 So. 2d 395 (Miss. 1950).

Ordinarily parent cannot claim possession of land adversely to minor child but may do so where child is adult, married and living separate and apart from parent at time adverse possession begins. *Randall v. Mitchell*, 41 So. 2d 44 (Miss. 1949).

Possession by mortgagee under void deed of trust and claim of color of title under a tax deed which failed to describe the land, with subsequent possession consisting of occupancy of the premises through the person who owned the land at the time of the purported tax sale, did not sustain defendant's claim of adverse possession and owner was entitled to decree canceling such claim as cloud upon his title. *Heidelberg v. Duckworth*, 206 Miss. 388, 40 So. 2d 179 (1949).

#### 18. —Tenant.

In view of evidence showing that defendants had recognized the validity of the title of complainants' predecessors in interest and had occupied the land as tenants, the action of the chancellor in confirming title in complainants was not manifestly wrong, since such recognition by the defendants destroyed any claim of title by adverse possession prior to that time, and there was no showing of any rupture of such relationship, or notice thereof, for as much as ten years prior to the institution of the action. *Delancey v. Davis*, 229 Miss. 475, 91 So. 2d 286 (1956).

Possession by defendant as lessee of 40 acres of 120-acre tract of land involved in partition suit, did not defeat defendant's

title by adverse possession to remaining 80 acres which he purchased at partition sale. *Taylor v. Twiner*, 195 Miss. 706, 16 So. 2d 31 (1943).

Possession as a tenant is not adverse so as to give title thereby. *Lucas v. New Hebron Bank*, 181 Miss. 762, 180 So. 611 (1938).

Grantee of life tenant, holding over after death of life tenant, was not in possession adverse to remaindermen, since such holding, being at sufferance of the remaindermen was not inconsistent with the title and right to possession of the remaindermen. *Thomasson v. Kinard*, 153 Miss. 398, 121 So. 109 (1929).

Adverse possession by a tenant runs from the time the landlord receives notice that the occupancy is hostile; and a tenant is not required to yield possession and again enter the premises before the statute will run in his favor. *Greenwood v. Moore*, 79 Miss. 201, 30 So. 609 (1901).

#### 19. —Cotenants, generally.

A possession by a cotenant in common with other owners is not exclusive possession for purposes of adverse possession. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

In a suit by cotenants to cancel as a cloud on their title the claims of cotenants which were purchased at a tax sale, the plaintiffs must establish their claim under the ten-year statute, before they can avail of any alleged laches as a defense to the suit. *Smith v. Smith*, 211 Miss. 481, 52 So. 2d 1 (1951).

A claim of ownership conditioned upon the erroneous assumption that all of the cotenants were dead is not of such character as is required to vest title by adverse possession, especially as between tenants in common. *Hurst v. J.M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), error overruled 209 Miss. 381, 47 So. 2d 811.

The rule which prevents one tenant in common from purchasing an outstanding title to the common property and setting it up against his cotenant is founded upon the confidential relation that is presumed to exist between them, and has no application where the circumstances surrounding them negative any such relation, and



show that they, though in law tenants in common, are not such in fact, and are asserting hostile claims against each other with reference to the common property. *Ferguson v. Chancellor*, 206 Miss. 518, 40 So. 2d 275 (1949).

The statute does not run in favor of one claiming an undivided interest with others until there is claim of title as sole owner and possession in severalty by him or someone under whom he claims. *Jonas v. Flanniken*, 69 Miss. 577, 11 So. 319 (1892).

#### 20. — —Notice to.

Where, in an action to determine title to land, the record failed to show that two of the tenants in common had notice of the defendant cotenant's adverse claims, there was no ouster as to them, and plaintiff, claiming through them, was adjudicated to be vested with their respective interests. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Where one of the tenants in common was an out-of-state resident, and it was not shown that she knew that her cotenants were claiming to be the exclusive owners of the property, and there was nothing charging her with such notice, the cotenants did not acquire her one-eighteenth undivided interest in the property by adverse possession. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

The mere recording alone of a fee simple deed by a cotenant does not impart notice to other cotenants of an adverse claim to land by a cotenant. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

Where a purchaser of realty at a void foreclosure sale claimed title to that realty by adverse possession of a tenant, who was a tenant in common the fact that the purchaser paid taxes on the property although it is strong evidence of a claim of title, it did not suffice to give notice of the purchaser's claim to the other cotenants. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error

overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

Tenant in common cannot acquire title against cotenant without notice; recorded deed held notice to cotenant of adverse claim. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

A tenant in common out of possession is entitled to assume that a cotenant in possession holds for all cotenants, until he is given knowledge to the contrary, or the equivalent thereof, which must be shown by clear and convincing evidence. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

It is not enough that the possession to convey title should be apparently adverse but must be such with actual notice to cotenants or shown by such acts of repudiation of their claim as are equivalent to actual notice. *Hurst v. J. M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), suggestion of error overruled, 209 Miss. 389, 47 So. 2d 811 (1950).

Silence of cotenants does not estop them from asserting their interest in realty in absence of showing of actual notice of adverse possession and ouster by other cotenant and they would not lose their title by mere abandonment over an extended period. *Hurst v. J. M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), suggestion of error overruled, 209 Miss. 389, 47 So. 2d 811 (1950).

One claiming entire interest in land under recorded instrument purporting to be deed from her father, and whose brothers and sisters, with knowledge of instrument, allowed her to remain in exclusive possession under claim of title without interference for more than fifteen years, is not required, as tenant in common with brothers and sisters, to give them notice of her exclusive claim in order to acquire title by adverse possession, since brothers and sisters had in fact all the notice that was necessary. *McDonald v. Roberson*, 204 Miss. 737, 38 So. 2d 189 (1948).

#### 21. — —Ouster.

A managing cotenant, in attempting to claim the interest of other cotenants by adverse possession, has the burden of

proving ouster by clear and convincing evidence, since a confidential relationship exists between cotenants, and a cotenant who desires to terminate the relationship has a remedy of partition, or sale for division of proceeds in a proper case, and rather than trying to oust his cotenant and claim adversely, he should deal openly and forthrightly with his cotenants and avail himself of such remedy. *Kennedy v. Bryant*, 252 So. 2d 784 (Miss. 1971).

In establishing that an ouster has occurred between relative cotenants not strangers to the title, followed by the required period of adverse possession, it is not enough to show acts of hostile possession which in other cases might constitute an adverse possession against a stranger, but the possessing cotenant must show actual notice to his cotenant, and the statute of limitations does not begin to run against a cotenant not in possession until the claim of ownership of the other cotenant is brought to his attention. *Johnstone v. Johnson*, 248 So. 2d 444 (Miss. 1971).

In an action to establish that an ouster has occurred between cotenants, the activities of the complainant's brother on the property of their father from the time he came into possession, namely creating pasture land, building fences, digging ponds, and changing the course of a creek, were entirely consistent with the occupancy of a cotenant, and were in no sense notice to the complainant of adverse possession. *Johnstone v. Johnson*, 248 So. 2d 444 (Miss. 1971).

In an action brought by cotenants to confirm and establish their title to an undivided interest as cotenants in certain land as against claims of the defendant, another cotenant, who had purchased a tax title to the property, the purchasing cotenant could not claim adverse possession as against her cotenants, where there was no ouster of the cotenants such as would give them notice that her claim was adverse to their interest. *Gavin v. Hosey*, 230 So. 2d 570 (Miss. 1970).

Where, in an action to determine title to land, the record failed to show that two of the tenants in common had notice of the defendant cotenant's adverse claims, there was no ouster as to them, and plaintiff, claiming through them, was adjudi-

cated to be vested with their respective interests. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Before cotenant can effect ouster of other cotenants, ouster must have arisen from actual knowledge or by acts equivalent thereto. *Hurst v. J.M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), error overruled 209 Miss. 381, 47 So. 2d 811.

Deed from grantor, who had received conveyance of an undivided interest from one of five heirs of original patentee, of his "right, title and interest" was not sufficient assertion of complete title or domination such as to constitute constructive notice or effect an ouster of other heirs. *Hurst v. J.M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), error overruled 209 Miss. 381, 47 So. 2d 811.

Silence of cotenants does not estop them from asserting their interest in realty in absence of showing of actual notice of adverse possession and ouster by other cotenant and they would not lose their title by mere abandonment over an extended period. *Hurst v. J.M. Griffin & Sons*, 209 Miss. 381, 46 So. 2d 440 (1950), error overruled 209 Miss. 381, 47 So. 2d 811.

A recorded deed of conveyance by the purchaser at an invalid foreclosure sale to the mortgagor's widow, along with the widow's subsequent long continued possession, use and improvement of the land for over forty years and the failure of her children as tenants in common to assert any claim after attaining their majority, or to seek any accounting of rents and profits, or a partition for such a long time after their mother ceased to be a widow, constituted an ouster of the children as tenants in common and supported the mother's claim of title by adverse possession. *Alewine v. Pitcock*, 209 Miss. 362, 47 So. 2d 147 (1950).

Before one tenant in common may claim adverse possession as against his cotenant there must be an ouster of other cotenants such as will afford them notice that his claim is adverse to their interest. *Howard v. Wactor*, 41 So. 2d 259 (Miss. 1949).

Acts of ownership and continuous adverse possession for more than ten years



by purchaser at foreclosure sale during which time purchaser repaired fences, improved houses, built houses, cultivated and used land, and paid taxes, amounted to complete ouster of his alleged cotenants, who, knowing of the foreclosure, moved off premises, and such possession overcame any presumption that title was being held for benefit of cotenants. *Jones v. Hoover*, 204 Miss. 345, 37 So. 2d 490 (1948).

Mortgage by one tenant in common purporting to convey entire estate does not constitute ouster nor start running of statute against other cotenants, where possession not taken. *Scottish-American Mtg. Co. v. Bunckley*, 88 Miss. 641, 41 So. 502, 117 Am. St. R. 763 (1906).

The statute does not run in favor of a tenant in common until he has actually ousted his co-tenants, or done some act deemed by law equivalent thereto. *Bentley v. Callaghan*, 79 Miss. 302, 30 So. 709 (1901).

## 22. — —Significance of recording or filing.

The mere recording alone of a fee simple deed by a cotenant does not impart notice to other cotenants of an adverse claim to land by a cotenant. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

The mere recording alone of a fee simple deed by a cotenant does not impart notice to other cotenants of an adverse claim to land by a cotenant. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

Tenant in common cannot acquire title against cotenant without notice; recorded deed held notice to cotenant of adverse claim. *Nichols v. Gaddis & McLaurin, Inc.*, 222 Miss. 207, 75 So. 2d 625 (1954), error overruled, 222 Miss. 240, 78 So. 2d 471 (1955).

One claiming entire interest in land under recorded instrument purporting to be deed from her father, and whose brothers and sisters, with knowledge of instrument, allowed her to remain in exclusive possession under claim of title without interference for more than fifteen years, is not required, as tenant in common with

brothers and sisters, to give them notice of her exclusive claim in order to acquire title by adverse possession, since brothers and sisters had in fact all the notice that was necessary. *McDonald v. Roberson*, 204 Miss. 737, 38 So. 2d 189 (1948).

The fact that the original deed from the tenant in common was not placed on record until long after it was executed and that suit was begun by his cotenants within ten years after date of its filing is immaterial. *Eastman, Gardiner & Co. v. Hinton*, 86 Miss. 604, 38 So. 779, 109 Am. St. R. 726 (1905).

## 23. — —Particular cases.

Acquisition of one-half interest in property by adverse possession was not established where former wife's occupancy of premises was not exclusive, being shared with husband; interest of former wife in property was at best homestead interest, her legal relationship with husband regarding title being analogous to that of co-tenants, which would have required effective communication of intent and legal ouster of husband from one-half interest in question, neither of which was shown. *Davis v. Davis*, 508 So. 2d 1062 (Miss. 1987).

A son who entered upon land in 1899 after his marriage, and built a home and thereafter exercised every use over the property to which it was susceptible without any protest by either his father or brother during the father's lifetime, possessed the land initially by color of right as a result of a presumptive parol gift from his father, which title ripened in him in 1909 by adverse possession, effectively divesting his father who died in 1912, so that the property in question did not descend to the father's heirs in cotenancy; it is well settled that a claim of title under a parol gift or purchase, accompanied by entry and adverse holding, may ripen into an indefeasible title by the lapse of the statutory period of limitation. *Thomas v. Collins*, 253 So. 2d 824 (Miss. 1971).

The actions of a managing cotenant in paying taxes on the property, having the land surveyed and the lines marked, selling timber therefrom, preventing trespass on the land by adjoining landowners, obtaining the services of the state forestry commission regarding the sale of timber,



and improving the timber stand by hiring employees and cutting trees for that purpose, were entirely consistent with the legal right of a cotenant upon the land, and were not sufficient to constitute the equivalent of actual knowledge on the part of the other cotenant, so as to start the running of the statute of limitations for adverse possession against the other cotenant. *Kennedy v. Bryant*, 252 So. 2d 784 (Miss. 1971).

Although a tenant in common, who in an action to determine title to land, asserted an interest of one-eighteenth of the whole tract, was chargeable with knowledge that his cotenants were claiming to be the sole owners, and exercising exclusive management and control over the land, the cotenants failed to acquire title as to the plaintiff by adverse possession. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Even though it was assumed that a lumber company, who acquired a warranty deed to land from the father and brother in which the children had an interest, became a tenant in common with the children, evidence showing that the lumber company upon acquiring the deed went into immediate possession of the land, enclosed it with a fence, had land assessed and paid taxes thereon, had a caretaker to look after it, cut timber thereon, and claimed the land openly as its own, and the children for at least 18 years after they became of age came back and forth to their father's old homestead just across the highway from the land, indicated that the children knew that the lumber company was in actual possession of the land and claiming full title thereto for a longer period than ten years. *Avera v. Turner Lumber Co.*, 230 Miss. 123, 92 So. 2d 458 (1957).

Co-heir's purchase of land at tax sale and possession thereafter exclusively, peaceably, continuously, adversely, and notoriously for a period of 52 years established his title by adverse possession as against other coheirs, and verbal protests and objections by coheirs were insufficient to stop the running of the statute of limitations in his favor. *Ferguson v. Chancellor*, 206 Miss. 518, 40 So. 2d 275 (1949).

Husband of tenant in common taking possession under void judicial sale and occupying with those under him for 10 years divests title of cotenants. *Stewart v. Foxworth*, 95 Miss. 442, 52 So. 354 (1910).

Where one tenant in common of land conveyed the whole estate in fee, and the grantee entered, and he and his successors in title held exclusive possession, claiming thereunder the entire estate for more than ten years, the original cotenants not under disability will be barred. *Eastman, Gardiner & Co. v. Hinton*, 86 Miss. 604, 38 So. 779, 109 Am. St. R. 726 (1905).

#### 24. — —Nonresidents.

Nonresident alien mortgagee obtaining possession under invalid sale through tenants, and holding possession and receiving rents for more than 10 years perfects title against mortgagor. *Scottish Am. Mtg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C, 1236 (1911).

A nonresident may acquire title by adverse possession held by others for him. Absence from the state does not prevent the running of the statute, since ejectment can be brought against the tenant. *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

#### 25. Title or interest acquired.

Because the private road in question was surrounded and encompassed by the land owned by the property owners, all that the adverse possessors were entitled to was a prescriptive easement. *Buford v. Logue*, 832 So. 2d 594 (Miss. Ct. App. 2002).

Code 1942, §§ 709 and 710 are limitation statutes which may be used defensively only, as distinguished from Code 1942, § 711, which provides that 10 years' possession vests full title, and which accordingly may be used affirmatively and defensively. *Neal v. Teat*, 240 Miss. 35, 126 So. 2d 124 (1961).

The holder of the legal title, on completion of the period of adverse possession, is divested of all right, title and interest in the land, including the right of possession, which rights then become vested in the adverse holder. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

A title gained by adverse possession is a new and complete title, not dependent upon or in any manner derived from, or in privity with, any former owner. *Levy v. Campbell*, 200 Miss. 721, 28 So. 2d 224 (1946).

Ten years' actual adverse possession under claim of ownership vests title in occupant. *Hickingbottom v. Lehman*, 124 Miss. 682, 87 So. 149 (1921).

Adverse possession may be used defensively or as basis of bill to confirm title. *Fant v. Williams*, 118 Miss. 428, 79 So. 343 (1918).

Where intention was to convey fee, but deed conveyed only life estate, grantee entering possession thereunder and holding for 10 years perfected title, parol evidence is admissible to show facts. *Breland v. O'Neal*, 88 Miss. 449, 40 So. 865 (1906).

A grantor will be barred of all claim to land intended to be, but not actually conveyed, after ten years from the beginning of possession by the grantee. *Moore v. Crump*, 84 Miss. 612, 37 So. 109 (1904).

On proper application equity will reform such a deed so as to make it convey the land intended to be conveyed. *Moore v. Crump*, 84 Miss. 612, 37 So. 109 (1904).

And this is true under the general statute of limitation. *Jones v. Brandon*, 59 Miss. 585 (1882).

The ten years' occupation, as declared in the statute, vests a "full and complete title," upon which the land can be recovered in ejectment, without further evidence than the facts showing such possession. *Davis v. Bowmar*, 55 Miss. 671 (1878); *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137 (1858); *Ellis v. Murray*, 28 Miss. 129 (1854).

## 26. —Easement.

Because the private road in question was surrounded and encompassed by the land owned by the property owners, all that the adverse possessors were entitled to was a prescriptive easement. *Buford v. Logue*, 832 So. 2d 594 (Miss. Ct. App. 2002).

Evidence showing that defendant and her predecessors in title had used a strip of land adjoining her lot exclusively for driveway purposes for more than 10 years warranted the granting of an easement

for driveway purposes. *Patrick v. Myers*, 234 Miss. 41, 104 So. 2d 894 (1958).

Easement by prescription may be established by such use as business or pleasure may require and it is not necessary to show that the way has been in constant use, day and night. *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188 (1948).

It is not essential to the creation of easement that dominant and servient tenements be adjacent, although an easement requires two distinct tenements, the dominant to which right belongs, and the servient upon which obligation is imposed. *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188 (1948).

Use of way over defendant's land, as means of ingress and egress to and from their home, by plaintiff, his predecessors in title, and their families, which continued for more than ten years, ripened into easement by prescription across defendant's land. *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188 (1948).

Right by prescription, growing out of use of way for more than ten years by plaintiff and his predecessors in title, to continue to use way is established by evidence that way was outlet to school, church and public road, its use was by car, by truck, by wagon and on foot as business or pleasure might direct, and that road was fairly well defined and continued in same location for more than ten years, except for occasional slight diversion because of some obstruction. *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188 (1948).

Public user, and working and maintaining of roadway traversing defendants' land by public authorities at public expense for 17 years, without objection of defendants, was sufficient to put landowners on notice that public authorities were asserting the right to deal with the road as part of the road system of the district, and to establish an easement for public road purposes by prescription through adverse user for the period prescribed by law, so as to preclude defendants' right to obstruct such road. *Armstrong v. Itawamba County*, 195 Miss. 802, 16 So. 2d 752 (1944).

City maintaining drain ditch for more than 10 years acquired right to maintain



it but not to enlarge it or increase water flow. *Sturges v. City of Meridian*, 95 Miss. 35, 48 So. 620 (1909).

Proprietor of land cannot claim easement by prescription in neighborhood road where his actions have been inconsistent with such a claim. *Wills v. Reid*, 86 Miss. 446, 38 So. 793 (1905).

Public does not acquire rights by prescription in neighborhood road over which it has exercised no supervision and to which it has asserted no claim. *Wills v. Reid*, 86 Miss. 446, 38 So. 793 (1905).

Title to a right of way may be acquired by prescription by ten years' adverse occupancy, but the use must be claimed under color of right and must be such as to expose the party asserting it to an action if he wrongfully exercised it. *Board of Supvrs. v. Mastronardi*, 76 Miss. 273, 24 So. 199 (1898).

Ten years is the time in this state by which to acquire an easement in land. *Alcorn v. Sadler*, 71 Miss. 634, 14 So. 444, 42 Am. St. R. 484 (1894).

## 27. — — Predecessors in interest.

Remand in an action for encroachment and adverse possession was appropriate because the chancellor erred in failing to determine whether the evidence established that the predecessors in title adversely possessed the portions of the lot that included the areas in question: the parking lot, the fence, the shed, and the floor, which were not built until 2002. *Jordan v. Fountain*, 986 So. 2d 1018 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 380 (Miss. 2008).

## 28. Running of limitation period.

In property owners' suit against their neighbors seeking to enjoin them from their adverse use of a common easement, the neighbors' prior conveyance of a specifically described easement interrupted the adverse possession as it ended the claim of right as to the entirety of the easement strip. The fact that the neighbors continued in possession at best meant that a new period of possession had commenced; that period did not continue for 10 years. *Tucker v. Long*, 873 So. 2d 1064 (Miss. Ct. App. 2004).

Where a person is in adverse possession of lands and the mineral estate has not been severed from the surface estate, and the legal owner of the land attempts to convey the mineral estate, the adverse possession will continue as if there had been no conveyance of the mineral estate. *Huddleston v. Peel*, 238 Miss. 798, 119 So. 2d 921 (1960), error overruled, 238 Miss. 803, 120 So. 2d 776 (1960).

Statute held to bar suit to remove an alleged cloud on title, a deed executed upon a sale for purposes of partition some forty years before, on ground that all parties in interest were not served and that land not shown therein to be incapable of partition in kind. *Hollingsworth v. Central Oil Co.*, 236 Miss. 779, 112 So. 2d 518 (1959).

Continued adverse possession provided by this section [Code 1942, § 711] does not begin to run against minors until the disability of minority has been removed. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

This section [Code 1942, § 711] has no application to a tax title claim by one cotenant against another, but cotenant must rely upon the ten-year adverse possessory statute. *Wall v. Wall*, 220 Miss. 642, 71 So. 2d 308 (1954).

Where there was a suit to cancel and remove some alleged clouds from the title of property which was sold under a bond mortgage to satisfy an indebtedness owing to a Louisiana corporation, in liquidation, the fact that the suit was filed just two days before the completion of the bar of ten-year statute of limitations, should not bar the action because of laches. *Enochs v. Mississippi Tower Bldg.*, 210 Miss. 676, 50 So. 2d 551 (1951).

Where a dispute over a piece of land arose out of two overlapping deeds, conversations and expressions of good will and recognition of one another's deeds by neighbors does not toll the statute of limitations and estop the assertion of title by adverse possession. *Lott v. Sebren*, 210 Miss. 99, 48 So. 2d 626 (1950).

Where there was privity between appellees and their predecessor in title, appellees are entitled to tack their possession to



that of their predecessor and to acquire title by adverse possession to small strip of land between an old fence line and the true boundary line although appellees were not themselves in possession for ten years. *Ricketts v. Simmons*, 44 So. 2d 537 (Miss. 1950).

Tax title purchaser claiming ten years' adverse possession between April 7, 1930, and June 12, 1945, who leased land for oil and gas in 1940, whose claim to land was open and notorious in community, who rented land to various tenants from 1935 to 1948, with exception of period from 1938 to 1943, there being breaks in occupancy of land between tenants who cultivated small patches of open land, and who did not improve land, fence it or cut timber, failed to show continuous use of land for statutory period required. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Regardless of extent and quality of adverse possession, its period is tolled by sale of the land to State for taxes, and adverse possessor is remanded to period following sale to State on which to build up his prescriptive title. *Winstead v. Winstead*, 204 Miss. 787, 38 So. 2d 118 (1948).

Title to land by adverse possession cannot be established in 1947, by tax receipts dated from 1931 to and including 1947 containing description of land, when land was sold to State for 1932 taxes and State issued patent to land in 1941 to purchaser other than individual claiming by adverse possession. *Winstead v. Winstead*, 204 Miss. 787, 38 So. 2d 118 (1948).

Allegations that holder of third deed of trust on lands agreed to purchase land "for owners" on foreclosure of first deed of trust, that land was purchased in name of his wife and conveyed to wife of cotenant who executed three deeds of trust covering purchase price, all of which conveyances were recorded, are insufficient to show a fraudulent concealment such as to prevent running of statute of limitations in favor of holder of original third deed of trust who purchased property on foreclosure of last deed of trust. *Jones v. Hoover*, 204 Miss. 345, 37 So. 2d 490 (1948).

Continuity of adverse possession is not interrupted by void sale for delinquent taxes. *Downing v. Starnes*, 35 So. 2d 536 (Miss. 1948).

Where the title of the State to tax forfeited land had matured for failure to redeem, the statute of limitations could not again begin to run until the land became the subject of private ownership. *Cotten v. Cotten*, 203 Miss. 316, 35 So. 2d 61 (1948).

The execution and recording of a warranty deed by several cotenants of land to a stranger to the title set in motion an adverse claim against a cotenant who had not signed the deed, which was thereupon made available to the grantee, who, by implementing such claim by adverse possession through himself and his successors in title for a period beyond the statutory limitation, matured the disseisin into complete ownership. *Davis v. Gulf Ref. Co.*, 202 Miss. 808, 32 So. 2d 133 (1947), error overruled, 202 Miss. 817, 34 So. 2d 731 (1948).

The filing of a bill by the record owner of land to remove defendant's claim as a cloud upon its title, wherein defendant by cross bill asserted title thereto by adverse possession, stopped the running of the ten-year period necessary to acquire title by adverse possession. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

The statute of limitations once put in operation is not tolled by the death of the owner. *Leggett v. Norman*, 192 Miss. 494, 6 So. 2d 578 (1942).

In an action to confirm title and remove cloud, as against defendants' claim of adverse possession and that the period of adverse possession was not interrupted by a decree in a former suit to which the defendants were made parties for confirmation of complainant's tax title on the ground that the issue of adverse possession was not involved in the former suit, allegations in the former suit that the complainant was in possession and that there was no adverse possession, with defendants' allegations to the contrary, put the claim of adverse possession in issue, and such issue was concluded by the decree in the former suit foreclosing further inquiry. *Norton v. Graham*, 185 Miss. 164, 187 So. 510 (1939), error overruled, 185 Miss. 188, 188 So. 314 (1939).

Where the owner of certain lots mortgaged one of them to the plaintiff and

thereafter conveyed the other lot and a part of the mortgaged lot to the defendant, a period of adverse possession as to the part of the mortgaged lot conveyed and in dispute did not begin until after the foreclosure and purchase thereunder by the plaintiff, so that defendant did not obtain title by adverse possession to such disputed piece of land where less than ten years had elapsed from the mortgagee's purchase until he filed his bill to confirm and quiet title, notwithstanding that the defendant had been in possession thereof for more than ten years. *Seymour v. Lamb*, 185 Miss. 37, 185 So. 824 (1939).

Statute begins to run at end of redemption period, where owner retains possession. *Carraway v. Lockard*, 150 Miss. 704, 116 So. 599 (1928).

Permissive holding should be deducted in computing adverse possession. *Meyer v. Sea Food Co.*, 136 Miss. 868, 101 So. 702 (1924).

Adverse possession by a tenant runs from the time the landlord receives notice that the occupancy is hostile; and a tenant is not required to yield possession and again enter the premises before the statute will run in his favor. *Greenwood v. Moore*, 79 Miss. 201, 30 So. 609 (1901).

An action of ejectment to recover lands conveyed by a wife under duress is not barred if begun within ten years after the duress ceases to be operative. *Allen v. Leflore County*, 78 Miss. 671, 29 So. 161 (1901).

It is only where a right of action accrues in this state and the person liable goes to reside elsewhere that the period of absence is not to be counted. *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

## 29. Evidence, generally.

Where a grantor claims by adverse possession all or part of the property conveyed, proof of actual notice of that possession by the grantor to the grantee should be stronger than in the normal adverse possession case and should be clear beyond a reasonable doubt; the evidence should reveal that the grantee has been ousted from the property he received under the conveyance. *Skelton v. Lewis*, 453 So. 2d 703 (Miss. 1984).

In boundary line dispute, evidence supported finding that location of line as found by court-appointed surveyor was true line and that an old fence line had not been recognized by the parties as the boundary so as to give defendants title by adverse possession to land between surveyed line and old fence line. *Jenkins v. Thweatt*, 42 So. 2d 95 (Miss. 1949).

As between parties sustaining parental and filial relations, possession of land of one by other is presumptively permissive or amicable, but this presumption is not conclusive and when facts are in evidence presumptions must disappear and yield to facts. *Randall v. Mitchell*, 41 So. 2d 44 (Miss. 1949).

Presumption that as between parties sustaining parental and filial relations, possession of land of one by other is permissive or amicable is not sufficient to overthrow direct and positive evidence that mother's possession of daughter's land was actual, open, notorious, exclusive, hostile, undisputed and under claim and honest belief of ownership continuous and uninterrupted for period of about eighteen years before she sold it; and purchaser is entitled to tack his possession onto that of the mother. *Randall v. Mitchell*, 41 So. 2d 44 (Miss. 1949).

Proof of ten years' actual possession under claim of ownership will prima facie defeat recovery in ejectment on a tax title executed and operative more than ten years prior to the suit, since the possession and claim will be presumed to have been adverse to the tax deed. *Graham v. Warren*, 81 Miss. 330, 33 So. 71 (1902).

## 30. —Deed.

Chancellor's order confirming and quieting title in landowner was proper where landowner's mother had claimed disputed property from 1945 until she deeded it to landowner in 1973; use of this property was exclusive and peaceful, continuous for 41 years, actual, open, and notorious, and under claim of right; evidence showed that disputed property was under fence for purpose of grazing cows from 1942 until mid-1960's, and fence remained in repair well enough to keep cattle until at least 1972; it does not matter whether land claimed under adverse possession is within "call of the title deeds," or is in



same quarter section or section as land lies which is described in deed; since requirements of adverse possession had been established by fence around disputed property and continued use of property for more than 40 years, once title ripened by adverse possession it was not necessary that fence be standing, or even in existence, when suit was filed. *Pieper v. Pontiff*, 513 So. 2d 591 (Miss. 1987).

Evidence showing that complainants entered into possession of parcel of land in 1942, under color of title by virtue of deed executed to them by a bank, and that complainants remained in possession of the land, claiming it as their own, and exercised acts of ownership on the land by cutting timber and pasturing cattle on the land, keeping the fences in state of repair, and paying taxes on the land for a period of 19 years, established complainants' title by adverse possession. *Bickham v. Bates*, 246 Miss. 171, 150 So. 2d 138 (1963).

Church, claiming under prior recorded deed which properly described the land therein by metes and bounds although reference to total acreage was erroneous, was entitled to have its title quieted thereto as against defendants claiming under a subsequent conveyance of the remainder of the quarter section from the same grantor, since defendants acquired no semblance or color of title to the church's realty under the latter conveyance, and their plea of adverse possession was not sustained by proof that they claimed some of the land and that each of them pastured a cow thereon for as long as ten consecutive years. *Miles v. Collinsville Methodist Church*, 46 So. 2d 110 (Miss. 1950), error overruled, 46 So. 2d 793 (Miss. 1950).

Proof of possession for 50 years and perfect chain of title back to uncle of patentee in 1861 raises presumption of lost deed from patentee to uncle. *Scarborough v. Native Lumber Co.*, 118 Miss. 138, 79 So. 84 (1918).

### 31. —Parol evidence.

Where intention was to convey fee, but deed conveyed only a life estate, grantee entering possession thereunder, and holding for 10 years perfected title, and parol evidence is admissible to show the facts.

*Breland v. O'Neal*, 88 Miss. 449, 40 So. 865 (1906).

### 32. —Burden of proof.

Chancellor properly denied plaintiffs' claim against defendants for adverse possession under Miss. Code Ann. § 15-1-13(1) because plaintiffs failed to show by clear and convincing evidence that all of the elements of adverse possession were met; the meager testimony created some confusion as to whether plaintiffs were discussing the full 120 acres of land owned by the parties or half of the acreage. *Frazier v. Frazier*, 31 So. 3d 1218 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 177 (Miss. 2010).

To establish the exclusivity element of its claim of adverse possession of the road, business had to show its conduct afforded an unequivocal indication that it exercised dominion of a sole owner, not that it excluded others from use of the road. *Lynn v. Soterra Inc.*, 802 So. 2d 162 (Miss. Ct. App. 2001).

In a case involving a claim of adverse possession where the party holds the property with co-tenants, the burden of proof is even greater. *Bacot v. Duby*, 724 So. 2d 410 (Ct. App. 1998).

Where persons claiming possession of land for more than 10 years admitted that complainants owned the record title to the property, the burden of proof was upon them to establish that they had obtained title by adverse possession, and they must show that the possession was adverse under a claim on right or ownership. *Ford v. Rhymes*, 233 Miss. 651, 103 So. 2d 363 (1958).

Burden of proof is upon adverse claimant to establish by competent evidence what particular area was used, cultivated, fenced, or actually occupied by him and where such areas were located on the tract, and to do this in such a way as to enable the court to determine its location and in its decree establish the area to which title has ripened by adverse possession. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).

Burden of proving continuous adverse possession for statutory period is on parties claiming title by adverse possession.



Heidelberg v. Duckworth, 206 Miss. 388, 40 So. 2d 179 (1949).

The burden is upon the former owner of land to which title has been gained by adverse possession, or any person claiming under him, who has anything to present as an exception or reservation. *Levy v. Campbell*, 200 Miss. 721, 28 So. 2d 224 (1946).

### 33. —Particular cases, evidence sufficient.

Once the appellee property owner satisfied the elements of adverse possession under Miss. Code Ann. § 15-1-13(1), title to the disputed parcel vested in him and in order for the appellant property owner to have established a superior claim to the disputed parcel, she would have had to have met all six of the elements of adverse possession by clear and convincing proof, which she failed to do. There simply was no necessity to reactivate appellee's adverse-possession claim after the survey or the execution of the lease. *Conliff v. Hudson*, 60 So. 3d 203 (Miss. Ct. App. 2011).

Finding that the appellee property owners adversely possessed the property at issue was appropriate under Miss. Code Ann. § 15-1-13(1) because they met all the required elements of adverse possession as to the property at issue. appellees built their home on the property, they occupied it for over 10 years, and they had even conveyed two other parcels located on the property; those actions were sufficient to give notice to the world that they were claiming the land as their own. *Pulliam v. Bowen*, 54 So. 3d 331 (Miss. Ct. App. 2011).

In an action to quiet title on the basis of adverse possession, where the evidence established that plaintiffs' predecessor in title had continuously used a field road until defendants placed a blockade on the road claiming ownership but where, prior to this assertion of ownership, the predecessor had continuously used the road uninterrupted for approximately 50 years, the evidence supported a conclusion that plaintiffs and their predecessor had used the field road far in excess of the 10-year statutory requirement. *Hill v. Johnson*, 27 So. 3d 426 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 63 (Miss. 2010).

Finding that plaintiffs proved the elements of adverse possession, Miss. Code Ann. § 15-1-13, was affirmed, as there was substantial evidence to support the finding; for example, as to actual and hostile possession, plaintiffs testified that they had performed such activities as mowing, clearing snakes, and clearing underbrush of the property at issue. *Sturdivant v. Todd*, 956 So. 2d 977 (Miss. Ct. App. 2007).

Prescriptive easement was properly granted to an owner where he showed that a predecessor in interest had used a driveway for ingress and egress under claim of ownership, with actual possession, openly and notoriously, continuously and uninterrupted for more than 10 years, pursuant to Miss. Code Ann. § 15-1-13. *Arrechea Family Trust v. Adams*, 960 So. 2d 501 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 412 (Miss. 2007).

Landowner, at the behest of its predecessor, was cutting timber on the disputed strip as early as 1987, and the rule of "tacking" as applied to adverse possession clearly allowed the time period the property was adversely possessed by the predecessor to combine with the time it was adversely possessed by the landowner in order to meet the statutory time period, as the parties were in privity; because there was evidence that the neighbors were aware of adverse activity on the disputed land as early as 1987, there was sufficiently substantial evidence to support the chancellor's finding of satisfaction of the time period element of Miss. Code Ann. § 15-1-13(1). *McLendon v. Copiah Forest Prods.*, 926 So. 2d 260 (Miss. Ct. App. 2006).

Chancellor did not abuse her discretion in determining that the trustee had established adverse possession to disputed property where the trustee had inspected the property twice a year and painted the boundary lines on the disputed property the same way he painted the boundary lines on his other property and the neighbors did not offer proof that they had ever maintained any lines between their property and that of the trustee. *Jackson v. Peoples Bank & Trust Co.*, 869 So. 2d 422 (Miss. Ct. App. 2004).

The evidence was sufficient to support the plaintiffs' claim of adverse possession where the adverse owners' family came into the property in dispute more than fifty years earlier, all witnesses at trial testified that the adverse owners had exclusive use of the property during that entire time, that they worked and played on the land, often inviting others to farm the land or cut hay there and the fact that the use of the land was not permissive was established by the testimony of the abutting owners, who both testified that neither had given the adverse owners permission to use the property. *Magee v. Garland*, 799 So. 2d 154 (Miss. Ct. App. 2001).

Evidence was sufficient to establish adverse possession where the land was used under claim of ownership and was actual or hostile; use of the land was quite open, notorious and visible as a fence was erected and the land was used for gardening and other visible operations; such activities continued for a continuous period long over the 10 year minimum; such uses were exclusive in that only the plaintiff's family gained advantage from the land; and such occupation was peaceful during this time, drawing no objection from the defendant's family. *Cheatham v. Stokes*, 760 So. 2d 795 (Miss. Ct. App. 2000).

Evidence was sufficient to require the court to consider the defendant's claim of adverse possession where (1) defendant built a driveway on the disputed property for her family's private and personal use, fully believing that it was on her property, (2) the driveway was clearly visible, and (3) the driveway had been in essentially the same place and had been used peacefully for 20 years or more. *Simmons v. Cleveland*, 749 So. 2d 192 (Miss. Ct. App. 1999).

Evidence established adverse possession of property along the boundary of the parties' properties, notwithstanding the contention that the boundary between the parties' lands had been in dispute since the early 1960's, where the appellees maintained a fence surrounding the disputed land for over 40 years and held that land in their exclusive peaceful possession from the mid-1960's until approximately 1992. *Murray v. McRae*, 741 So. 2d 1009 (Miss. Ct. App. 1999).

Adverse possession was established by evidence that possessors cleared land and planted grass, grazed cattle on land, repaired damage caused by hurricane, built and repaired fish pond, paid taxes in all but 2 years, frequently visited property, and made other improvements; titleholder's nonpayment of taxes coupled with awareness that grass was planted and cattle were grazed on pastures gave rise to notice of adverse claim. *Ramsey v. Copiah Bank*, 678 So. 2d 637 (Miss. 1996).

Evidence that a landowner's predecessor in title maintained a fence which encroached upon an adjoining lot between 6 ½ and 7 feet for a 25-year period, that the predecessor used the yard up to the fence and regarded it as her own, and that the adjoining landowner's predecessors in title likewise recognized the fence line as the property line throughout the 25 years, was sufficient to establish adverse possession of the property. *Stallings v. Bailey*, 558 So. 2d 858 (Miss. 1990).

Claim of adverse possession to wild, undeveloped accretion property on southern tip of island owned by claimants but within northern boundary of contestant's plantation was established where the possessory acts of the claimants in planting tree sprigs and seedlings, granting oil, gas and mineral leases, issuing grazing and hunting leases, and personally hunting on the land each year constituted sufficient control and possession given the character of the property as unsuitable for habitation, cultivation or permanent useful improvement; exemption from requirement of open and notorious possession was established by actual notice of adverse claim given to contestant over 20 years prior to commencement of the action. *Houston v. United States Gypsum Co.*, 652 F.2d 467 (5th Cir. 1981).

Where adverse claimants placed a "brushed out" line on appellant's land, posted signs at road entrances, annually grazed cattle thereon, and advised appellants in writing that they claimed lands in dispute, and appellant's only action was to paint a so-called line which he considered to be the true line, the chancellor was warranted in determining that the adverse claimants had acquired title to the disputed area. *Kayser v. Dixon*, 309 So. 2d 526 (Miss. 1975).



In an action to establish the correct lines to a residence lot, the chancellor's finding, under conflicting evidence, that the lot owner and his predecessors in title had acquired title to the disputed strip of land by more than 30 years adverse possession, was affirmed. *Myers v. Orr*, 233 Miss. 498, 102 So. 2d 674 (1958).

Evidence that school trustees and their predecessors in office were in actual adverse possession for more than ten years of a strip of land adjoining that deeded to them for so long as it should be used for school purposes sustained their claim of ownership thereof by adverse possession subject to the limitations prescribed in the deed. *Kelly v. Wilson*, 204 Miss. 56, 36 So. 2d 817 (1948).

Agreement to convey land upon payment of sum in addition to payment disclosed by receipt for part of purchase money, followed by continuous occupancy and use of land for at least forty-four years, raises presumption that remainder of purchase price was paid and conveyance in fact executed, in the absence of any showing to the contrary. *Rosenbaum v. Bohannon*, 204 Miss. 9, 36 So. 2d 798 (1948).

In the absence of an order of the board of supervisors, or other record evidence showing that the roadway had been designated as a public road, public user and working and maintaining of roadway across defendants' land by public authorities at public expense for 17 years, without objection of defendants was sufficient to put them on notice that public authorities were asserting a right to deal with the road as part of the road system in the district, and to establish an easement for public road purposes by prescription to adverse user for the period prescribed by law, so as to preclude defendants from placing gates across or otherwise obstructing such road. *Armstrong v. Itawamba County*, 195 Miss. 802, 16 So. 2d 752 (1944).

Description of road across defendants' land in action to enjoin defendants from obstructing such road, designating the road to be "as it now runs across the lands of the defendants," the proof showing without substantial conflict that it now runs along the same location where it had

been traveled and used for more than 50 years, and stating the point of beginning, the direction of its course, and its terminus at a point on another public road therein named, at or near a certain residence, was a sufficient description of such road to show its location. *Armstrong v. Itawamba County*, 195 Miss. 802, 16 So. 2d 752 (1944).

Although evidence was conflicting as to whether fence enclosing land adversely claimed was continuously kept up by repairs in such condition as to exclude cattle, it was sufficient to show that fence was amply sufficient during a continuous period of ten years to fly the flag over the land and put the true owner on notice that the land within the fence was being held under an adverse claim of ownership, and when taken in connection with other facts, title by adverse possession was substantiated. *Snowden & McSweeney Co. v. Hanley*, 195 Miss. 682, 16 So. 2d 24 (1943).

Showing that land was deeded to one or two remote grantors in 1891 and continuous possession had since under claim of ownership with complainant's acquiescence, established title. *Hammond v. Cowart*, 52 So. 451 (Miss. 1910).

### 34. — —Evidence insufficient.

Judgment finding that plaintiffs failed to sustain their claim that they had adversely possessed two sections of property was affirmed where (1) simply because plaintiffs purchased property in 1991 did not automatically mean that they held property other than that which was described in the 1991 deed under a claim of ownership; and (2) the mere existence of a fence near the actual boundary line did not establish that the fence was the accepted boundary between the properties. *Niebanck v. Block*, 35 So. 3d 1260 (Miss. Ct. App. 2010).

In their appeal, appellees argued that they had adversely possessed parcel 2B even though they held title to parcel 2B; there was no specific testimony regarding appellants' attempt to adversely possess this parcel, and thus the court reversed the determination and rendered judgment to show that appellees were the record titleholders of parcel 2B. *Nelson v. Bonner*, 13 So. 3d 880 (Miss. Ct. App. 2009).



Testimony presented established appellees' ownership of the area near one of appellant's mobile home, but there was no clear and convincing evidence that parcel 2A was adversely possessed by appellees under Miss. Code Ann. § 15-1-13(1). *Nelson v. Bonner*, 13 So. 3d 880 (Miss. Ct. App. 2009).

Neighbor whose land abutted a church's land failed to show that its possession of the land by allowing its lessee's cows to graze there was hostile or adverse to the church's interest as required by Miss. Code Ann. § 15-1-13, because the neighbor did nothing to eject the church or its surveyors and took no other hostile action. *Double J Farmlands, Inc. v. Paradise Baptist Church*, 999 So. 2d 826 (Miss. 2008).

Appellants failed to meet their burden to establish title by adverse possession under Miss. Code Ann. § 15-1-13 of adjacent property because there was substantial credible evidence that appellants' use of the disputed property was not exclusive in that both appellants and the claimants had used the property during the 10-year period. *Riverland Plantation P'ship v. Klingler*, 942 So. 2d 294 (Miss. Ct. App. 2006).

Denial of an adverse possession claim was affirmed because appearing occasionally to inspect the land and allowing a fence to fall into disrepair were insufficient for adverse possession under Miss. Code Ann. § 15-1-13. *Askew v. Reed*, 910 So. 2d 1241 (Miss. Ct. App. 2005).

Neighbor failed to establish any of the elements of adverse possession under Miss. Code Ann. § 15-1-13 with regard to the land parcel at issue, where the owner of the parcel had permitted the neighbor's predecessor to build a road on the parcel, the owner had prohibited the neighbor's loggers from removing trees from the parcel, and the owner tore down a new fence that was built by the neighbor on the parcel to replace an old fence that was near the boundary line between the properties. *Scrivener v. Johnson*, 861 So. 2d 1057 (Miss. Ct. App. 2003).

Where the neighbor cited Miss. Code Ann. § 95-5-10 as authority for the argument that any person who took a tree without the consent of the owner was liable in the amount double the fair mar-

ket value of the tree, the neighbor was not entitled to such damages from the owner; the neighbor was not the owner of the parcel at issue, because the neighbor's adverse possession claim under Miss. Code Ann. § 15-1-13 failed. *Scrivener v. Johnson*, 861 So. 2d 1057 (Miss. Ct. App. 2003).

Appellants did not point to any specific acts by them or their predecessors in title which would satisfy the requirements for adverse possession of disputed property after the change in a river's channel, especially as the disputed property was assessed to the appellee and it had consistently paid the taxes. *Cox v. F-S Prestress, Inc.*, — So. 2d —, 1999 Miss. App. LEXIS 719 (Miss. Ct. App. July 20, 1999).

The plaintiff was not entitled to a prescriptive easement where her use of a road across the defendants' property was permissive and remained so until the defendants informed her that she would no longer be allowed to use the easement. *Sharp v. White*, 749 So. 2d 41 (Miss. 1999).

Evidence was insufficient to establish plaintiff's adverse possession based on the location of a fence erected many years earlier since (1) the plaintiff failed to put the defendant on notice that she claimed ownership of the tract of land, and (2) the defendant had allowed the plaintiff's predecessor-in-title to erect the fence east of the disputed property and on his own land. *Stringer v. Robinson*, 760 So. 2d 6 (Miss. Ct. App. 1999).

Evidence was insufficient to show adverse possession of property extending the edge of a ditch which was wholly within the plaintiff's property where the defendant's claim of possession was based on his storage of junk cars and his occasional parking of trucks on the property, his mowing and gardening of the property, the plaintiff took immediate action against the defendant when the latter moved three houses onto the property. *Walker v. Murphree*, 722 So. 2d 1277 (Ct. App. 1998).

A chancellor committed manifest error by concluding that a county had acquired a public easement by prescription across a private road under § 15-1-13 where there was no record of any official action taken by the county board of supervisors to

make the road public, and, though individual members of the board of supervisors were permitted to testify as to whether the road was private or public, no board minutes were offered into evidence. *Myers v. Blair*, 611 So. 2d 969 (Miss. 1992).

The evidence was insufficient to support a finding of ownership of land by adverse possession, even though the alleged adverse possessor claimed that he had stored "junk" consisting of a washing machine, tractor and tractor parts, on the land in question for well over 10 years, where the landowner strongly objected to a fence as soon as it was erected by the alleged adverse possessor. *Rawls v. Parker*, 602 So. 2d 1164 (Miss. 1992).

A claimant failed to establish a prima facie case of adverse possession of wild swamp land where no surveys were run, no posted signs were put up, no fences were constructed, no timber was cut, no taxes were paid on the property by the claimants, no written documents describing the property were ever recorded, and the only evidence of possession was that the claimant walked on the land "several times." *Holliman v. Charles L. Cherry & Assocs.*, 569 So. 2d 1139 (Miss. 1990).

Evidence of old barbed wire fence which adverse claimant claims to have helped grandfather patch and repair but which claimant concedes has subsequently fallen into state of disrepair or disappeared altogether is insufficient evidence upon which to base adverse possession claim. *Davis v. Clement*, 468 So. 2d 58 (Miss. 1985).

Evidence that the father of adverse claimant, with permission of the then owner, built a fence around the disputed acreage in 1907, while title thereto was in the State, and for some time afterwards the fence was not kept in repair and neighborhood cattle grazed at will thereon after crops were gathered, and claimant had failed to have the property assessed for taxes, did not show exclusive possession in the adverse claimant as against the rights of purchaser under a valid tax sale. *Harmon v. Buckwalter*, 233 Miss. 761, 102 So. 2d 895 (1958).

The chancellor did not err in dismissing with prejudice a proceeding by a land-

owner to confirm title to two small parcels of land adjoining his 40-acre tract on the ground that he had acquired title thereto by adverse possession as against the adjoining landowner, where the adverse claimant did not erect any improvements upon the disputed land, or cut the timber on the land, but merely cultivated some portion thereof part of the time, and the zigzag fence, erected by claimant, had been strung on trees, bushes and poles and had not been kept in repair. *Mason v. Gaddis Farms, Inc.*, 230 Miss. 666, 93 So. 2d 629 (1957).

Evidence was insufficient to show that cotenants had divested one of their cotenants of her record title to one-half of the surface and three-tenths of the minerals by an ouster and adverse possession for more than ten years. *Anderson v. Boyd*, 229 Miss. 596, 91 So. 2d 537 (1956).

Evidence supported the chancellor's finding that grantor's re-entry into land was, in the outset, permissive, and the grantor was a tenant and had paid rent as late as September 10, 1945, and his claim to adverse possession had not equalled the necessary period of ten years before the action was filed by the widow of his grantee. *Walker v. McLaurin*, 229 Miss. 425, 90 So. 2d 857 (1956).

Complainant entering under invalid tax deed failed to meet burden of proof to establish ten years adverse possession where evidence disclosed that no use was made of the land after tax sale except cultivation of small patches, that land was unimproved, and that there was no actual occupancy of the land by anyone. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Proof by adverse claimant to 40-acre tract that he resided thereon in a house which he constructed, had a garden and potato patch, had at one time fenced about two acres thereof, that the remainder of the tract was second growth timber, which he allegedly guarded against fire and trespassers, without any proof as to the location of his house or the two acres fenced by him on the tract, was insufficient to establish title by adverse possession, it also appearing that taxes were paid by record owner. *Page v. O'Neal*, 207 Miss. 350, 42 So. 2d 391 (1949).



Evidence was insufficient to establish that defendant was in adverse possession of an adjacent tract of land for the requisite period of ten years where there was no evidence that defendant's predecessor in title ever made claim to the land in question, although there was evidence to show that defendant as tenant of such predecessor and without its knowledge cultivated the land in question. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

In suit to quiet title, filed in 1934, evidence that from 1920 to 1924 and from 1928 to 1931, defendant's predecessors recognized complainant's predecessor and complainant as landlords and paid rent, did not establish claim to title through adverse possession, allegedly beginning in 1917. *Lucas v. New Hebron Bank*, 181 Miss. 762, 180 So. 611 (1938).

### 35. Instructions.

In ejectment, under conflicting evidence, erroneous instruction that defendant's adverse possession must be undisputed held not cured by instruction that defendant should have verdict regardless of other facts in case if he has actual, uninterrupted, hostile, and adverse possession. *May v. Culpepper*, 177 Miss. 811, 172 So. 336 (1937).

### 36. Miscellaneous.

Although not addressed in the pleadings for a boundary line dispute, because evidence was heard on an adverse possession claim, the claim was tried by consent and the chancellor should have ruled on the claim in the judgment. *Stewart v. Graber*, 754 So. 2d 1281 (Miss. Ct. App. 1999).

Period of adverse possession by remainderpersons could begin running against interests of third parties prior to date outstanding life estate on property was removed; life tenant's possession was hostile as to third parties and could be tacked on to remainderperson's interest. *Ramsey v. Copiah Bank*, 678 So. 2d 637 (Miss. 1996).

A statement made by a record owner's predecessor in title to an adverse claimant that he owned the land in question and that he wanted to get the matter settled so

that there would be no question about the boundary line was insufficient to negate the claimant's adverse possession of the property or to establish that his possession was with the permission of the predecessor in title where the claimant never wavered in his position that he owned the land in dispute, and the predecessor in title did nothing to interfere with the claimant's possession and claim of ownership of the land. *Rice v. Pritchard*, 611 So. 2d 869 (Miss. 1992).

Neither party claiming ownership to a disputed parcel of land established title by adverse possession where both parties constructively possessed the land by their deeds, but the possession of each party against the other, if adverse, was inexplicably intermittent, or alternated with use by the true owner, so that both parties failed to prove hostile and exclusive possession of the land to which each held record title for a period of 10 years. *Blankinship v. Payton*, 605 So. 2d 817 (Miss. 1992).

The party asserting adverse possession as the basis for other claim of title has the burden of proof on the issue. *Roy v. Kayser*, 501 So. 2d 1110 (Miss. 1987).

Chancellor is the trier of facts and his determination that parties had not established adverse possession claim to land would not be overturned on appeal where not manifestly wrong. *Savage v. Parrish*, 488 So. 2d 1342 (Miss. 1986).

In an action by a husband and a wife to remove clouds upon their property title and for injunctive relief, the trial court erred in concluding that the defendants had failed to plead and prove adverse possession where the defendants had claimed title to the area in question by deed and had testified that they had used the disputed property for 25 years, erecting a storage shed and cultivating a garden thereon; although the defendants did not seek by cross-bill to cancel the claim of the husband and the wife to the property and confirm and quiet title in themselves, the allegations in their answer sufficiently raised the defense of adverse possession. *Pittman v. Simmons*, 408 So. 2d 1384 (Miss. 1982).

Sections 716 and 717, Code of 1942, were inapplicable to an action to deter-



mine ownership of land in which the plaintiffs claimed an undivided one half interest, and in which defendants, who were successors in interest to a tenant in common who had also acquired tax title to the land, claimed title through adverse possession and laches; but the parties' rights were to be tested by the ten-year statute of limitations. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Ordinarily ignorance of his or her legal rights by a person against whom land is claimed by adverse possession is no defense against the running of the statutes of limitations. *Bonds v. Bonds*, 226 Miss. 348, 84 So. 2d 397 (1956).

Title by adverse possession, set up as defense to claim of title by another, will

not be adjudicated affirmatively in the absence of a cross-bill. *Downing v. Starnes*, 35 So. 2d 536 (Miss. 1948).

Any judgment adjudging plaintiff in an action to remove cloud from his title to be the owner of the land as against one claiming by adverse possession is not binding as against a third person not made a party to the suit who might have acquired a good and perfect title by 10 years' adverse possession. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

Continuity of adverse possession is not broken by temporary changes in the actual occupancy of the land between the time of the removal of one tenant and the entry of another. *Douglas v. Skelly Oil Co.*, 201 Miss. 23, 28 So. 2d 227 (1946).

## RESEARCH REFERENCES

**ALR.** Occupancy of premises by both record owner and another as notice of title or interest of latter. 2 A.L.R.2d 857.

Adverse possession by religious society. 4 A.L.R.2d 123.

Adverse possession: Mortgagee's possession before foreclosure as barring right of redemption. 7 A.L.R.2d 1131.

Change in party after statute of limitations has run. 8 A.L.R.2d 6.

Title by adverse possession as affected by recording statutes. 9 A.L.R.2d 850.

Taking adverse possession of area not within description of deed or contract. 17 A.L.R.2d 1128.

Adverse possession: Sufficiency, as regards continuity, of seasonable possession other than for agricultural or logging purposes. 24 A.L.R.2d 632.

Estoppel to rely on statute of limitations. 24 A.L.R.2d 1413.

Possession by stranger claiming under conveyance by cotenant as adverse to other cotenants. 32 A.L.R.2d 1214.

Acquisition of title to mines or minerals by adverse possession. 35 A.L.R.2d 124.

Possession of mortgagor or successor in interest as adverse to purchaser at foreclosure sale. 38 A.L.R.2d 348.

Adverse possession of landlord as affected by tenant's recognition of title of third person. 38 A.L.R.2d 826.

Grantor's possession as adverse possession against grantee. 39 A.L.R.2d 353.

Reputation as to ownership or claim as admissible on question of adverse possession. 40 A.L.R.2d 770.

Acquisition of title to ground through adverse possession by cemetery or graveyard authorities. 41 A.L.R.2d 925.

Adverse possession under parol gift of land. 43 A.L.R.2d 6.

Adverse possession of executor or administrator or his vendee as continuous with that of ancestor and heirs. 43 A.L.R.2d 1061.

Title by or through adverse possession as marketable. 46 A.L.R.2d 544.

Tax sales or forfeitures by or to governmental units as interrupting adverse possession. 50 A.L.R.2d 600.

Judgment or decree as color of title. 71 A.L.R.2d 404.

Acquisition of right of way by prescription as affected by change of location or deviation during prescriptive period. 80 A.L.R.2d 1095.

Adverse possession involving ignorance or mistake as to boundaries-modern views. 80 A.L.R.2d 1171.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Adverse possession based on encroachment of building or other structure. 2 A.L.R.3d 1005.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another. 12 A.L.R.3d 1265.

Acquisition of title to land by adverse possession by state or other governmental unit or agency. 18 A.L.R.3d 678.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession. 48 A.L.R.3d 818.

Use of property by public as affecting acquisition of land by adverse possession. 56 A.L.R.3d 1182.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession. 76 A.L.R.3d 1202.

Adverse possession between cotenants who are unaware of cotenancy. 27 A.L.R.4th 420.

Grazing of livestock, gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession. 39 A.L.R.4th 1148.

Scope of prescriptive easement for access (easement of way). 79 A.L.R.4th 604.

**Am Jur.** 3 Am. Jur. 2d, Adverse Possession §§ 1, 3, 4 et seq.

1A Am. Jur. Pl & Pr Forms (Rev), Adverse Possession, Forms 1 et seq; Form 2.1 (complaint, petition, or declaration — hostile possession for longer than statutory period — another form); Form 73.1 (complaint, petition, or declaration-boundary line dispute-construction of fence).

1A Am. Jur. Legal Forms 2d, Adverse Possession §§ 11:9 et seq. (notices).

1 Am. Jur. Proof of Facts, Adverse Possession, Proof No. 1 (actual possession); Proof No. 2 (open and notorious character of possession); Proof No. 4 (exclusiveness of possession).

28 Am. Jur. Proof of Facts 2d 703, Permissive Possession or Use of Land.

39 Am. Jur. Proof of Facts 2d 261, Acquisition of Title to Property by Adverse Possession.

2 Am. Jur. Proof of Facts 3d 125, Establishment of Private Prescriptive Easement.

2 Am. Jur. Proof of Facts 3d 197, Establishment of Public Prescriptive Easement.

## § 15-1-15. Three years' actual occupation under a tax title bars suit.

Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time, after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons.

**SOURCES:** Codes, 1871, § 1709; 1880, § 539; 1892, § 2735; 1906, § 3095; Hemingway's 1917, § 2459; 1930, § 2288; 1942, § 716; Laws, 1912, ch. 233.

**Cross References** — Proceedings to confirm tax title, see § 11-17-1.

Suits to cancel tax title, see § 15-1-17.

Three-year general statute of limitations, see § 15-1-29.

## JUDICIAL DECISIONS

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**1. In general.**

Where the public has enjoyed access to waters for more than 10 consecutive years, those waters belong to the state by adverse possession, to be held in trust for the people. Waters used by the public under a claim of right, openly, notoriously, peacefully, continuously and uninterrupted for more than 10 years become public and, once public, such waters may not be lost by prescription. *Dycus v. Sillers*, 557 So. 2d 486 (Miss. 1990).

The 3-year possession statute was intended to cut off the right to assert the invalidity of the tax sale. *Yocom v. Patton*, 277 So. 2d 110 (Miss. 1973).

The tax collector's certified list of lands sold for taxes is a conveyance under this statute. *Yocom v. Patton*, 277 So. 2d 110 (Miss. 1973).

This section [Code 1942, § 716] and Code 1942, § 717, were inapplicable to an action to determine ownership of land in which the plaintiffs claimed an undivided one half interest, and in which defendants, who were successors in interest to a tenant in common who had also acquired tax title to the land, claimed title through adverse possession and laches; but the parties' rights were to be tested by the ten-year statute of limitations. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Where minerals had been severed from the surface, and defendants, claiming under a color of title of a void tax deed,

although exercising acts of ownership of which the surface was susceptible, had never taken actual possession of any of the minerals, they did not acquire rights to the minerals by adverse possession, so that plaintiffs who held mineral rights to the land through inheritance from the grantor of the surface rights did not lose their rights to the minerals by limitations or laches. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

The only conveyance which the tax collector executes or is authorized to execute is his certified list of lands sold for taxes. *Powe v. Brantley*, 210 Miss. 627, 50 So. 2d 229 (1951).

The word conveyance as used in § 716, Code of 1942, which provides that three years actual occupation of land held under a conveyance by a tax collector shall bar suit to recover such land, does not necessarily mean a deed of conveyance to be executed by the chancery clerk under § 9958, Code of 1942 providing for execution of deeds of conveyance to individuals purchasing land at tax sales. *Powe v. Brantley*, 210 Miss. 627, 50 So. 2d 229 (1951).

Three years of actual occupation by tax title purchaser divests the holder of the legal title of all right, title and interest in the land. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

The statute [Code 1880, § 539] applies to sales made before as well as after its enactment, and to apparent as well as real delinquents. *Patterson v. Durfey*, 68 Miss. 779, 9 So. 354 (1891), overruled on other grounds, *Hoskins v. Illinois C.R. Co.*, 78 Miss. 768, 29 So. 518 (1901).

As to the curative effect of statutes like Code 1942, § 716. *Sigman v. Lundy*, 66 Miss. 522, 6 So. 245 (1889); *Metcalf v. Perry*, 66 Miss. 68, 5 So. 232 (1888); *Nevin v. Bailey*, 62 Miss. 433 (1884); *Gibson v. Berry*, 66 Miss. 515, 6 So. 325 (1889).

The statute [Code 1880, § 539] was never intended to defeat a subsequently acquired tax-title. *Lewis v. Siebles*, 65 Miss. 251, 3 So. 652, 7 Am. St. R. 649 (1888).

**2. Lands subject.**

Title and ownership of land does not depend upon the validity or invalidity of



the tax sales and the Forfeited Tax Land Patents which were subsequently acquired since if the sales were legally and validly made then the titles that are derived through the Forfeited Tax Land Patents are good under § 15-1-15 and, on the other hand, if one or more of the tax sales was invalid or illegal then title to the lands in question remained in individuals and thereby was subject to acquisition by purchasers through adverse possession under § 15-1-13. *United States v. 613.86 Acres of Land*, 507 F. Supp. 327 (N.D. Miss. 1980).

Where a party enters into the possession of land under color of title, he is not considered as a mere disseizor, and confined to the part of premises in his actual occupancy, but his claim extends to all the lands embraced in the deed under which he claims. *Smith v. Cook*, 213 Miss. 876, 58 So. 2d 27 (1952).

Neither this section [Code 1942, § 716] nor the two-year statute of limitations provided by Code 1942, § 717, has any application to a tax title claim by one cotenant against another. *Smith v. Smith*, 211 Miss. 481, 52 So. 2d 1 (1951).

A conveyance from the chancery clerk is necessary to transfer title to the tax purchaser, where the sheriff and the tax collector's list of tax sale has been duly made and filed with the clerk. *Powe v. Brantley*, 210 Miss. 627, 50 So. 2d 229 (1951).

This section [Code 1942, § 716] does not confer title to state lands since they are not subject to taxation, tax deed in such case being wholly void. *Penick v. Floyd Willis Cotton Co.*, 119 Miss. 828, 81 So. 540 (1919); *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660 (1914).

This section [Code 1942, § 716] inapplicable to wild land not occupied by anyone. *Dubose v. McNeil*, 104 Miss. 634, 61 So. 706 (1913).

The statute [Code 1942, § 716] applies only to lands that were taxable when sold for taxes. *Mitchell v. Bond*, 84 Miss. 72, 36 So. 148 (1904); *Hoskins v. Illinois Cent. R. Co.*, 78 Miss. 768, 29 So. 518, 84 Am. St. R. 644 (1901).

The statute [Code 1942, § 716] applies, although the land was not subject to sale and although the assessment roll was not properly returned by the assessor. *Carlisle*

*v. Yoder*, 69 Miss. 384, 12 So. 255 (1891), overruled on other grounds, *Hoskins v. Illinois C.R. Co.*, 78 Miss. 768, 29 So. 518 (1901).

The statute [Code 1871, § 1709] does not apply to land held under the conveyance of a clerk of the circuit court, made under Acts 1872 and 1873 (Laws 1872 p. 9, and Laws 1873 p. 91), where there is no evidence that such land is held immediately or remotely under a conveyance by a tax-collector. *Clay v. Moore*, 65 Miss. 81, 3 So. 142 (1887).

### 3. Defects subject to bar.

Section 15-1-15, which affords a 3-year limitation after a 2-year redemption period following a tax sale, cannot lend validity to a tax sale which is void for want of an adequate description. Although possession of the type required by the statute may set at rest an otherwise void sale, it cannot do so where the invalidity is because of the want of an adequate description. *Bowser v. Tootle*, 556 So. 2d 1373 (Miss. 1990).

Where attempted conveyance of mineral and royalty interests in a tract of land by tax deed was void for uncertainty of description, that description could not be cured by occupancy for three years under Code 1942, § 716 irrespective of the degree of such occupancy because the tax purchaser took nothing under this part of the description and there was no color of title which could be perfected under the statute. *Wilson v. Clark*, 278 So. 2d 250 (Miss. 1973).

This section [Code 1942, § 716] is not applicable where claim was under void tax deed constituting color of title. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952), reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

A void tax deed may serve as color of title and be the basis of an adverse possessory claim. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952),

reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

Where the state highway commission condemned a strip of land for highway purposes as against the holder of a tax title thereto, and it went into possession and occupied the same for more than three years, such period of possession without challenge on the part of the original owner destroyed the owner's right to challenge the commission's ownership, notwithstanding that the tax sale was void. *Baldwin v. Mississippi State Hwy. Dep't*, 187 Miss. 642, 193 So. 789 (1940).

Statute respecting three years' occupancy held inapplicable, where assessment and tax deed were nullities because of insufficient description. *Patterson v. Morgan*, 161 Miss. 807, 138 So. 362 (1931).

The statute [Code 1942, § 716] is designed to cure one link in a title; that is, the possession continued for three years under a conveyance makes the sale a valid and legal sale for all purposes after the expiration of such time, but such possession does not cure a defect in a subsequent conveyance; accordingly, possession of a purchaser through conveyance from a municipality of land acquired by the municipality at a tax sale did not operate to cure the defects in the sale where no authority for such conveyance was provided by ordinance. *Byrd v. Dickson*, 152 Miss. 605, 120 So. 562 (1929).

Occupancy for 3 years after 2 years from tax sale ripens into good title, though tax sale was void. *Dimitry v. Lewis*, 150 Miss. 818, 117 So. 265 (1928), appeal dismissed, 278 U.S. 570, 49 S. Ct. 81, 73 L. Ed. 511 (1928).

Amendment eliminating former clause declaring the statute inapplicable to void sales and making statute applicable to actions claiming sale void held to apply to tax sale made prior thereto. *Slawson v. W.T. Adams Mach. Co.*, 117 Miss. 777, 78 So. 753 (1918).

This section [Code 1942, § 716] applies to any defects in tax titles. *Littler v. Boddie*, 104 Miss. 178, 61 So. 171 (1913).

Possession for three years under void tax sale confers good title. *Smith v. Lea-*

*venworth*, 101 Miss. 238, 57 So. 803 (1911), error dismissed, 235 U.S. 690, 35 S. Ct. 205, 59 L. Ed. 427 (1914).

Possession under tax sale made under unconstitutional law, for the statutory period confers title on purchaser. *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466 (1911); *Kennedy v. Sanders*, 90 Miss. 524, 43 So. 913 (1907); *McLemore v. Anderson*, 92 Miss. 42, 43 So. 878 (1907), aff'd, 92 Miss. 65, 47 So. 801 (1908).

Three-year statute inapplicable to illegal purchase of land by chancery clerk at tax sale. *Barker v. Jackson*, 90 Miss. 621, 44 So. 34 (1907).

The statute [Code 1880, § 539] protects a tax title, although the sale was made on the wrong day and under a law (in this case the abatement act of 1875) not applicable. *Brougher v. Stone*, 72 Miss. 647, 17 So. 509 (1895).

#### 4. Actual occupation defined.

Under § 15-1-15, "actual occupancy" does not mean that one must reside personally upon the property but it does mean possession over the 3-year period which is of such a nature, throughout the 3-year period, that another, believing himself or herself to be the owner of the property, would recognize that someone else was asserting a claim to it because of a clearly visible indicia of occupancy on the property. *Bowser v. Tootle*, 556 So. 2d 1373 (Miss. 1990).

The occupancy referred to in Code 1942, § 716, must be by someone claiming under color of title by and through the tax collector's deed and in the absence of such claim and occupancy, the three-year term proscribed by this section does not begin to run. *Wilson v. Clark*, 278 So. 2d 250 (Miss. 1973).

It is not mere adverse possession that gives title under Code 1942, § 716 but it is actual occupation claiming under a conveyance by a tax collector in pursuance of a tax sale. *Yocom v. Patton*, 277 So. 2d 110 (Miss. 1973).

The words "actual occupation" under this section [Code 1942, § 716], do not require the tax buyer to go and live upon or use the premises, but he may occupy the land by a tenant and the occupancy of his tenant is the occupancy of the tax



buyer. *Cox v. Richerson*, 186 Miss. 576, 191 So. 99, 124 A.L.R. 1138 (1939).

The possession necessary to put the statute in operation must be an actual occupancy of at least a part of the land and continuous from the time named. *Pearce v. Perkins*, 70 Miss. 276, 12 So. 205 (1892).

### 5. —Applicability.

The section [Code 1942, § 716] is not applicable to a suit to remove a tax sale as a cloud of title to wild land which has never been actually occupied by anyone. *Waldrop v. Whittington*, 213 Miss. 567, 57 So. 2d 298 (1952).

This section [Code 1942, § 716] applies to those who have actual occupation "under a conveyance by a tax collector", and the sheriff of the county is the tax collector and the chancery clerk is not a tax collector. *Powe v. Brantley*, 210 Miss. 627, 50 So. 2d 229 (1951).

Law relating to actual possession curing defect in tax sale relates only to sale followed by possession therein described; privity between purchaser at tax sale and person in possession is required for application of law relating to possession curing defects in sale; possession by purchaser through conveyance from municipality of lands acquired by the municipality at tax sale without ordinance authorizing such conveyances did not operate to cure defects in sale. *Byrd v. Dickson*, 152 Miss. 605, 120 So. 562 (1929).

Where two tracts were contiguous and all of one and part of the other were adversely occupied under tax title, statute operates as to both. *Dimitry v. Lewis*, 150 Miss. 818, 117 So. 265 (1928), appeal dismissed, 278 U.S. 570, 49 S. Ct. 81, 73 L. Ed. 511 (1928).

Proof of the occupancy of one of two contiguous lots embraced in the deed, there being no evidence as to the possession of the other, will protect the title to both. *Brouger v. Stone*, 72 Miss. 647, 17 So. 509 (1895).

### 6. —Purpose.

The legislature intended by this section [Code 1942, § 716] that the possession of the holders of the tax title should be of such character and evidenced by such change of occupancy and acts of owner-

ship as to leave no doubt as to whether the former owner would be thereby afforded the means of becoming advised that the title was being claimed pursuant to the tax sale. *Smith v. Anderson*, 193 Miss. 161, 8 So. 2d 251 (1942).

The purpose of this section [Code 1942, § 716] is to require an actual possession as against a mere constructive possession under a paper title. *Cox v. Richerson*, 186 Miss. 576, 191 So. 99, 124 A.L.R. 1138 (1939).

### 7. —Requirements.

In order to show adverse possession, there is a necessity for unequivocal acts showing an occupancy which is actual, continuous, and hostile, especially where such occupancy is by a member of a family against another. *Coleman v. L. & M. Land & Mineral Corp.*, 54 So. 2d 213 (Miss. 1951).

Without color of title, adverse possession gives title only to the land actually and continuously used, cultivated or occupied. *Parks v. Simmons*, 52 So. 2d 14 (Miss. 1951).

The character and type of "adverse possession" required under Code 1942, § 717, limiting the time for attacking validity of tax sale to the state, is that pertaining to ten years adverse possession, and not that under this section [Code 1942, § 716]. *Leavenworth v. Cloughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

While, under the ten years' adverse possession statute one may acquire title to land without actually occupying it, either himself or by tenant, but by merely cultivating, pasturing, cutting and selling timber, and other acts of ownership and control over the same, under the three-year statute it is required that there be actual occupancy for three years, and not the mere exercise of acts of ownership and control such as would give title by adverse possession without actual occupation. *Smith v. Anderson*, 193 Miss. 161, 8 So. 2d 251 (1942).

### 8. —Particular cases.

A forfeited tax land patent void on its face constitutes color of title to the land therein described and possession for 3 years after 2 years from the date of the tax sale bars any action to invalidate the tax



title. *Yocom v. Patton*, 277 So. 2d 110 (Miss. 1973).

Possession by mortgagee under void deed of trust and claim of color of title under a tax deed which failed to describe the land, with subsequent possession consisting of occupancy of the premises through the person who owned the land at the time of the purported tax sale, did not sustain defendant's claim of adverse possession and owner was entitled to decree canceling such claim as cloud upon his title. *Heidelberg v. Duckworth*, 206 Miss. 388, 40 So. 2d 179 (1949).

Claimant to land under void tax title could not invoke the three-year limitation period under this section [Code 1942, § 716] to support his claim of title where he never occupied the land either subsequent or prior to the sale. *Thompson v. Reed*, 199 Miss. 129, 23 So. 2d 888 (1945).

Fact that patentee's vendee of wild and uncultivated land sold to the state under void tax sale paid taxes on the land continuously for three or four years prior to the filing of suits by the former owners to determine title, gave a deed of trust thereon for each of such years, and went upon such lands in person or by agent and offered to sell some timber therefrom although no timber was actually sold, cut or removed, did not constitute sufficient adverse possession to put the former owners on notice that their constructive possession of such land had been invaded, so that the two-year limitation period under Code 1942, § 717 was not available to the vendee. *Thompson v. Reed*, 199 Miss. 129, 23 So. 2d 888 (1945).

While a claimant under a void tax title may not be required to change the tenants on a farm in order to put the three-year statute in operation, he is not entitled to claim the benefit of the statute where he knows that the alleged change in actual occupation is being successfully and skillfully concealed from the former owners by reason of the fact that the agents or tenants of the former owners are allowed to rent out the land and exercise full management and control of the property in the same manner as they had done prior to the tax sale. *Smith v. Anderson*, 193 Miss. 161, 8 So. 2d 251 (1942).

## 9. Persons who may invoke bar.

This section [Code 1942, § 716] does not bar suit by tenant in common against cotenant in possession, as cotenant in possession has duty to pay taxes or to redeem from tax sale for benefit of all tenants in common, he cannot purchase any interest adverse to cotenants, and purchase of outstanding tax title by tenant in common inures to benefit of all tenants, the cost of redemption being common charge against property held in common. *Howard v. Wactor*, 41 So. 2d 259 (Miss. 1949).

Grantees of cotenant in possession who attempted to purchase land at tax sale cannot invoke this section [Code 1942, § 716], grantees taking land with notice since it is shown by record of title purchased that grantor was cotenant and disabled to acquire title for himself by purchase of tax title. *Howard v. Wactor*, 41 So. 2d 259 (Miss. 1949).

The effect of eminent domain proceedings against the holder of a tax title to the land in question, is to acquire the right of easement from such tax title holder, and the corporation or body condemning was entitled under the statute to enter and take possession and use the property for the purpose condemned, and was vested with all the rights and privileges that the party having the tax title would have, among which is the right to enter possession if it can peaceably do so, and hold possession for the statutory period under this section [Code 1942, § 716]. *Baldwin v. Mississippi State Hwy. Dep't*, 187 Miss. 642, 193 So. 789 (1940).

Since the chancery clerk could not legally become a purchaser of land at the tax sale, one claiming through him could not invoke the bar of the statute. *Barker v. Jackson*, 90 Miss. 621, 44 So. 34 (1907).

Neither one under duty to redeem, nor those claiming through him, can purchase a tax title from the state and invoke the statute. *Lyebrook v. Hall*, 73 Miss. 509, 19 So. 348 (1896).

A cotenant who has acquired a tax title cannot invoke the statute. *Jonas v. Flanniken*, 69 Miss. 577, 11 So. 319 (1892).

The section [Code 1942, § 716] applies as well to a purchaser from the state of tax lands as to a purchaser from the tax

collector. *Pipes v. Farrar*, 64 Miss. 514, 1 So. 740 (1887).

The statute [Code 1942, § 716] cannot be availed of where the occupant could not, if his tax title were perfect, assert it against the claimant of the land; its effect is to protect from assailement the tax title of one who, being authorized under the principles of law to claim under a sale for taxes, finds his title, which, if valid, would protect his possession, attacked for irregularities existing in the proceedings of sale. *McGee v. Holmes*, 63 Miss. 50 (1885).

Where at the time of tax sale, the purchaser was in possession as mortgagee under one to whom a life tenant had conveyed the land, the statute could not be availed of as against the title of the heirs at law of the original owner. *McGee v. Holmes*, 63 Miss. 50 (1885).

#### 10. Persons affected.

Remaindermen are not barred under this section [Code 1942, § 716] from attacking a void tax title where the duty to pay the taxes rested upon the life tenant, who was still living, notwithstanding that they might have filed a bill to establish their rights as remaindermen, as against the void tax title, they being unable in such a suit to obtain possession prior to the death of the life tenant. *Cox v. Richerson*, 186 Miss. 576, 191 So. 99, 124 A.L.R. 1138 (1939).

This statute [Code 1942, § 716] is a mere statute of limitations and was not intended to cut off remaindermen, whose right of action does not accrue until the death of the life tenant; and the word "assail" adds no force to the statute since without it the statute would mean the same thing. *Carter v. Moore*, 183 Miss. 112, 183 So. 512 (1938).

#### 11. Running of limitation period.

Limitation period provided by this section [Code 1942, § 716] does not begin to run against former owner or his vendee until their possession, whether actual or constructive, has been invaded, after alleged tax sale. *Ellard v. Logan*, 39 So. 2d 485 (Miss. 1949).

Even though it is true that one relying upon this section [Code 1942, § 716] to acquire a title through a void tax sale by means of actual occupation of the land for

three years, after the expiration of the period of redemption, is not required to notify the former owners as to the fact of the claim and occupation thereunder, he must do something to denote a change in the character of the possession as compared with that preceding the commencement of the three years' actual occupation relied on, such as would afford the former owners the means of acquiring knowledge that the land is being appropriated to his use under claim of ownership. *Smith v. Anderson*, 193 Miss. 161, 8 So. 2d 251 (1942).

To set this statute [Code 1942, § 716] in operation there must be some person, either the buyer or his agent, assignee, or vendee, to go upon the premises and use the land in such manner as to show that parties are in possession under claim of right, and in such case the suit to show the tax sale void must be commenced within three years after the expiration of the time for redemption of the sale. *Cox v. Richerson*, 186 Miss. 576, 191 So. 99, 124 A.L.R. 1138 (1939).

Statute begins to run at end of redemption period, where owner retains possession. *Carraway v. Lockard*, 150 Miss. 704, 116 So. 599 (1928).

A suit to recover because of defects in a tax sale, or any steps leading to the sale, is barred where the purchaser went into actual possession after the expiration of the time allowed for redemption and remained in possession for three years. *Butts v. Ricks*, 82 Miss. 533, 34 So. 354 (1903).

#### 12. —Redemption.

Possession from the time named will not bar the owner, where within the time allowed there was a redemption, this being a matter occurring after the sale. *Cochran v. Richberger*, 70 Miss. 843, 12 So. 851 (1893).

#### 13. Evidence.

A purchaser of a tax title from the state, to avail of this statute, must prove that the land was sold for taxes, and a deed from the state unsupported by such proof is insufficient. *Bennett v. Chaffe*, 69 Miss. 279, 13 So. 731 (1891).

#### 14. Pleading.

Where a defendant in a suit to cancel a tax title fails to plead the statute and a

decree is rendered canceling the title, his heir, who continues in possession, cannot afterwards invoke the statute against the

complainant. *Jones v. Merrill*, 69 Miss. 747, 11 So. 23 (1892).

### RESEARCH REFERENCES

**ALR.** Statutory limitation of period for attack on tax deed as affected by failure to comply with statutory requirement as to notice before tax deed. 5 A.L.R.2d 1021.

Reputation as to ownership or claim as admissible on question of adverse possession. 40 A.L.R.2d 770.

Adverse possession of executor or administrator or his vendee as continuous with that of ancestor and heirs. 43 A.L.R.2d 1061.

Title by or through adverse possession as marketable. 46 A.L.R.2d 544.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Limitation of action against insurer for breach of contract to defend. 96 A.L.R.3d 1193.

## § 15-1-17. Limitations applicable to actions or suits to cancel tax titles.

The owner, mortgagee or other person interested in any land which has been sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes within two years after the period of redemption shall have expired, and not thereafter. However, the limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes.

If any person entitled to bring any such suit or action shall, at the time at which the cause of action accrues, be under the disability of infancy, or unsoundness of mind, he may bring the suit or action within the time in this section respectively limited after his disability shall be removed but the saving of persons under disability shall never extend longer than twenty-one years.

The completion of the limitation herein prescribed to bar any action shall defeat and extinguish all the right, title and interest, including the right of possession in and to such land, of any and all persons whatsoever, except the State of Mississippi and its patentees, and it shall vest in the state, and its patentees, a fee simple title to such lands.

**SOURCES:** Codes, 1942, § 717; Laws, 1934, ch. 196.

**Cross References** — Proceedings to confirm tax title, see § 11-17-1.

### JUDICIAL DECISIONS

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### 1. Validity.

Statute [Code 1942, § 717] held not unconstitutional as impairing contract since it reserves taxpayer full two years after passage in which to assert defects. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

Statute [Code 1942, § 717] held not unconstitutional as classification violating equal protection of laws. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

Alleged unconstitutionality, on ground statute vested fee simple title in state or patentees before expiration of three-year period of redemption allowed by Laws 1934 c. 383, would not be considered until case presented wherein statute was sought to be applied so as to cut off unexpired portion of redemption period. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

### 2. Construction and application generally.

The holder of a forfeited tax land patent, which was based upon a void assessment and invalid sale to the state, and his successors in title, could not by mere adverse possession of the surface become vested with title to the minerals, which had been antecedently separated. *Wilson v. Eckles*, 232 Miss. 577, 99 So. 2d 846 (1958).

Under this section [Code 1942, § 717] there must be actual possession by purchaser of tax title. *Wall v. Wall*, 220 Miss. 642, 71 So. 2d 308 (1954).

Where an attack on the validity of a tax sale was made two years after the sale, the action was barred by this section [Code 1942, § 717]. *Brown v. Pittman*, 211 Miss. 344, 51 So. 2d 732 (1951).

Claimant acquired title under § 717, Code of 1942, the two-year tax statute of

limitations, where there was an invalid tax sale to the state of three parcels of land which were adjoining and constituted and should have been sold as one tract, but where the claimant exercised ownership over the property, paid taxes, gave a turpentine lease under which visible acts upon trees were performed by the lessee, and where the claimant developed a program of reforestation. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

The two-year period prescribed by this section [Code 1942, § 717] within which suit may be brought to cancel the title of the state is, in effect, a statute of limitations. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

Neither payment of taxes by patentee or his vendee of land sold to the state under a void tax sale, nor the giving of deeds of trust thereon, or both, constitutes a sufficient invasion of possession which follows legal title of the former owner to require the latter to file suit to set aside the tax sale within the two-year limitation prescribed by this section [Code 1942, § 717]. *Thompson v. Reed*, 199 Miss. 129, 23 So. 2d 888 (1945).

The two-year limitation of this section [Code 1942, § 717] does not apply where the former owner and his vendees have continuously remained in possession from the time of the tax sale. *State v. Butler*, 197 Miss. 218, 21 So. 2d 650 (1945).

The character and type of "adverse possession" required under this section [Code 1942, § 717] is that pertaining to ten years' adverse possession, and not that under Code 1942, § 716 respecting three-year actual occupation under a tax title. *Leavenworth v. Cloughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

Statute does not cure or validate defects, irregularities and illegalities in assessment, levy, and sale of land for taxes, but is purely a statute of limitation. It does not take away vested rights but fixes a reasonable period of time in which they may be asserted, leaving former owner the right to sue and have sale declared void because of such defects, etc. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

Statute [Code 1942, § 717] could be successfully invoked against any suit

challenging validity of tax sale to state, embraced within its provisions, on ground of defects, etc., as one of limitation, where effect would be neither to shorten period of redemption, nor divest estate in possession. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

Though a tax sale is subject to be defeated by redemption within time and in manner prescribed by law, if there is no redemption, sale becomes valid, and title relates back to date of sale and takes precedence over any mortgage, deed, or other instrument executed by owner during period of redemption. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

Fact that statute ran concurrently with portion of redemption period was immaterial since effect was not to shorten redemption period, and prior to expiration of limitation, taxpayer could enter suit to cancel claim of state's patentee as cloud on his title, whether taxpayer was in possession or not or whether he was threatened to be disturbed in his possession. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 182 So. 102 (1938).

### 3. Possession by state or those claiming through it.

Where an action was brought in 1945 against the state to confirm a forfeited tax land patent and there was an adjudication of validity of the patent, and that though fraud had been perpetrated, the land commissioner and attorney general properly refused to cancel the tax sale to state and patent issued thereunder in an action brought therefor in 1949 by the heirs of the original owner of forfeited lands. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952), reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

Entry of possession by defendant pursuant to patent from state after tax sale to state, with actual knowledge of former owner, and continuance in possession for more than two years with payment of taxes on the land, established adverse possession as against the former owner,

notwithstanding that the land was used during such period by neighbors for pasturage with consent of both the former owner and defendants. *Webb v. Anderson*, 206 Miss. 398, 40 So. 2d 189 (1949).

The former owner is not required to actually occupy the land in the meantime by residing thereon to have it in his possession and under his control in order to prevent the running of the two-year limitation against his right to have a tax title canceled. *Smith v. Myrick*, 201 Miss. 647, 29 So. 2d 924 (1947).

So long as the real owner of land is in possession, it would be unconstitutional for the legislature to require him to commence an action against anyone claiming through an invalid tax sale to the state. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

Whenever it is shown that former owner of land remained in possession thereof after sale for taxes, either in person or by tenant, then statute [Code 1942, § 717] does not apply and claim of title and possession of such owner can be defeated only by proof of a valid assessment, levy and sale, coupled with failure to redeem within time allowed by law. *Byrd v. Byrd*, 193 Miss. 249, 8 So. 2d 510 (1942); *Grant v. Montgomery*, 193 Miss. 175, 5 So. 2d 491 (1942); *Russell Inv. Corp. v. Russell*, 182 Miss. 411, 182 So. 102 (1938); *White v. Noblin*, 183 Miss. 92, 183 So. 914 (1938).

This statute of limitations [Code 1942, § 717] is wholly inapplicable to a case where, if the former owner does not remain in actual possession, there has been no adverse occupancy or possession by the purchaser at the tax sale, its patentee or his vendee for the period of limitations prescribed. *Grant v. Montgomery*, 193 Miss. 175, 5 So. 2d 491 (1942).

Where shortly after the first of two sales of property to the state for taxes the former owner moved therefrom, upon destruction of the building thereon by fire, and the property remained vacant, with neither the state nor its patentee taking possession, the statute of limitations did not bar one claiming under the former owner from bringing action more than two years after such sale to cancel as a cloud upon his title the tax sales and subsequent patents from the state because of



defects in the tax sales rendering them void. *Grant v. Montgomery*, 193 Miss. 175, 5 So. 2d 491 (1942).

#### 4. Wild lands.

Neither actual occupation, cultivation, nor residence are necessary to constitute actual possession when the property is so situated as not to admit any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

It is the rule that less notorious and obvious acts upon the land are essential to vest title in what are known as wild lands than lands suitable to occupancy by residing thereon and putting them to husbandry and farming. *Broadus v. Hickman*, 210 Miss. 885, 50 So. 2d 717 (1951).

Fact that patentee's vendee of wild and uncultivated land sold to the state under void tax sale paid taxes on the land continuously for three or four years prior to the filing of suits by the former owners to determine title, gave a deed of trust thereon for each of such years, and went upon such lands in person or by agent and offered to sell some timber therefrom although no timber was actually sold, cut or removed did not constitute sufficient adverse possession to put the former owners on notice that their constructive possession of such land had been invaded, so that the two-year limitation period under this section [Code 1942, § 717] was not available to the vendee. *Thompson v. Reed*, 199 Miss. 129, 23 So. 2d 888 (1945).

#### 5. Color of title.

A person in possession under a void instrument where its description is good, is in possession under a color of title and possession is extended from a part to the whole tract under this section [Code 1942, § 717]. *Shepherd v. Mahannah*, 220 F.2d 737 (5th Cir. 1955).

A person in possession of land under color of a tax-forfeited land patent acquires title thereto by the requisite exclusive adverse possession over a period of two years even though the tax deed be

void. *Shepherd v. Mahannah*, 220 F.2d 737 (5th Cir. 1955).

A void tax deed may serve as color of title and be the basis of an adverse possessory claim. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952), reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

This section [Code 1942, § 717] which deals expressly with sales to the state, encompasses possession under color of title. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952), reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

Without color of title, adverse possession gives title only to the land actually and continuously used, cultivated or occupied. *Parks v. Simmons*, 52 So. 2d 14 (Miss. 1951).

#### 6. Defects subject to bar.

This statute [Code 1942, § 717] applies only to any defect, irregularity or illegality in the assessment, levy or sale of land for delinquent taxes, and has no reference whatsoever to the question who may purchase at a tax sale and does not remove the disqualification of a wife to purchase at tax sale the tax forfeited land of her husband. *Griffin v. Griffin*, 194 Miss. 622, 11 So. 2d 311 (1943).

The statute of limitations applies as against either statutory or constitutional objections to the tax sale. *Grant v. Montgomery*, 193 Miss. 175, 5 So. 2d 491 (1942).

#### 7. Persons affected.

##### 8. —Owner in possession.

The two-year limitation period of § 15-1-17 was inapplicable where a tax sale was void and the owner had remained in possession. *Pittman v. Currie*, 414 So. 2d 423, 35 A.L.R.4th 801 (Miss. 1982).

Possession by mortgagee under void deed of trust and claim of color of title



under a tax deed which failed to describe the land, with subsequent possession consisting of occupancy of the premises through the person who owned the land at the time of the purported tax sale, did not sustain defendant's claim of adverse possession and owner was entitled to decree canceling such claim as cloud upon his title. *Heidelberg v. Duckworth*, 206 Miss. 388, 40 So. 2d 179 (1949).

The owner of land sold for taxes is not precluded from attacking the tax sale and patent unless the nature of the acts claimed by the holder of the patent to constitute adverse possession and the time when such acts were begun are shown by definite, specific, clear and positive evidence. *Smith v. Myrick*, 201 Miss. 647, 29 So. 2d 924 (1947).

This statute [Code 1942, § 717] has no application to an owner in possession, whether in person or by a tenant. *Byrd v. Byrd*, 193 Miss. 249, 8 So. 2d 510 (1942); *Grant v. Montgomery*, 193 Miss. 175, 5 So. 2d 491 (1942); *E.L. Bruce Co. v. Smallwood*, 188 Miss. 771, 196 So. 227 (1940).

The limitation provided herein does not apply to preclude a former owner from maintaining a suit to cancel a patent and certain conveyances as a cloud on title, based upon a void tax sale, where such former owner remained in possession, since until his possession is invaded or disturbed by the purchaser at the sale, or by a subsequent vendee of such purchaser, the statute of limitations prescribed by the statute for commencing an action does not begin to run. *E.L. Bruce Co. v. Smallwood*, 188 Miss. 771, 196 So. 227 (1940).

#### 9. —Cotenants.

This section [Code 1942, § 717] and Code 1942, § 716, were inapplicable to an action to determine ownership of land in which the plaintiffs claimed an undivided one half interest, and in which defendants, who were successors in interest to a tenant in common who had also acquired tax title to the land, claimed title through adverse possession and laches; but the parties' rights were to be tested by the ten-year statute of limitations. *Wilder v. Currie*, 231 Miss. 461, 95 So. 2d 563 (1957), suggestion of error sustained in

part, overruled in part, 231 Miss. 461, 97 So. 2d 384 (1957).

Neither this section [Code 1942, § 717] nor the three-year statute of limitations under Code 1942, § 716, has any application to a tax title claim by one cotenant against another. *Smith v. Smith*, 211 Miss. 481, 52 So. 2d 1 (1951).

#### 10. Running of limitation period.

In an action to cancel as a cloud on title a sale of property to the state in 1948 for 1947 taxes on minerals, the chancellor properly overruled the state's demurrer where the demurrer admitted the complainant's allegation that the 1948 tax sale had been invalid for failure to comply with the predecessor statute of § 27-41-59 requiring that the tax collector first offer the property in 40-acre tracts. In addition, where the demurrer admitted the allegation that the state had not been in possession of the property since the tax sale, the chancellor properly overruled the special demurrer that the action was barred by the limitations in §§ 13-1-7 [Repealed], 15-1-9, and 15-1-17 since possession is required to start any of the three statutes into operation. *Pittman v. Currie*, 391 So. 2d 654 (Miss. 1980).

Limitation period provided by this section [Code 1942, § 717] does not begin to run against former owner or his vendee until their possession, whether actual or constructive, has been invaded, after alleged tax sale. *Ellard v. Logan*, 39 So. 2d 485 (Miss. 1949).

The limitation provided for by this section [Code 1942, § 717] does not begin to run against the owner until his possession is invaded by some act of a claimant which amounts to an actual, hostile, adverse possession of the nature required by Code 1942, § 711, the ten years' adverse statute. *Smith v. Myrick*, 201 Miss. 647, 29 So. 2d 924 (1947).

The period within which the real owner of land must commence an action against anyone claiming through an invalid tax sale to the state does not begin to run so long as the real owner is in possession either in person or by tenant. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

Adverse possession must be maintained continuously for the prescribed two-year period in order to bar the true owner

under this section [Code 1942, § 717]. *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

If this section [Code 1942, § 717] were not construed to require adverse possession on the part of the claimant before the limitation period began to run, but started the period running from the date of the sale, it would be unconstitutional. *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

The two-year period of limitation under this section [Code 1942, § 717] does not begin to run until possession of the true owner, whether actual or constructive, is invaded or disturbed by or through claimant under the alleged invalid tax sale by an invasion which amounts to actual, adverse possession. *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

Where patentee of uncultivated, unenclosed, cut-over land sold to the state under an invalid tax sale, did nothing to arrest owner's attention until she had the land surveyed less than two years prior to the filing by the owner of cross-bill challenging the tax sale, there was not sufficient adverse possession for two years necessary to extinguish owner's right and title to the land under this section [Code 1942, § 717]. *Leavenworth v. Claughton*, 197 Miss. 606, 20 So. 2d 821 (1945).

Until the owner's possession is invaded or disturbed by the purchaser at the tax sale, or by a subsequent vendee of such purchaser, the limitation period prescribed by the statute for commencing an action does not begin to run. *E.L. Bruce Co. v. Smallwood*, 188 Miss. 771, 196 So. 227 (1940).

#### 11. Rights affected.

Where a tax sale was void because the minutes of the Board of Supervisors were not read and approved when the board adjourned, the defect could have been cured under this section [Code 1942, § 717] by taking and holding possession of the land for two years. *Parks v. Simmons*, 52 So. 2d 14 (Miss. 1951).

The two-year limitation in this section [Code 1942, § 717] does not apply where the sale to the state is utterly void for want of description and consequently no tax deed to the land exists. *Meyerkort v.*

*Warrington*, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

Statutes of limitation do not run in favor of the holder of the tax deed void on its face. *Meyerkort v. Warrington*, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

This section [Code 1942, § 717] is more than a mere statute limiting the time within which to bring an action to cancel the title of the state to land sold to it for taxes; for, on the expiration of the time limit in ¶ 1 hereof, it extinguishes all the rights in and to the land of any and all persons whatsoever. *Lee v. Smith*, 189 Miss. 636, 198 So. 296 (1940).

#### 12. —Right of redemption.

This section [Code 1942, § 717] in no way affects the right of redemption as to land sold prior to its enactment; it simply limits the time within which an action can be brought by an owner of land sold to the state for taxes "to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes" to two years after the statute became effective on April 4, 1934. *Lee v. Smith*, 189 Miss. 636, 198 So. 296 (1940).

Where § 3 of chapter 196, Laws 1934, approved April 4th, 1934, if applied to a case where a tax sale, had prior to the enactment thereof, on September 18, 1933, was void and at that time the owner had three years from the day of the sale in which to redeem, would extinguish such right of redemption at the expiration of two years from the date of sale, thereby cutting off five months, fourteen days from the time in which the owner could redeem it, and would be unconstitutional, such section is inoperative to that extent so that the right of the owner to redeem the land from the tax sale would be unaffected thereby; a constitutional defect in such section, as applied to such circumstances, does not render it wholly void but simply requires that its operation be so restricted as to preserve the right of redemption that existed when the land was sold for taxes. *Lee v. Smith*, 189 Miss. 636, 198 So. 296 (1940).



**13. Effect of redemption.**

When the owner of land sold for taxes redeemed it therefrom, the chancery clerk, through whom the redemption must be made, was required to execute to him a release of all claim or title of the state or purchaser to such land, by virtue of which the tax sale from which the land was regained is without further efficacy and the owner's title and right to possession do not rest on defects in the assessment or sale of the land so that the necessity for an action to cancel the title of the purchaser at the sale no longer exists. *Lee v. Smith*, 189 Miss. 636, 198 So. 296 (1940).

An owner of land sold for taxes, which sale is void, may, if he so desires, redeem it from the sale, bring an action to cancel the sale, or await action by the purchaser at the sale or his vendee and then invoke the invalidity of the sale in bar of any title therefrom, this section [Code 1942, § 718] limiting only the time in which the owner of land sold to the state for taxes can plead any defect in the sale referred to in the statute against the state or its patentees. *Lee v. Smith*, 189 Miss. 636, 198 So. 296 (1940).

**14. Actions to cancel title.**

The principle that only the state is entitled to have a patent canceled on the sole ground of the fraud committed upon its land commissioner in the procurement thereof, does not preclude the former owners of the land from having the patent canceled in their own right as a cloud upon their title on the separate ground that the tax sale to the state is void as having been made on a date not autho-

rized by law; nor are such former owners prevented from proving the fraud and the notice thereof furnished in the application of the patentee or from emphasizing the grossly inadequate price paid to the state, as disclosed in the reported patent, in answer to a subsequent vendee's contention that he is an innocent purchaser for value without notice. *E.L. Bruce Co. v. Smallwood*, 188 Miss. 771, 196 So. 227 (1940).

In an action by the owners of land to set aside a patent from the state based upon a sale for delinquent taxes and to cancel a conveyance from the patentee to another, the latter could not successfully maintain that it occupied the position of an innocent purchaser for value without notice, even in the absence of any notice, actual or constructive, of the fraud committed upon the state in procurement of the patent, where the tax sale itself, made on a date not authorized by law, disclosed that the state had acquired no title, and could not convey any by the patent issued to such purchaser's vendor. *E.L. Bruce Co. v. Smallwood*, 188 Miss. 771, 196 So. 227 (1940).

Where land was sold for delinquent taxes on August 1st, 1932, the court would not inquire into the validity of the tax sale in an action to cancel the sale brought in 1939, since such inquiry would necessitate a decision on the merits, which was the very thing the statute intended to cut off, the only exceptions thereto recognized by the statute being the actual payment of the taxes on the land prior to its sale therefor. *Jones v. Russell*, 187 Miss. 827, 194 So. 290 (1940).

**§ 15-1-19. Limitations applicable to suits to redeem mortgage or deed of trust.**

When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage except within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him. In such case a suit may not be brought except within ten years next after the time at which such acknowledgment, or the last of such



acknowledgments, if more than one, was given. Such acknowledgment shall be effectual only as against, and to the extent of the interest of the party signing it.

**SOURCES:** Codes, 1857, ch. 57, art. 3; 1871, § 2149; 1880, § 2666; 1892, § 2732; 1906, § 3092; Hemingway's 1917, § 2456; 1930, § 2289; 1942, § 718.

**Cross References** — Sale of lands under mortgages and deeds in trust, see § 89-1-55.

Barring of lien where time has lapsed on the face of the record, see § 89-5-19.

## JUDICIAL DECISIONS

1. In general.
2. Possession; receipt of profits or rent.
3. Persons entitled to invoke bar.
4. Rights and interests barred.
5. Running of limitation period.
6. —Acknowledgment of mortgagor's rights.
7. Laches.

### 1. In general.

This provision [Code 1942, § 718] may be first pleaded on a retrial. *Gaddis & McLaurin, Inc. v. Nichols*, 234 Miss. 155, 105 So. 2d 459 (1958).

Where mortgagee was in possession of realty for more than ten years but did not invade the actual and constructive possession of his wife in order to create duty on her part to commence an action for protection of her rights as owner during the occupancy of the mortgagee, the mortgagee acquired no title under this section. *Cassidy v. Central Lumber Co.*, 219 Miss. 96, 68 So. 2d 286 (1953).

This section [Code 1942, § 718] does not apply to deed of trust on homestead void because of wife's failure to join, the statute barring suits after adverse possession of ten years being the applicable statute. *Woods v. Campbell*, 87 Miss. 782, 40 So. 874 (1906).

Under the statute [Code 1942, § 718], the doctrine as to stale claims not prevailing in this state, a bill to redeem land illegally purchased by a mortgagee at his own sale is only barred by the ten years' limitation. *Houston v. National Mut. Bldg. & Loan Ass'n*, 80 Miss. 31, 31 So. 540, 92 Am. St. R. 565 (1902).

### 2. Possession; receipt of profits or rent.

Nonresident alien mortgagee secured perfect title against mortgagor, where he obtained possession through tenants under invalid sale and held possession and received rents for more than 10 years under claim of title. *Scottish Am. Mtg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C, 1236 (1911).

Mortgagee's title complete, either upon obtaining and holding actual possession after condition broken or receiving rents and profits for statutory period; in absence of fraud it is immaterial that only part of mortgagors surrendered possession. *Garrett v. Ellis*, 98 Miss. 1, 52 So. 451 (1910).

Mortgage by one tenant in common purporting to convey entire estate did not amount to ouster nor start running of statute where possession was not taken thereunder. *Scottish-American Mtg. Co. v. Bunckley*, 88 Miss. 641, 41 So. 502, 117 Am. St. R. 763 (1906).

If the mortgagee buys at a mortgage sale, voidable for irregularities, enters and continues in possession as owner for nearly ten years, with the acquiescence of the mortgagor, the latter is estopped to plead the statute of limitations against the debt or assert the legal title until the status quo is restored. *Lucas v. American Freehold Land Mtg. Co.*, 72 Miss. 366, 16 So. 358 (1894).

In such case the purchaser will be treated as mortgagee in possession, entitled to satisfaction of his debt, but liable to an accounting as to the rents. *Lucas v. American Freehold Land Mtg. Co.*, 72 Miss. 366, 16 So. 358 (1894).

### 3. Persons entitled to invoke bar.

As a defense to an action by a successor in title to redeem encumbered land from the holder of a trust deed who had purportedly purchased the encumbered land at an invalid trustee's foreclosure sale, and had taken possession of the land and paid the taxes thereon for 24 years, the holder of the trust deed could rely on either Code 1942, § 711, 10-year statute of adverse possession, or this section [Code 1942, § 718], as a mortgagee in possession after a condition broken, notwithstanding Code 1942, § 888, providing in part that an error in the mode of sale such as makes a sale void would not be cured by any statute of limitations, except after the 10-year statute of adverse possession. *Gulfport Farm & Pasture Co. v. Hancock Bank*, 232 Miss. 289, 98 So. 2d 862 (1957), appeal dismissed, cert. denied, 358 U.S. 67, 79 S. Ct. 122, 3 L. Ed. 2d 106 (1958).

A nonresident alien mortgagee secured a perfect title against the mortgagor, where he obtained possession through tenants under an invalid sale and held possession for the statutory period under claim of title. *Scottish Am. Mtg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C,1236 (1911).

A husband mortgaged his lands; the mortgagee without foreclosure conveyed to the wife, who thereafter occupied for ten years. She thereby acquired a perfect title. *Little v. Teague*, 60 Miss. 115 (1882).

### 4. Rights and interests barred.

A mortgagor who allows a mortgagee or those claiming under him to remain in possession for more than ten years is barred of all equity of redemption. *Tuteur v. Brown*, 74 Miss. 774, 21 So. 748 (1897).

### 5. Running of limitation period.

The statutes of limitation do not begin to run against persons in actual or constructive possession of lands until an adverse entry has been made. *Trigg v. Trigg*, 233 Miss. 84, 101 So. 2d 507 (1958).

Where the father remained in possession of land, which he had conveyed by warranty deed to a son in 1937 allegedly as security for an indebtedness, and exercised complete dominion over the land until his death, and thereafter the father's heirs retained possession of the land and dealt with it as part of the father's estate until 1951, an action by the heirs in 1956 against the son to establish a resulting trust for the benefit of the heirs was not barred by the statutory limitations imposed by this section [Code 1942, § 718] and §§ 709 and 719, Code of 1942. *Trigg v. Trigg*, 233 Miss. 84, 101 So. 2d 507 (1958).

### 6. —Acknowledgment of mortgagor's rights.

Acknowledgment of mortgagor's title to land in possession of mortgagee, or right to redeem, in writing signed by mortgagee, or person claiming through him, is only acknowledgment tolling statute of limitation. *Cossar v. Grenada Oil Mill*, 138 Miss. 890, 103 So. 509 (1925).

### 7. Laches.

Laches was unavailable as defense to action seeking to set aside deed on grounds that it had been intended to serve as security, and not as conveyance, where persons instituting action acted seasonably under statute. *Sweet v. Luster*, 513 So. 2d 1240 (Miss. 1987).

Suit to redeem from mortgage begun on last day before expiration of statutory time for bringing such suits, not barred by laches. *Cox v. American Freehold & Land Mtg. Co.*, 88 Miss. 88, 40 So. 739 (1906).

## RESEARCH REFERENCES

**ALR.** Possession by stranger claiming under conveyance by cotenant as adverse to other cotenants. 32 A.L.R.2d 1214.

Mortgages: effect on subordinate lien of redemption by owner or assignee from sale under prior lien. 56 A.L.R.4th 703.

**Am Jur.** 3 Am. Jur. 2d, Adverse Possession §§ 201-205.

55 Am. Jur. 2d, Mortgages §§ 406 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 51, 64.

59A C.J.S., Mortgages §§ 1424-1428.



**§ 15-1-21. Actions on mortgages, deeds of trust, and statutory liens to be brought within time allowed for action upon writing in which debt is specified.**

When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified. In all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

**SOURCES:** Codes, 1857, ch. 57, art. 4; 1871, § 2150; 1880, § 2667; 1892, § 2733; 1906, § 3093; Hemingway's 1917, § 2457; 1930, § 2290; 1942, § 719.

**Cross References** — Completion of limitation period extinguishing right of action, see § 15-1-3.

Limitation on equity remedy generally, see § 15-1-9.

Effect of payment of mortgage, see § 89-1-49.

### JUDICIAL DECISIONS

1. In general.
2. Joint debt.
3. Extension of debt.
4. Rights affected.
5. Running of limitation period.
6. Actions or proceedings.
7. Pleading.
8. Estoppel.

**1. In general.**

An instrument executed by a debtor was an assignment, rather than an equitable mortgage barred by the statute of limitations, where there was no note secured by the mortgage which could be barred by the statute of limitations. *Gillis v. Case*, 574 So. 2d 692 (Miss. 1990).

Where the father remained in possession of land, which he had conveyed by warranty deed to a son in 1937 allegedly as security for an indebtedness, and exercised complete dominion over the land until his death, and thereafter the father's heirs retained possession of the land, and dealt with it as part of the father's estate until 1951, an action by the heirs in 1956 against the son to establish a resulting trust for the benefit of the heirs was not barred by the statutory limitations im-

posed by this section [Code 1942, § 719] and §§ 709 and 718, Code of 1942. *Trigg v. Trigg*, 233 Miss. 84, 101 So. 2d 507 (1958).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

The rule that even where the debt secured by a mortgage is barred by the statute of limitations, the mortgagee cannot be deprived of possession by the mortgagor until the debt is paid does not apply in an action by a bank against the state to quiet title where the rights of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and the patent was void. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Where the debt is barred the mortgage cannot be enforced. *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933); *Hembree v. Johnson*, 119 Miss. 204, 80 So.



554 (1919); *Maddux v. Jones*, 51 Miss. 531 (1875); *Huntington v. Heirs of Bobbitt*, 46 Miss. 528 (1872).

When secured debt is barred both right and remedy are extinguished. *McDaniel v. Short*, 127 Miss. 520, 90 So. 186 (1921); *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933).

The statutes of limitation do not begin to run against persons in actual or constructive possession of lands until an adverse entry has been made. *Dixon v. Porter*, 23 Miss. 84 (1851).

### 2. Joint debt.

A mortgage of her land by a wife to secure the joint debt of herself and husband will after his death be binding on the land, although her personal liability for the debt in the meantime be barred by limitation, the debt as to his estate not being barred. *Bell v. Clark*, 71 Miss. 603, 14 So. 318 (1893).

### 3. Extension of debt.

Where note secured by deed of trust was extended from time to time, but fact of extensions was not noted on margin of record of deed of trust before remedy to enforce it appeared on face of record to be barred, or within six months thereafter, such extensions did not affect rights of subsequent creditors and purchasers for valuable consideration without notice of extensions. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

Where note secured by deed of trust was extended from time to time, but fact of extensions was not noted on margin of record of deed of trust before remedy to enforce it appeared on face of record to be barred, or within six months thereafter, that no cause of action accrued in favor of indorser of note until he paid debt held immaterial as affects rights of subsequent creditors and purchasers without notice. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

Where no effort was made to renew or extend notes or mortgage securing them until after notes were barred, right and remedy as to notes and mortgage were barred, and could not be revived. *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933).

Sale made under deed of trust after original indebtedness barred was valid where creditor entered marginal reference showing note extended, within six months. *McBride v. Burgin*, 142 Miss. 859, 108 So. 148 (1926), motion granted, 143 Miss. 596, 108 So. 811 (1926).

### 4. Rights affected.

Section 722, Code of 1942, providing for six-year limitation period when no other period is prescribed, this section [Code 1942, § 719] barring action on mortgage when debt it secures is barred, and § 743, Code of 1942, providing that completion of period of limitation bars action and defeats and extinguishes the right, operate to extinguish on September 1, 1935, deed of trust given to secure note falling due on September 1, 1929, and, in absence of renewal, or institution of foreclosure proceedings, power of sale and all other rights conferred by deed of trust are utterly destroyed on that date. *Perkins v. White*, 208 Miss. 157, 43 So. 2d 897 (1950).

Where note secured by deed of trust was extended from time to time but the fact of extension was not noted on the margin of the record of the deed of trust before the remedy to enforce it was barred, or within six months thereafter, such extensions did not affect rights of subsequent creditors and purchasers for value without notice of the extensions. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

That junior lien attached before bar of limitations attached to prior deed of trust did not affect right of junior lienor's transferees who purchased for valuable consideration the note and security and had no notice that lien had not been extinguished, and parted with something of value, and hence became "creditors" or "subsequent purchasers" within statute providing that recorded lien should have no effect as to creditors and subsequent purchasers where remedy thereof was barred by limitation. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

Where senior mortgage and notes secured thereby were barred, neither junior mortgagee nor one claiming under him was bound to know any facts not of record, nor estopped to claim priority, not to assert that attempted revival of senior mort-

gage was void. *Musser v. First Nat'l Bank*, 165 Miss. 873, 147 So. 783 (1933).

Junior mortgagee cannot redeem from sale under prior mortgage if his debt is barred. *Central Trust Co. v. Meridian L. & Ry.*, 106 Miss. 431, 63 So. 575 (1913), error overruled, 64 So. 216 (Miss. 1914).

### 5. Running of limitation period.

The limitation period for the enforcement of a deed of trust was not tolled by the fact that the defendant continued to make 74 monthly payments after the balloon payment on the promissory note became due since such payments did not unequivocally acknowledge when the balance was due, to whom the balance was due, and for what the balance was due, and, moreover, such payments did not contain a specification of the debt referred to and a promise to pay a fixed amount. *EB, Inc. v. Smith*, 757 So. 2d 1017 (Miss. Ct. App. 2000).

Advertisement of sale of property secured by trust deed pursuant to power of sale contained in the deed constitutes "proceeding" brought or had on trust deed, commencement of which tolls statute of limitations. *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (1936).

Proceeding for foreclosure of trust deed commenced three days before note secured thereby would become barred by limitations by advertisement in newspaper in the exercise of power of sale contained in the trust deed held not barred by limitations, notwithstanding sale could not have been made before expiration of statutory period. *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (1936).

### 6. Actions or proceedings.

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and the creditor never filed collection on the note. *Chimento v. Fuller*, 965 So. 2d 668 (Miss. 2007).

An action in subrogation filed by a credit association which had purchased land under a foreclosure sale under its second deed of trust against the successors in title in January, 1967, to recover the amount which it had paid to the beneficiary of the first deed of trust in June of

1961, in payment of a delinquent payment owed to the beneficiary of the first trust deed by the grantor who had executed the deeds of trusts, was barred by the six-year statute of limitations where the delinquent payment had been due in January of 1961, since the plaintiff credit association acquired no greater rights than those of its subrogor so that when the debt became barred, the plaintiff's right to enforce its remedy in equity on the deed of trust was likewise barred. *Meridian Prod. Credit Ass'n v. Edwards*, 231 So. 2d 806 (Miss. 1970).

The words "action or suit" as used in this section [Code 1942, § 719] cover every proceeding of judicial character by which trust deed may be enforced and words "other proceedings" would be meaningless if restricted to proceedings of a judicial character. *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (1936).

This section [Code 1942, § 719] includes "proceeding" to foreclose trust deed by exercise of power of sale contained in deed. *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (1936).

Equity, at suit of complainant willing to do equity, will enjoin ejectment on ground sale to complainant was invalid because made by substituted trustee not legally appointed, where complainant had been in possession 8 years and debt had become barred. *Wall v. Harris*, 90 Miss. 671, 44 So. 36 (1907).

### 7. Pleading.

In an action by a bank against the state to quiet title where the rights and remedies of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and where the patent was void, the absence of a specific plea of statute of limitations was not defective and the bank was not entitled to quiet title. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

A bill by a mortgagee purchasing at a sale in pais under his mortgage against the mortgagor, filed before the debt was barred, which, though in form to remove clouds from the title, yet presents every allegation necessary to foreclose the mortgage, may be amended upon the mortgagor setting up that the title of the mort-



gagage was invalid because of defects in the sale, so as to pray for and procure a foreclosure of the mortgage, notwithstanding at the time of such amendment an original bill would be barred. *Easter v. Riley*, 79 Miss. 625, 31 So. 210 (1902).

### 8. Estoppel.

The defendant was not equitably estopped from asserting the limitations pe-

riod in an action to enforce a deed of trust, notwithstanding that he continued to make 74 monthly payments after the balloon payment on the promissory note became due, as there was no evidence that the plaintiff relied on the defendant or that he sought to induce the plaintiff's reliance. *EB, Inc. v. Smith*, 757 So. 2d 1017 (Miss. Ct. App. 2000).

## RESEARCH REFERENCES

**Am Jur.** 55 Am. Jur. 2d, Mortgages § 618.

**CJS.** 54 C.J.S., Limitations of Actions §§ 51, 63, 64.

**Law Reviews.** The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

### § 15-1-23. Limitations applicable to suits or actions on installment notes following foreclosure or sale of property pledged as security therefor.

In all cases, no suit or action shall hereafter be commenced or brought upon any installment note, or series of notes of three or more, whether due or not, where said note or notes are secured by mortgage, deed of trust, or otherwise, upon any property, real or personal, unless the same is commenced or brought within one year from the date of the foreclosure or sale of the property pledged as security for said note or notes.

**SOURCES:** Codes, 1942, § 720; Laws, 1934, ch. 251.

**Cross References** — Exception for notes or evidences of debt issued by bank or moneyed corporation, see § 15-1-79.

## JUDICIAL DECISIONS

### 1. In general.

The emphasis of the one-year statute of limitations for actions brought against "any installment note" under § 15-1-23, is on notes secured by a mortgage or deed of trust which has been foreclosed. The import of the statute's language, "upon any installment note, or a series of notes three or more, whether due or not," is that the statute of limitations begins to run after the foreclosure and not on the due date of any portion of the note or the due date of any note of a series of 3 or more. *Rankin County Bank v. McKinion*, 531 So. 2d 822 (Miss. 1988).

Mississippi Code § 15-1-23 operated to bar action to recover deficiency judgment

from defendant after plaintiff's repossession and sale of collateral pledged on installment note, and court rejected plaintiff's argument that § 15-1-49 should apply, where maker of note was not same party who granted security interest; court also rejected argument that statute was in direct conflict with cumulative remedy concept provided in Uniform Commercial Code since plaintiff was not precluded from exercising its cumulative remedies as long as it did so in timely manner. *Commercial Agency v. Loe*, 667 F. Supp. 359 (S.D. Miss. 1987).

Code § 15-1-49, rather than § 15-1-23, applied in an action by a bank for a deficiency judgment on an instrument



guaranteeing payment of a secured note. *First Nat'l Bank v. Drummond*, 686 F.2d 1117 (5th Cir. 1982).

In an action on a guaranty contract, the general six-year statute of limitations Code § 15-1-49 would be applied rather than the one-year statute of limitations regarding actions following the foreclosure of an installment note. *First Nat'l Bank v. Drummond*, 419 So. 2d 154 (Miss. 1982).

The words "series of notes" as employed in this section, mean multiple notes given in a single transaction and for the same consideration, and without regard for their several maturity dates. Thus, in an action by a bank against the makers and endorsers of a note in the amount of \$300,000, the trial court erred in dismissing the action upon a plea of the statute of limitations where the action involved two separate notes of \$150,000 each given at different times and two other notes, one for \$150,000 to renew the first note and one for \$300,000 to renew and consolidate both original notes. *Peoples Bank & Trust Co. v. Kinsey*, 385 So. 2d 615 (Miss. 1980).

This section [Code 1942, § 720] was not applicable to an action which involved only two notes, neither of which was an installment note. *Rivervalley Co. v. Deposit Guar. Nat'l Bank*, 331 F. Supp. 698 (N.D. Miss. 1971).

A replevin action asserted by a vendor under a conditional sales contract is not a foreclosure and thus does not set the one year statute of limitations in motion. *Paul O'Leary Lumber Corp. v. Mill Equip., Inc.*, 332 F. Supp. 1144 (S.D. Miss. 1970), *aff'd*, 448 F.2d 536 (5th Cir. 1971).

A suit for a deficiency judgment on a promissory note instituted more than one year after the date of the sale of the property securing the same was barred by this section [Code 1942, § 720]. *Guthrie v. Merchants Nat'l Bank*, 254 Miss. 532, 180 So. 2d 309 (1965).

The fact that the contract from which the suit for a deficiency judgment arose was executed in another state by residents of that state and that the subject property was located there was immaterial; for the *lex fori* controlled rather than *lex loci contractus*, and the applicable limitations statute was that of Mississippi. *Guthrie v. Merchants Nat'l Bank*, 254 Miss. 532, 180 So. 2d 309 (1965).

This section [Code 1942, § 720] is not applicable to bar an action to collect on a deficiency judgment where the judgment was obtained before the passage of this act and the case involved an action based on that judgment and not upon a note. *Roebke v. Love*, 186 Miss. 609, 191 So. 122 (1939).

The purpose of this section [Code 1942, § 720] was to alleviate distressed mortgage debtors and to discourage foreclosure of mortgages during the depression. *Lewis v. Simpson*, 176 Miss. 123, 167 So. 780 (1936).

This section [Code 1942, § 720] is applicable only to suit on note secured by mortgage which has been foreclosed and is not applicable to suit on a note secured by another mortgage on the same realty which has not been foreclosed. *Lewis v. Simpson*, 176 Miss. 123, 167 So. 780 (1936).

## RESEARCH REFERENCES

**ALR.** Redemption rights of vender defaulting under executory land sales contract after foreclosure sale or foreclosure decree enforcing vendor's lien or rights. 51 A.L.R.2d 672.

Priority as between vendor's lien and mortgage or deed of trust to third person

furnishing purchase money. 55 A.L.R.2d 1119.

**Am Jur.** 55 Am. Jur. 2d, Mortgages §§ 696 et seq.

**CJS.** 59A C.J.S., Mortgages §§ 1260, 1261, 1266, 1281 et seq.

## § 15-1-25. Limitations applicable to action or scire facias against executor or administrator.

An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art 6 (12); 1857, ch. 57, art. 11; 1871, § 2155; 1880, § 2676; 1892, § 2745; 1906, § 3105; Hemingway's 1917, § 2469; 1930, § 2295; 1942, § 725.

**Cross References** — Limitations on actions in setoff, see § 15-1-71.

Limitation of action on sales contracts, see § 75-2-725.

Suits on contractor's bond, see § 85-7-189.

Actions which survive against executor or administrator, see § 91-7-235.

### JUDICIAL DECISIONS

1. In general.
2. Claims subject to bar.
3. Application to guardians.
4. Computation of limitation period.
5. —Effect of change, resignation, etc., of executor or administrator.

#### 1. In general.

Section 15-1-25, which specifically states that a suit against an executor or administrator must be filed within 4 years of the qualification of the executor or administrator, is an example of the legislature carving out a specific statute of limitations period in order to preempt the general 6-year limitations, and therefore the specific statute of § 15-1-25 preempts the general statute of § 15-1-49. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

Section 15-1-25 is not unconstitutional as violative of equal protection in that it provides only 4 years in which to file a claim against an estate while other tort victims have the benefit of the general 6-year statute of limitations, since the legislature's interest in finality with respect to estates is a legitimate governmental interest and the statute of limitations is a rational means of serving that specific interest. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

Statutes of limitation are remedial in their nature and are to be construed liberally. *First Nat'l Bank & Trust Co. v.*

*Landau*, 183 Miss. 651, 184 So. 618 (1938).

This section [Code 1942, § 725] is the only limitation applicable to claims probated and registered which were not barred at time. *Duffy v. Kilroe*, 116 Miss. 7, 76 So. 681 (1917).

The statute [Code 1942, § 725] runs without regard to the publication for creditors to probate their claims. *Sivley v. Summers*, 57 Miss. 712 (1880).

#### 2. Claims subject to bar.

This section [Code 1942, § 725], and not the one-year period fixed by Code 1942, § 610, governs an action against an estate for decedent's negligence. *Jones v. Evans*, 247 Miss. 285, 156 So. 2d 742 (1963).

This section [Code 1942, § 725] governs the personal actions which survive under Code 1942, § 610. *Powell v. Buchanan*, 245 Miss. 4, 147 So. 2d 110 (1962).

Statute of limitations, whether general or special, does not run in favor of executor or administrator with respect to claims for legacies or distributive shares until there is a final settlement or at least a disavowal of the trust. *Bailey v. Sayle*, 206 Miss. 757, 40 So. 2d 618 (1949).

Legatee's suit for accounting, brought more than 27 years after testatrix' death, was not barred by statute of limitations as against executor named in will, who took charge of estate without issuance of letters or notice to creditors and who had



never filed any inventory, report, account, or other paper or pleading in court, and had never been discharged from his trust. *Bailey v. Sayle*, 206 Miss. 757, 40 So. 2d 618 (1949).

The section [Code 1942, § 725] does not apply to causes of action which accrue after the death of the decedent. *Tom E. Taylor Undertaking Co. v. Smith's Estate*, 183 Miss. 45, 183 So. 391 (1938); *Sivley v. Summers*, 57 Miss. 712 (1880); *Buckingham v. Walker*, 48 Miss. 609 (1873); *McLean v. Ragsdale*, 31 Miss. 701 (1856); *Pope v. Bowman*, 27 Miss. 194 (1854); *Bingaman v. Robertson*, 25 Miss. 501 (1852).

A proceeding to subject a decedent's estate to the payment of the balance due on funeral expenses is not barred by the four-year statute of limitations, since such statute applies only to obligations incurred by the decedent in his lifetime, and the statute of limitations does not run against funeral expenses which are a part of the cost of the administration of the estate as long as the estate is open. *Tom E. Taylor Undertaking Co. v. Smith's Estate*, 183 Miss. 45, 183 So. 391 (1938).

Administrator's claim against estate not barred by limitation where duly probated and not barred at time of appointment. *Oliver v. Smith*, 94 Miss. 879, 49 So. 1 (1909).

The statute of limitations does not run in favor of an executor against a legatee until he has finally accounted, even where under the will he was to own the entire estate as long as he remained single, and the legatee's right to the legacy accrued only upon his subsequent marriage. *Edwards v. Kelly*, 83 Miss. 144, 35 So. 418 (1903).

### 3. Application to guardians.

This section [Code 1942, § 725] applies to claims against guardians for liability of their wards by virtue of Code 1930, § 1902, Code 1942, § 439. *First Nat'l Bank & Trust Co. v. Landau*, 183 Miss. 651, 184 So. 618 (1938).

### 4. Computation of limitation period.

In a wrongful death action against the administrator of an estate, the 4-year limitations period set forth in § 15-1-25 began to run 90 days after the letters of

administration were issued since § 91-7-239 provides that a suit cannot be filed against an executor or administrator until after 90 days following the issuance of the letters of administration. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

In a wrongful death action against the administrator of an estate arising from an automobile accident, the 4-year limitations period set forth in § 15-1-25 was not tolled pursuant to § 15-1-57 during the time that another suit stemming from the same accident was on direct appeal to the Supreme Court from an order granting a directed verdict where the plaintiff in the wrongful death action was not a party to the second suit, and did not have any involvement with it except that the plaintiff's decedent had been riding in the same automobile as the plaintiff's decedent in the second lawsuit; the order granting the directed verdict in the second case in no way prevented the plaintiff from filing his wrongful death cause of action. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

Statute allows four years and six months within which an executor or administrator can be sued. *Toler v. Wells*, 158 Miss. 628, 130 So. 298 (1930).

Where administrator was appointed and letters of administration were issued November 17, 1922, action could not be maintained against administrator after May 17, 1927. *Toler v. Wells*, 158 Miss. 628, 130 So. 298 (1930).

Claims against estate which matured before decedent's death are barred, not withstanding probate, by failure to sue thereon within 4 years and 6 months from grant of letters. *Rogers v. Rosenstock*, 117 Miss. 144, 77 So. 958 (1918).

Claim for medical services rendered during last illness not barred until 4 years and 6 months after grant of letters. *Hardenstein v. Brien*, 96 Miss. 493, 50 So. 979 (1910).

The period within which executors and administrators cannot be sued as provided by statute pertaining specifically to executors and administrators (Code 1942, § 612) should not be computed as part of the time. *Wilkinson v. Moore*, 27 Miss. 365 (1854); *West Feliciana R. Co. v. Stockett*,



21 Miss. (13 S. & M.) 395 (1850); Jennings v. Love, 24 Miss. 249 (1852).

**5. —Effect of change, resignation, etc., of executor or administrator.**

In a wrongful death action against the administrator of an estate, the 4-year limitations period provided in § 15-1-25 did not run from the appointment of the second administrator of the estate since the statute of limitations runs from the original grant of the letters of administration regardless of whether subsequent ad-

ministrators are named. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

The statute [Code 1942, § 725] begins to run on the qualification of the administrator, and is not stopped by his subsequent resignation. *Champion v. Cayce*, 54 Miss. 695 (1877).

The statute [Code 1942, § 725] applies if four years have elapsed since the original grant of letters upon the estate, even if the particular administrator or executor who is sued has not been so long in office. *Boyd v. Lowry*, 53 Miss. 352 (1876).

## RESEARCH REFERENCES

**ALR.** Running of statute of limitations as affected by doctrine of relation back of appointment of administrator. 3 A.L.R.3d 1234.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 A.L.R.3d 630.

**Am Jur.** 1 Am. Jur. 2d, Accounts and Accounting §§ 14 et seq., 58.

31 Am. Jur. 2d, Executors and Administrators § 809.

4 Am. Jur. Trials, Statutes of Limitation § 234.

**CJS.** 1 C.J.S., Account, Action on §§ 21, 23.

34 C.J.S., Executors and Administrators §§ 893-917.

## § 15-1-27. Limitations applicable to action by ward against guardian or surety.

All actions against a guardian and the sureties on his bond, or either of them, by the ward, shall be commenced within five years next after the ward shall have arrived at the age of twenty-one years, and not after.

**SOURCES:** Codes, 1892, § 2738; 1906, § 3098; *Hemingway's* 1917, § 2462; 1930, § 2296; 1942, § 726.

**Cross References** — Effect of running of limitations against guardian, see § 15-1-53.

Guardian's bond, see § 93-13-17.

Final account and settlement by guardian, see § 93-13-77.

## JUDICIAL DECISIONS

1. In general.
2. Applicability.

### 1. In general.

Statute [Code 1942, § 726] does not begin to run against suits on guardian's bond until final settlement of his trust. *Pattison v. Clingan*, 93 Miss. 310, 47 So. 503 (1908).

### 2. Applicability.

After a guardianship account was drained, the twenty-four-year-old ward sued the bank for breaching its duty by allowing the funds on deposit to be converted without a court order; the claim was barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, because it was not filed three

years after he turned twenty-one. The bank was not a surety; therefore, Miss. Code Ann. § 15-1-27 was not the applica-

ble statute of limitations. *Williams v. Duckett* (In re Duckett), 991 So. 2d 1165 (Miss. 2008).

## RESEARCH REFERENCES

**Am Jur.** 39 Am. Jur. 2d, Guardian and Ward §§ 137, 140.

**CJS.** 39 C.J.S. Guardian and Ward §§ 251, 256.

## § 15-1-29. Limitations applicable to actions on accounts and unwritten contracts.

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art 6 (10); 1857, ch. 57, art. 5; 1871, § 2151; 1880, § 2670; 1892 § 2739; 1906, § 3099; Hemingway's 1917, § 2463; 1930, § 2299; 1942, § 729; Laws, 1964, ch. 299; Laws, 1966, ch. 316, § 10-105; Laws, 1976, ch. 488, § 1, eff from and after July 1, 1976.

**Cross References** — When statute commences to run on open accounts, see § 15-1-31.

## JUDICIAL DECISIONS

1. Contracts in general.
2. Contracts in writing.
3. Unwritten contracts, generally.
4. — Involving employment.
5. — Involving attorneys.
6. — Miscellaneous cases.
7. Implied contract.
8. Accounts.
9. — Acknowledgments.
10. Miscellaneous.
11. Evidence.
12. Pleading.
13. Running of limitation period.
14. — Accrual of cause of action.
15. — New cause of action.

### 1. Contracts in general.

Section 15-1-49, rather than this section, applies to contracts for professional services. *Law Firm of Logan & Bise v. Stewart*, 732 So. 2d 255 (Miss. 1999).

Where plaintiff, recipient of certain scholarship funds as financial assistance

for medical school costs and tuition, was required to fulfill 4 year service obligation at approved health care facility, and signed private practice assignment agreement with health care facility, with such agreement stating that it would be "negotiable at the end of one year", and accepted employment there, but was terminated 10 months later with the termination being memorialized as a non-renewal of employment agreement, § 15-1-35 was not applicable to portion of complaint alleging termination of his employment, rather appropriate provision was "catch all" statute of limitations § 15-1-49. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

In a probate proceeding based upon an oral contract whereby the decedent promised to bequeath to the claimant a parcel of real property in return for a loan of \$11,000, the cause of action for breach of

the oral contract arising out of the failure of the will to be admitted to probate did not arise until the death of the decedent; therefore, where the claim for probate was filed within three months of the decedent's death, it was not barred by the three-year statute of limitations for all contracts set forth in § 15-1-29. *McKellar's Estate v. Brown*, 404 So. 2d 550 (Miss. 1981).

In an employment discrimination action pursuant to 42 USCS § 1981, the general six-year statute of limitations provided by § 15-1-49 rather than the contractual three-year statute of limitations provided by § 15-1-29 would be applicable even though a mere claim for back pay would ordinarily be governed by the three-year statute. *Walton v. Utility Prods., Inc.*, 424 F. Supp. 1145 (N.D. Miss. 1976).

Where the action was one either in tort or for a wrongful breach of duty in a suit on a letter agreement, the three-year limitations statute applicable to open accounts did not apply, and the action was governed by the six-year statute of limitations. *Bentz v. Vardaman Mfg. Co.*, 210 So. 2d 35 (Miss. 1968).

This statute [Code 1942, § 729] is applicable as the law of the forum to an action in a Mississippi Federal court against a citizen of Mississippi on a contract for services in Mississippi to be paid for in Louisiana. *Le Mieux Bros. Corp. v. Armstrong*, 91 F.2d 445 (5th Cir. 1937).

To take a case out of the application of this statute [Code 1942, § 729] there must be a writing evidencing an acknowledgment of indebtedness, or promising to pay, in such terms as to render any supplemental evidence unnecessary. *First Nat'l Bank v. Johnson*, 177 Miss. 634, 171 So. 11 (1936); *Blount v. Miller*, 172 Miss. 492, 160 So. 598 (1935); *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930); *Foote v. Farmer*, 71 Miss. 148, 14 So. 445 (1893).

This section [Code 1942, § 729] applies alone to actions on open or stated account not acknowledged in writing, signed by debtor, and on unwritten contracts. *Blodgett v. Pearl River County*, 134 Miss. 816, 98 So. 227 (1923).

The statute [Code 1942, § 729] relates only to actions founded on contract, express or implied. *Adams v. Illinois C.R. Co.*, 71 Miss. 752, 15 So. 640 (1894).

## 2. Contracts in writing.

Although it would not disaffirm employment-at-will status, the hiring information section of the plaintiff's employment application contained sufficient information for the document to constitute a writing for purposes of the statute of limitations where that section, which was completed after the plaintiff was hired, clearly established her rate of pay, her position, her start date, and her work hours. *Levens v. Campbell*, 733 So. 2d 753 (Miss. 1999).

A store's setoff counterclaim against the shopping mall in which it was located was not barred by the 3-year statute of limitations set forth in § 15-1-29 where the store's setoff defense was based on allegedly fraudulent overcharges made by the mall which implied an action arising under the lease between the store and the mall, and therefore the store's fraud claim was subject to § 15-1-49's 6-year limitation period for an action on a written contract. *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938 (Miss. 1992).

Where under a sales representative agreement with a manufacturer, the manufacturer was to pay commissions on specified sliding scale for orders up to \$250,000 and special commission allowances were to be established by the manufacturer for jobs greater than that amount, the 6-year statute of limitations governing obligations on written contracts was applicable rather than the 3-year statute governing actions on open account, notwithstanding that parol testimony was necessary to establish the amount due. *Beacham v. Beacham*, 243 So. 2d 62 (Miss. 1971).

While the 3-year statute of limitations applies to oral and implied contracts, the statute has no application where an implied warranty arises out of and accrues from a written contract between the parties. *Paul O'Leary Lumber Corp. v. Mill Equip., Inc.*, 332 F. Supp. 1144 (S.D. Miss. 1970), *aff'd*, 448 F.2d 536 (5th Cir. 1971).

Action by seller against buyer on written order signed by buyer's president and seller's salesman which gives accurate description of goods purchased, price and terms of sale, stipulates that all special terms must be incorporated in order and



duplicate to be recognized and order is not subject to countermand, and under which goods were shipped and accepted by buyer, is controlled by six-year statute of limitations, § 722, Code of 1942, and not by three-year statute of limitations. *Dixie Pine Prods. Co. v. Universal Ref. Prods. Co.*, 208 Miss. 45, 43 So. 2d 752 (1949).

An action for restitution of money deposited in connection with a bid submitted for construction of a municipal sewage system and thereafter attempted to be withdrawn because of a mistake in the calculation thereof, was not taken out of the operation of the statute by a written notice of withdrawal which failed to state in writing the character of the mistake made. *City of Hattiesburg v. Cobb Bros. Constr. Co.*, 183 Miss. 482, 184 So. 630 (1938).

A trainman's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainman's union was based on written contract with union rather than on verbal contract of employment, and hence was subject to six-year rather than to three-year statute of limitations. *Moore v. Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593 (1937).

Six-year period of limitations applicable to all actions for which no other period is prescribed held applicable to action against stockholders of insolvent bank for their double liability, and not three-year period applicable to actions on unwritten contracts, since double liability of a stockholder is provable by writing, and therefore is not an implied contract, but written contract with an implied promise to pay. *Rather v. Moore*, 179 Miss. 78, 173 So. 664 (1937).

Three-year statute of limitations would not be applicable to action against stockholders of insolvent State bank for their double liability, even if such liability is statutory, since liability is not a "penalty" and hence six-year statute would apply. *Rather v. Moore*, 179 Miss. 78, 173 So. 664 (1937).

Orders for funeral supplies setting forth description of goods purchased, price, and terms of sale, held "contracts provable by writing" upon acceptance by seller, so that action thereon, which was commenced

within six years from maturity of items, was not barred by statute of limitations governing contracts not provable by writing. *Champion Chem. Co. v. Hank*, 174 Miss. 732, 165 So. 807 (1936).

Written contract of guaranty, not setting out amount of indebtedness, is governed by six-year statute of limitations. *W.T. Raleigh Co. v. Fortenberry*, 138 Miss. 410, 103 So. 227 (1925).

Action for loss of cotton seed is one on written contract although bill of lading did not specify amount to be transported. *Illinois Cent. R.R. v. Jackson Oil & Ref. Co.*, 111 Miss. 320, 71 So. 568 (1916).

The three-year statute is inapplicable to action on written contract. *Vicksburg Waterworks Co. v. Yazoo & Miss. v. Ry.*, 102 Miss. 504, 59 So. 825 (1912).

A cause of action evidenced by a writing acknowledging a debt is not barred by this statute [Code 1942, § 729]. *Cock v. Abernathy*, 77 Miss. 872, 28 So. 18 (1900).

Where a vendor sells for part cash, and part to be paid in installments, reserving a lien as security, the right of action arises upon a contract provable by a writing, whether the vendor proceeds on the promise contained in the deed or that implied by the acceptance of the deed, and this statute [Code 1942, § 729] does not apply. *Washington v. Soria*, 73 Miss. 665, 19 So. 485, 55 Am. St. R. 555 (1896).

### 3. Unwritten contracts, generally.

This section bars any claim as to alleged unwritten 4 year contract brought by one of the parties. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

If oral promise to devise land was not binding promisee could recover value of services performed and money advanced under agreement. *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1930).

Contract held unwritten one within 3-year statute of limitations. *Attala Whse. & Compress Co. v. J.N. Alexander Mercantile Co.*, 139 Miss. 615, 102 So. 779 (1925).

Three-year statute bars claim for board against estate of decedent. *Loviza v. Lynch*, 115 Miss. 694, 76 So. 629 (1917).

### 4. — Involving employment.

Under the statute of limitations governing claims based on unwritten contracts,

Miss. Code Ann. 15-1-29, the former employee had until March 2, 2007, one year from the date of his termination on March 2, 2006, to file his wrongful termination claim against his former employer, a manager, and a store services company. Because he did not file his claim until March 5, 2007, it was barred by the one-year limitations period in § 15-1-29. *Davis v. Belk Stores Servs.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 487 (S.D. Miss. Jan. 6, 2009).

One-year statute of limitation in Miss. Code Ann. § 15-1-29 applied to the former employee's wrongful termination claim against his former employer, a manager, and a store services company (defendants) since the employee did not allege that he had a written contract of employment, and there was no proof that the employment relationship between the employee and defendants was other than an unwritten contract. *Davis v. Belk Stores Servs.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 487 (S.D. Miss. Jan. 6, 2009).

Even if an employee's quantum meruit claim was not barred due to the existence of his unwritten employment contract, the claim was barred under the one-year statute of limitations in Miss. Code Ann. § 15-1-29 where the latest date upon which the employee's claim could have accrued, which was when additional projects were awarded to the employer, presumably because of the employee's good performance on the first project, was more than a year before the employee filed suit. *United States ex rel. Shannon v. Fed. Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 56509 (S.D. Miss. Aug. 11, 2006), affirmed by 251 Fed. Appx. 269, 2007 U.S. App. LEXIS 21133 (5th Cir. Miss. 2007).

The defendant's claim regarding an adjustment of retirement account funds that were in the plaintiff's name, made in the context of an action to dissolve two corporations, sounded on an unwritten contract for employment. *Hall v. Dillard*, 739 So. 2d 383 (Miss. Ct. App. 1999).

The phrase "actions on unwritten contracts of employment" in § 15-1-29 applies only to traditional employer-employee situations as opposed to contracts for professional services. *Michael S. Fawer v. Evans*, 627 So. 2d 829 (Miss. 1993).

Claim of plaintiff, who was discharged from employment on August 17, 1988, and did not file complaint until December 18, 1990, that defendant breached express or implied oral contract of employment, was barred by statute of limitations. *Watkins v. UPS, Inc.*, 797 F. Supp. 1349 (S.D. Miss. 1992), aff'd, 979 F.2d 1535 (5th Cir. 1992).

The presentation of an employee handbook to an employee some 4 or 5 months after the date of employment did not make the employment agreement a written contract and, where the action for breach of the employment agreement was not filed until more than one year after termination of employment, the action was barred. *Sloan v. Taylor Mach. Co.*, 501 So. 2d 409 (Miss. 1987).

Mississippi's one-year statute of limitations for unwritten contracts of employment (Miss Code § 15-1-29) applied to bar an action alleging discriminatory terminations brought under 42 USCS § 1981. *White v. UPS*, 692 F.2d 1 (5th Cir. 1982), cert. denied, 464 U.S. 860, 104 S. Ct. 186, 78 L. Ed. 2d 165 (1983).

This section provides the most appropriate state statute of limitations for an employment discrimination cause of action under 42 USCS § 1981, and any such suit must thus be filed within one year after the cause of action has accrued. *Jordan v. Lewis Grocer Co.*, 467 F. Supp. 113 (N.D. Miss. 1979).

The maximum period of recovery of monetary damages for back wages or other damages in an employment discrimination action brought under 42 USCS §§ 1981 and 1982 was three years prior to the filing of suit, by virtue of this section's limitations period on unwritten contracts. *Williams v. Yazoo Valley-Minter City Oil Mill, Inc.*, 469 F. Supp. 37 (N.D. Miss. 1978).

## 5. —Involving attorneys.

An attorney's action against his or her client for fees for professional legal services rendered by the attorney to the client on open account pursuant to an unwritten agreement is subject to the 3-year limitations period prescribed by § 15-1-29 for actions on an open account or any unwritten contract, not the one-year limitation period prescribed by the same statute for actions based on an unwritten



contract of employment. *Michael S. Fawer v. Evans*, 627 So. 2d 829 (Miss. 1993).

In legal malpractice action against attorney who delayed in asserting federal tort claim until relevant limitations period had expired, fact that claim arose by virtue of oral contract securing attorney's services did not preclude application of 6 year statute of limitations governing torts, rather than 3 year statute of limitations governing contracts. *Hickox ex rel. Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987).

In a malpractice action against an attorney resulting from his issuance of defective title certificates, the six-year general statute of limitations under § 15-1-49 was applicable, rather than the three-year statute of limitations governing actions on unwritten contracts under § 15-1-29. *United Cos. Mtg. of Miss., Inc. v. Jones*, 465 So. 2d 1083 (Miss. 1985).

#### 6. —Miscellaneous cases.

Whether lender's claims were founded upon unwritten contracts, making them subject to the three-year limitations of Miss. Code Ann. § 15-1-29, or whether they fell within the general three-year limitations of Miss. Code Ann. § 15-1-49, the result was the same where (i) the last payment made upon the loans was in March 2001, (ii) the action to collect on the delinquent loans was filed in January 2005, (iii) the action to collect on the delinquent loans was filed approximately three years and ten months from the date of default, and (iv) the fact that the lender was fully aware that no payments were being made on these delinquent loans between March 2001 and January 2005 was beyond debate; thus, the claims were time-barred. *Morgan v. Stevens*, 989 So. 2d 482 (Miss. Ct. App. 2008).

An oral contract which provided that all the assets of one corporation would be transferred to a second corporation in return for which the second corporation would employ the two stockholders of the first corporation until 1983 or, if said stockholders were involuntarily terminated prior to that time, would pay to them two and one-half times the "annualized" commissions on the accounts which had been transferred by the first corporation was not a contract of employment and

the trial court therefore erred in dismissing the complaint which had been filed by the involuntarily dismissed stockholders more than one year but less than three years after the cause of action accrued. *Avery, Shanks & Waltman, Inc. v. Giordano-Kirby Ins. Agency, Inc.*, 404 So. 2d 1036 (Miss. 1981).

Where the complainant waited approximately three years and eight months to bring suit for the recovery of his expenses in constructing a building on the defendant's property under an oral contract, the suit was barred by the three year statute of limitations. *Bryan v. Bryan*, 323 So. 2d 84 (Miss. 1975).

Where it appeared that on the death of one partner, the surviving partner had agreed to hold the shares of two of the decedent's heirs as an active trust for their benefit until demand was made by them for payment of the principal, that all of the parties to the agreement had died and the estate of the surviving partner had been administered, with due notice given to creditors, a bill filed by heirs of the first deceased partner, more than three and one-half years after the death of the surviving partner and after the estate had been administered and the personal property distributed, and without a claim having been presented to the administratrix of his estate, to fix and impose a money decree upon the administratrix and the heirs at law of the surviving partner was barred by the statute relating to limitation of actions on unwritten contracts. *Whitaker v. Davenport*, 193 Miss. 523, 10 So. 2d 202 (1942).

Action to recover money deposited by bidder for municipal sewer construction contract guaranteeing that it would enter into contract upon acceptance of bid commenced more than three years but less than six years after cause of action arose would be barred by three-year statute of limitations applicable to actions on unwritten contracts only in case of oral withdrawal of bid if written record had been kept of proceedings of city's mayor and commissioners in reference to matter. *City of Hattiesburg v. Cobb Bros. Constr. Co.*, 174 Miss. 20, 163 So. 676 (1935).

#### 7. Implied contract.

In order for an implied promise to be outside the operation of this section [Code



1942, § 729], it must be to perform a contract, the terms of which are written. *Prince v. Prince*, 190 Miss. 309, 200 So. 126 (1941).

An action by an accommodation maker against the maker of a promissory note for reimbursement of payments made on the note is within the purview of this section [Code 1942, § 729], since his rights as against the maker on paying the note were not set out therein but rested on what effect the law would give to such payment and in view of the fact that the payments made by the plaintiff were not provable by any writing but rested in parol. *Prince v. Prince*, 190 Miss. 309, 200 So. 126 (1941).

In shipper's action for freight charges exceeding those authorized by Railroad Commission, three-year statute applied. *Gulf & S.I.R.R. v. Laurel Oil & Fertilizer Co.*, 172 Miss. 630, 158 So. 778 (1935), error overruled, 172 Miss. 654, 159 So. 838 (1935), corrected, 172 Miss. 657, 160 So. 564 (1935).

An obligation to repay interest collected upon a usurious agreement is in its nature an implied contract, and suit thereon will be barred within three years after the cause of action accrued. *Beck v. Tucker*, 147 Miss. 401, 113 So. 209 (1927); *Buntyn v. National Mut. Bldg. & Loan Ass'n*, 86 Miss. 454, 38 So. 345 (1905).

Suit by buyer of lumber to recover original consideration and freight paid after rescission, on an implied contract, is barred in 3 years. *Warren-Godwin Lumber Co. v. Lumber Mineral Co.*, 120 Miss. 346, 82 So. 257 (1919).

Action by railway to recover freight charges barred in 3 years where writings introduced only showed amount collected from defendant as being less than what law imposed, there being only an implied contract for the difference. *D.S. Pate Lumber Co. v. Southern Ry. Co.*, 115 Miss. 402, 76 So. 481 (1917).

Under former enactment, this section [Code 1942, § 729] was held to apply only to express contracts and was not applicable to implied contracts; accordingly it did not apply to an action against a city to recover money illegally coerced as a privilege tax. *Musgrove v. City of Jackson*, 59 Miss. 390 (1882).

## 8. Accounts.

Where no summons was issued immediately following the filing of a declaration on an open account, and the actual issuance of the summons did not occur until more than three years following the time when a cause of action accrued, the suit was barred by the statute of limitations. *Erving's Hatcheries, Inc. v. Garrott*, 250 Miss. 701, 168 So. 2d 52 (1964).

Ten-year limitation period of § 709, Code of 1942, applies to a bill to set aside a deed and to hold grantee as trustee of the land for benefit of complainants, neither the three-year limitation period of this section [Code 1942, § 729], nor the six-year period of Code 1942, § 722, being applicable when accounting feature contained in bill is merely incidental. *Burton v. Gibbes*, 204 Miss. 248, 37 So. 2d 285 (1948).

Items of account for funeral supplies sold by wholesaler for which no written orders were proved, and which matured more than three years before commencement of action thereon, held barred by limitations. *Champion Chem. Co. v. Hank*, 174 Miss. 732, 165 So. 807 (1936).

Advances of money and supplies made by lessor to lessee constitute an "open account" so as to require action thereon within three years after cause of action accrued, notwithstanding deed of trust given by lessee provided that advancements should be secured by deed, since writing was insufficient to make debt one acknowledged in writing under six-year statute of limitations. *Blount v. Miller*, 172 Miss. 492, 160 So. 598 (1935).

Open account is an unwritten contract where deed of trust securing same fails to specify a definite debt, and is barred by 3-year statute. *Hembree v. Johnson*, 119 Miss. 204, 80 So. 554 (1919).

The statute [Code 1942, § 729] does not apply to the claim of a member of the board of supervisors for compensation under § 8 of the Act of 1890 (Laws 1890, c 250), since such claim does not rest in open account, the six-year statute being applicable. *Madison County v. Collier*, 79 Miss. 220, 30 So. 610 (1905).

A judgment by default in an action upon an open account was taken, shown by the record to be void, the defendant not being

summoned, and the case went off the docket. Eleven years thereafter, plaintiff, treating the suit as pending, had the defendant summoned. Held, that as the original cause of action was barred, and the judgment, if valid, was also barred, defendant was protected by the statute. *Berkson v. Coen*, 71 Miss. 650, 16 So. 204 (1894).

### 9. —Acknowledgments.

Statute of limitations, applicable to all but two items on debit and credit open account, was not tolled by partial payment on the account where there was no written acknowledgment of indebtedness or promise to pay by the debtor. *McArthur v. Acme Mechanical Contractors*, 336 So. 2d 1306 (Miss. 1976).

The verbal acknowledgment of the correctness of an account, making it an account stated, will not avoid the statute applicable to open accounts. *Stephenson v. Louisiana Oil Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938); *Floyd v. Pearce*, 57 Miss. 140 (1879).

Where defendant, by sworn plea, expressly denies that he wrote, signed, or authorized letter to plaintiff acknowledging correctness of written account sued on, and there is no evidence to contrary, denial must be accepted as true. *Stephenson v. Louisiana Oil Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938).

### 10. Miscellaneous.

Documents signed by plaintiff employees in a Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C.S. § 2101 et seq., during orientation, setting forth their rate of pay and other information, did not constitute a written employment contract within the meaning of Miss. Code. Ann. § 15-1-49; Miss. Code. Ann. § 15-1-29 set forth the appropriate statute of limitations in the case. *Brewer v. Am. Power Source, Inc.*, 517 F. Supp. 2d 881 (N.D. Miss. 2007), affirmed by 291 Fed. Appx. 656, 2008 U.S. App. LEXIS 19338, 28 I.E.R. Cas. (BNA) 236 (5th Cir. Miss. 2008).

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and the creditor never filed collec-

tion on the note. *Chimento v. Fuller*, 965 So. 2d 668 (Miss. 2007).

Fact that a former wife had a high paying job and a husband voluntarily left his employment was insufficient to show a material change in circumstances justifying a modification of alimony; however, a chancery court did not err by fashioning the wife a remedy from an escalation clause in a property agreement, and the three-year statute of limitations applied since it was a contract matter. *D'Avignon v. D'Avignon*, 945 So. 2d 401 (Miss. Ct. App. 2006).

In action by plaintiff who sought to be paid for interview given by him, which resulted in book about him and his family, where plaintiff's quantum meruit claims against publisher and author of book were time barred under § 15-1-29, 15-1-29 also barred plaintiff's quantum meruit claims against foreign broadcasting corporation that filmed documentary based on book and cable television channel that aired documentary, as plaintiff failed to show that he rendered any new services to television defendants after he provided interview. *Haynes v. Lemann*, 921 F. Supp. 385 (N.D. Miss. 1996), aff'd, 98 F.3d 1339 (5th Cir. 1996).

A bad faith breach of contract cause of action arising from an attorney's alleged failure to properly pursue an appeal alleged the tort of bad faith, not a breach of contract per se, and was therefore governed by the 6-year general limitation in § 15-1-49 rather than the 3-year statute of limitations in § 15-1-29 for actions based on unwritten contracts. *Hurst v. Southwest Miss. Legal Servs. Corp.*, 610 So. 2d 374 (Miss. 1992), overruled on other grounds, *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999).

When a writing or memorandum is lost or destroyed, both its existence and contents may be proven by parole evidence; the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds. Thus, § 15-1-29, § 15-1-73 and the Statute of Frauds (§ 15-3-1) did not bar an action to enforce a loan agreement which was allegedly destroyed in a fire where the plaintiff sufficiently proved the existence and contents of the destroyed memorandum. *Williams v. Evans*, 547 So. 2d 54 (Miss. 1989).



Action against attorney for negligence in preparing title certificate is governed by 6 year statute of limitations (§ 15-1-49), not by 3 year statute (§ 15-1-29). *United Cos. Mtg. of Miss., Inc. v. Jones*, 465 So. 2d 1083 (Miss. 1985).

In a legal malpractice action the six-year statute of limitations provided in § 15-1-49 governed the action rather than § 15-1-29, where plaintiffs clients' declaration charging that the attorney negligently conducted the legal representation of the plaintiffs by failing to list certain priority claims that could have been satisfied from the assets of the bankruptcy estate sounded in tort, regardless of the oral contract under which the attorney undertook legal representation of the plaintiffs. *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982).

The availability of the defense afforded by this section [Code 1942, § 729] will depend on the particular facts in each case. *Johns-Manville Sales Corp. v. Mitchell Enters., Inc.*, 417 F.2d 129 (5th Cir. 1969).

In an action in federal court based on diversity, even though it appears from the papers filed by the plaintiff that so much of the amount sued for on an open account will be barred by operation of this section [Code 1942, § 729] to reduce the amount in controversy to less than \$10,000, this fact alone will not serve to deprive the court of jurisdiction, for the issue is a factual one requiring adjudication on the merits. *Johns-Manville Sales Corp. v. Mitchell Enters., Inc.*, 417 F.2d 129 (5th Cir. 1969).

This section [Code 1942, § 729] of the statute was not applicable to a situation where a donor delivered certain promissory notes secured by mortgage to a bank for certain beneficiaries and, the bank being incapable of performing the trust, the donor assumed control of such notes for the benefit of the beneficiaries and through his unauthorized act the notes became valueless giving rise to an action against his executor, since there existed a trust in regard to the notes and their intended security not cognizable by the courts of the common law to the enforcement of which the ten-year statute of limitations applied. *Yandell v. Wilson*, 182 Miss. 867, 183 So. 382 (1938).

Mississippi six-year statute, not three-year statute, applied to action for use and occupation of river bank controlled by Louisiana law. *Louisiana & Miss. R. Transf. Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930).

Mortgagee's action against parties cashing check on unauthorized indorsement for award in condemnation proceeding was barred by three-year statute, since action was based on the canceled check with the indorsements of the parties on the back thereof, there being no implied promise to pay deducible from the instrument itself. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Replevin action involving ownership of personal property is not within the purview of this section [Code 1942, § 729]. *Shinault v. Shinault*, 146 Miss. 900, 112 So. 593 (1927).

Where land subject to mortgage was foreclosed and the former owner induced another to purchase it from the mortgagee who had purchased it at the foreclosure sale under an oral agreement to repurchase, former owner could not, after default, defend action to cancel his claims to the land by setting up either the three- or six-year statutes of limitation, since under the circumstances nothing but adverse possession for ten years could avail him. *Gentry v. Gamblin*, 79 Miss. 437, 28 So. 809 (1900).

### 11. Evidence.

In an action by an insurance agent to recover from insured premiums paid on his behalf when such insured failed to pay them, under a contract between the parties, the burden was on insured to show that the premiums sued for had been made more than three years prior to the commencement of the action. *Neely v. Johnson-Barksdale Co.*, 194 Miss. 529, 12 So. 2d 924 (1943).

Where an executor or administrator is sued on a probated account against the estate he is administering, some of the items of which appear on the face of the account, as probated, to have been barred by the statute of limitations at the time of the decedent's death, and the executor or administrator pleads the statute of limitations in bar thereof, the plaintiff cannot



in reply thereto allege, and offer evidence of, facts not appearing on the probated claim disclosing that the decedent was estopped at the time of his death from pleading the statute of limitations. *Whitehead v. Puffer*, 187 Miss. 193, 192 So. 566 (1940).

Where buyer sought to take action for fraudulent sale of bonds out of three-year statute of limitations by showing seller acknowledged obligation to deliver bonds in writing within time limited, instrument which purported to be nothing more than acknowledgment of receipt of money for bonds delivered could not be supplemented by parole evidence that it was given for promise to procure and deliver bonds in future. *First Nat'l Bank v. Johnson*, 177 Miss. 634, 171 So. 11 (1936).

## 12. Pleading.

The defense afforded by this section [Code 1942, § 729] must be pleaded in order for the defendant to take advantage of it. *Johns-Manville Sales Corp. v. Mitchell Enters., Inc.*, 417 F.2d 129 (5th Cir. 1969).

The statute [Code 1942, § 729] may not be invoked because defendants were not again summoned after amendment of the declaration, where the order permitting amendment was by agreement. *J.R. Watkins Co. v. Welborn*, 243 Miss. 527, 138 So. 2d 296 (1962).

The striking out of some of the averments in defendant's replication, setting up fraudulent concealment of the note on which the action was based as a defense to plaintiff's plea of the statute of limitations to the defendant's counterclaim, was not reversible error where the averments of the replication which were not stricken were sufficient to present the issue of the alleged fraudulent concealment of the claim. *Williams Yellow Pine Co. v. Williams*, 187 Miss. 425, 193 So. 1 (1940).

Where defendant pleaded the general issue and the three-year statute of limitations, the granting of permission to file a sworn plea, at the trial and over plaintiff's objections, denying writing of a letter alleged to constitute acknowledgment of indebtedness removing the bar of the three-year statute was within trial court's discretion. *Stephenson v. Louisiana Oil*

*Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938).

The alleged error in permitting appellant to file a sworn plea at trial denying writing of letter alleged to constitute acknowledgment of debt taking case out of three-year statute of limitations could not be considered on appeal in absence of cross-assignment of error by appellee. *Stephenson v. Louisiana Oil Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938).

Plea of statute of limitations held properly in issue by request for a peremptory instruction, though plea was not read to court or jury, where plea was on file several days before trial and was developed on cross-examination of plaintiff's witnesses. *First Nat'l Bank v. Johnson*, 177 Miss. 634, 171 So. 11 (1936).

## 13. Running of limitation period.

Judgment for real estate seller was affirmed under Miss. Code Ann. § 15-1-29 and Miss. Code Ann. § 15-1-49 because, applying the three-year statute of limitations, the seller was entitled to collect installment payments beginning three years ago; the purchasers would have been unjustly enriched if allowed to retain possession of the property without being responsible for the remaining debt. *Kersey v. Fernald*, 911 So. 2d 994 (Miss. Ct. App. 2005).

In an action arising out of an oral agreement between cotton merchants to enter into a joint venture with no definite date for its termination, the act was not barred by the statute of limitations where the last transaction of the venture took place on July 24, 1970, and the action was commenced sometime prior to December 12, 1972; nor was the action barred by § 15-3-1 where the oral agreement had been of an indefinite duration and susceptible of performance within 15 months and where the agreement had been substantially performed by both parties. *Beane v. Bowden*, 399 So. 2d 1358 (Miss. 1981).

Where a cause of action for labor and materials furnished to improve the defendant's property located in Mississippi accrued in this state and the defendant was a nonresident of Mississippi at the time of such accrual and remained a nonresident thereafter, the three-year statute of limi-

tations did not run to bar the claim. *Gross v. Thomas*, 187 So. 2d 307 (Miss. 1966).

Nonresidence of plaintiff in action for purchase price of goods precludes running of statute against counterclaim based upon nonconformity of goods to description. *Hedges v. Louisiana Agric. Supply Co.*, 238 Miss. 805, 120 So. 2d 136 (1960).

Statute of limitations runs against claim for damages from inferior quality of goods purchased, from time of delivery, and not from time when goods were ordered. *Hedges v. Louisiana Agric. Supply Co.*, 238 Miss. 805, 120 So. 2d 136 (1960).

A declaration on December 30, 1950, alleging that defendant became indebted to the plaintiff for professional services on or about February 19, 1947, for one amount and on or about November 11, 1947, for another amount, and it was not specifically alleged that the amounts became due and payable on the dates that the indebtedness accrued therefor, the declaration did not necessarily show on its face that the claim was barred by the three-year statute of limitations. *Anderson v. Rieveley*, 218 Miss. 211, 67 So. 2d 249 (1953).

The rule that facts which prevent the running of the statute of limitations against a probated claim should appear in some form on probate thereof and cannot be made to appear for the first time by evidence offered when claim is under consideration in administration of deceased's estate, does not apply to services and necessities furnished by a brother to his insane sister, since limitations in such case does not begin to run until her death. *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

Facts which prevent the statute of limitations from running against a probated claim should appear in some form on the probate thereof and cannot be made to appear for the first time by evidence offered when the claim is under consideration in the administration of the decedent's estate. *Boggan v. Scruggs*, 200 Miss. 747, 29 So. 2d 86 (1947), overruled on other grounds, *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

The statute does not begin to run against general deposits, wrongfully paid out by bank, until the depositor has made

demand on the bank for the money by check, order, draft or other writing. *Letts v. Hancock Bank*, 195 Miss. 519, 15 So. 2d 422 (1943), suggestion of error sustained in part, 195 Miss. 519, 15 So. 2d 774 (1943).

Where rentals under an oil, gas and mineral lease, which were to be paid to bank as depository of lessor, were remitted by writing directing deposit to lessor's account, but were paid by the bank to third person on forged receipts, after death of lessor, of which neither lessee nor bank had knowledge, and neither lessor's administrator nor grantees of the land had actual knowledge of the lease at the times when such wrongful payments were made, the bank was not relieved by limitation statute of the duty to pay such money to the persons entitled thereto, where no demand was made by lessor's administrator or the grantees of the property. *Letts v. Hancock Bank*, 195 Miss. 519, 15 So. 2d 422 (1943), suggestion of error sustained in part, 195 Miss. 519, 15 So. 2d 774 (1943).

Bank chargeable with interest only from the date demand was made upon the bank for payment of the money. *Letts v. Hancock Bank*, 195 Miss. 519, 15 So. 2d 422 (1943), suggestion of error sustained in part, 195 Miss. 519, 15 So. 2d 774 (1943).

Where from inception of loan in 1920 to foreclosure in 1934 there was continuous transaction of renewals and payments, and contract was usurious, statute of limitations was properly applied in permitting credit of payments on principal debt. *Hardin v. Grenada Bank*, 182 Miss. 689, 180 So. 805 (1938).

Notice to buyer of corporate bonds of default of corporation on coupons and of resulting organization of bondholders' protective committee held sufficient notice of falsity of seller's representations that bonds were safe investment to start running of three-year limitation, under statute providing that period of limitation should run from time fraud might have been discovered by reasonable diligence. *First Nat'l Bank v. Johnson*, 177 Miss. 634, 171 So. 11 (1936).

#### 14. — Accrual of cause of action.

Although a trial court correctly determined that an oral contract existed rather



than an open account since there was no final and certain price, summary judgment should not have been granted in favor of a company because there was a genuine issue of material fact as to when payment for barge repairs was due, and equitable estoppel applied to a statute of limitations argument due to apparent repeated assurances that payment would be received upon the sale of the barge. *Douglas Parker Elec., Inc. v. Miss. Design & Dev. Corp.*, 949 So. 2d 874 (Miss. Ct. App. 2007).

Simple demand note was matured at the date of its execution without actual demand being required, and an actual demand was required to begin the running of the statute of limitations only where it was clear that the parties themselves actually intended for a demand to be made; testimony reflected that only interest on the loan was to be paid until an actual demand for payment was made, and accordingly the statute of limitations did not bar recovery of the cash loan. *Associated Nursing, Inc. v. Sides*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 19324 (N.D. Miss. Mar. 19, 2007).

Employee's breach of contract claim against his former employer was barred under the one-year statute of limitations in Miss. Code Ann. § 15-1-29 because, *inter alia*, the latest date upon which the employee's claim could have accrued, which was when additional projects were awarded to the employer, presumably because of the employee's good performance on the first project, was more than a year before the employee filed suit. *United States ex rel. Shannon v. Fed. Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 56509 (S.D. Miss. Aug. 11, 2006), affirmed by 251 Fed. Appx. 269, 2007 U.S. App. LEXIS 21133 (5th Cir. Miss. 2007).

Services rendered by a daughter to her father until his death under an oral agreement to compensate her therefor, constituted a continuous claim not barred by the three-year statute of limitation. *Van Zandt v. First Nat'l Bank*, 220 Miss. 127, 70 So. 2d 327 (1954); *Stephens v. Duckworth*, 188 Miss. 626, 196 So. 219 (1940).

Where in 1943 a bank by mistake credited a deposit to an account of a brother of depositor and both accounts remained in-

active until January 1949, when the brother withdrew his account and the bank did not discover the mistake until March 1951 when the active depositor presented his passbook, the cause of action for restitution of the funds did not arise until January 1949 and neither the three- nor the six-year statutes of limitation barred suit thereon brought on June 1951. *Van Zandt v. First Nat'l Bank*, 220 Miss. 127, 70 So. 2d 327 (1954).

Where a suit was instituted in 1951 to recover for services rendered during 1946 to 1948, to decedent who died in 1950, and this suit was based on promise that claimant would be taken care of for her services at decedent's death, the three-year statute of limitations was not a bar to the action. *In re Whittington's Estate*, 217 Miss. 457, 64 So. 2d 580 (1953).

Where more than three years has elapsed since on oral agreement for furnishing and installation of an ice cream freezing unit was entered into and unit received by the plaintiff, an action for breach of oral contract was not barred by the statute of limitations since the agreement was in part based on two contingencies, the sale of the existing equipment or its breaking down and the action was started within three years after the equipment ceased to function. *Southern Wholesalers v. Stennis Drug Co.*, 214 Miss. 461, 59 So. 2d 78 (1952).

A contract for board, lodging and services, whether expressed or implied, with no time fixed for payment, or for the termination of the contract, is a continuous one and the statute of limitations is inoperative until the contract is terminated by death. *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

Statute of limitations against claim of brother for services and necessities furnished to insane sister with expectation of re-payment from the property does not begin to run until the death of such sister. *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

The fact that the claim of a brother for services and necessities furnished to his insane sister, under expectation of repayment from her property, was divided into monthly and yearly periods, cannot effect an acceleration of the commencement of



the running of the statute of limitations, for limitations could only start to operate at the death of the deceased. *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

A cause of action for payment of personal services performed in return for promise of the devise of property did not arise until the death of the promisor without having made such a devise. *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

The right of action by a subrogee accrues when and not before the date of the payment or payments which makes him a subrogee, and the statute of limitations begins to run against him from and not before the date, or dates of such payments by him. *Neely v. Johnson-Barksdale Co.*, 194 Miss. 529, 12 So. 2d 924 (1943).

The statute does not commence to run on a claim for support until the death of the person supported, where there was no definite time for termination of the contract for such support and the obligation was continuing. *Lee v. Lee's Estate*, 186 Miss. 636, 191 So. 661 (1939).

Cause of action by reason of false certificate to abstract accrued, as respected limitations, at time abstract was certified to and delivered. *Johnson v. Crisler*, 156 Miss. 266, 125 So. 724 (1930).

Item on account held barred by 3-year limitation; custom that accounts with farmer were not due until October 1 of the year in which the items were sold held not proved. *M.G. Travis & Co. v. Mosley*, 148 Miss. 368, 114 So. 628 (1927).

Where goods delivered in installments on 60 days, 3-year statute begins to run 60 days after delivery of last installment. *Deweese v. Bostick Lumber & Mfg. Co.*, 96 Miss. 253, 50 So. 865 (1910).

The right of a surety to enforce contribution from its cosureties arises upon payment which discharges the sureties, and the statute runs from that time and not from the accrual of the right of action on the original obligation. *Pass v. Board of Supvrs.*, 71 Miss. 426, 14 So. 447 (1894).

Credits in money and farm products upon an open account for schooling, the items being mainly for tuition, books, etc., does not make the account a mutual and current open account, and the statute runs against the several items from their dates. *Allen v. Hillman*, 69 Miss. 225, 13 So. 871 (1891).

### 15. —New cause of action.

Where an attorney brought a suit in chancery against a client for attorney's fee, an amended bill introduced no new cause of action and stated no new facts as the basis for recovery and it simply made definite the allegation as to when the attorney was to be paid, and thereby perfected or amplified the cause of action set up in the original pleading and related back to the commencement of the action, the running of statute of limitations was tolled. *Harrison v. Landrum*, 223 Miss. 207, 78 So. 2d 132 (1955).

Where on May 6, 1953, a drug company brought an action against a former partner for indebtedness due to the partnership for drugs sold, and where on July 13, 1953 the drug company filed an amendment to its declaration which consisted of a sworn itemized statement of account with copies of the original invoices of merchandise sold and delivered to the partner during the period from May 10, 1950, to June 2, 1950, this amendment introduced no new cause of action and the statute of limitations did not apply. *McKesson & Robbins, Inc. v. Coker*, 222 Miss. 774, 77 So. 2d 302 (1955).

## RESEARCH REFERENCES

**ALR.** What constitutes a contract in writing within statute of limitations. 3 A.L.R.2d 809.

Limitation of actions as applied to account stated. 51 A.L.R.2d 331.

When is account "mutual" for purposes

of rule that limitations run from last item in open, current, and mutual account. 45 A.L.R.3d 446.

What statute of limitations governs damage action against attorney for malpractice. 2 A.L.R.4th 284.

What statute of limitations governs physician's action for wrongful denial of hospital privileges. 3 A.L.R.4th 1214.

Debtor's restrictive language accompanying part payment as preventing interruption of statute of limitations. 10 A.L.R.4th 932.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

**Am Jur.** 7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 13.1 (answer — defense — statute of limitations).

**CJS.** 54 C.J.S., Limitations of Actions §§ 86-91.

**Law Reviews.** 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

## § 15-1-31. When statute commences to run on open accounts.

In all actions brought to recover the balance due upon a mutual and open current account, where both parties are merchants or traders, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account. In all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof from the dates at which the same respectively became due and payable.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (10); 1857, ch. 57, art. 20; 1871, § 2164; 1880, § 2671; 1892, § 2740; 1906, § 3100; Hemingway's 1917, § 2464; 1930, § 2300; 1942, § 730.

**Cross References** — Recovery of attorney's fees in suit on open account, see § 11-53-81.

### JUDICIAL DECISIONS

1. What are mutual and open current accounts.
2. Persons to whom applicable.
3. Accrual of cause of action.
4. —Effect of custom and usage.

#### 1. What are mutual and open current accounts.

Cash payments upon an open account will not create a "mutual and open current account." Stephenson v. Louisiana Oil Ref. Co., 180 Miss. 410, 177 So. 912 (1938); Abbey v. Owens, 57 Miss. 810 (1880).

Where an account for goods sold, even if originally a mutual and open account, was past due more than three years before suit thereon was filed, cash payments reducing balance due did not make it a "mutual and open current account" within the meaning of this section [Code 1942, § 730]. Stephenson v. Louisiana Oil Ref. Co., 180 Miss. 410, 177 So. 912 (1938).

An account is not a mutual account, though containing many items where the defendant's items were merely payments, and he had no independent account against his creditor. George D. Barnard & Co. v. Sykes, 72 Miss. 297, 18 So. 450 (1895).

If a merchant sell supplies to his customer, and receive from him cotton, which he sells for him and credits the net proceeds of the cotton to the account against the customer for supplies, the account thus kept will be a "mutual and open current account." Abbey v. Hill, 64 Miss. 340, 1 So. 484 (1887).

#### 2. Persons to whom applicable.

Farmer paying account partly with cotton and livestock, credited on account, was not "trader" within statute of limitation. M.G. Travis & Co. v. Mosley, 148 Miss. 368, 114 So. 628 (1927).

**3. Accrual of cause of action.**

In an action arising out of an oral agreement between cotton merchants to enter into a joint venture with no definite date for its termination, the action was not barred by the statute of limitations where the last transaction of the venture took place on July 24, 1970, and the action was commenced sometime prior to December 12, 1972; nor was the action barred by § 15-3-1 where the oral agreement had been of an indefinite duration and susceptible of performance within 15 months and where the agreement had been substantially performed by both parties. *Beane v. Bowden*, 399 So. 2d 1358 (Miss. 1981).

Action for balance upon mutual and open current account barred in 3 years from date of last item. *W.W. Walley & Son*

*v. L.N. Dantzler Lumber Co.*, 114 Miss. 601, 75 So. 433 (1917).

Cause of action for price of fertilizer did not accrue until time for settlement under contract. *Gulfport Fertilizer Co. v. McMurphy*, 114 Miss. 250, 75 So. 113 (1917).

**4. —Effect of custom and usage.**

A local usage as to time of payment may be so well known that it will be implied into a contract unless a different time were agreed. *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. R. 382 (1879); *Hunter v. Wilkinson*, 44 Miss. 721 (1870).

It is competent to show, by custom of merchants, that when cash is not paid for merchandise the sale is on a credit for a certain time. *Effinger v. Henderson*, 33 Miss. 449 (1857).

**RESEARCH REFERENCES**

**ALR.** Limitation of actions as applied to account stated. 51 A.L.R.2d 331.

When is account "mutual" for purposes of rule that limitations run from last item in open, current, and mutual account. 45 A.L.R.3d 446.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

**CJS.** 54 C.J.S., Limitations of Actions §§ 186-191.

**§ 15-1-33. Limitations applicable to actions and suits for penalty or forfeiture.**

All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

**SOURCES:** Codes, 1857, ch. 57, art. 23; 1871, § 2167; 1880, § 2672; 1892, § 2741; 1906, § 3101; *Hemingway's* 1917, § 2465; 1930, § 2301; 1942, § 731.

**Cross References** — Limitations on prosecutions generally, see §§ 99-1-5 et seq.

**JUDICIAL DECISIONS**

1. In general.
2. Actions subject to limitation.
3. Actions not subject to limitation.
4. Pleading.

**1. In general.**

A statute is penal in character within the purview of this section [Code 1942,

§ 731] when its controlling purpose is to impose a punishment for violation of its provisions. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

Law of the forum determines whether or not an action or suit is one to recover a



“penalty” within the purview of this section [Code 1942, § 731]. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

Whether an action under the Federal Fair Labor Standards Act for recovery of overtime compensation, liquidated damages, and attorney’s fees constitutes an action for “penalty” within the meaning of this section [Code 1942, § 731], is for the determination of the Supreme Court of Mississippi rather than that of the Federal Supreme Court. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

This section [Code 1942, § 731] is not remedial, but imposes a penalty. *State ex rel. Rogers v. Newton*, 191 Miss. 611, 3 So. 2d 816 (1941).

## 2. Actions subject to limitation.

Section 95-5-10(2) is subject to the statute of limitations provided in § 95-5-29 because it involves specific penalties; § 95-5-10(1) is not subject to § 95-5-29, but is subject to § 15-1-33 because it is a penalty controlled by a one year statute of limitation. *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788 (Miss. 1998).

Tenant, who became trespasser by holding over beyond expiration of term, is liable for double rent thereafter, but only for that period dating from one year prior to suit. *Sherrill v. Stewart*, 199 Miss. 216, 23 So. 2d 915 (1945).

The one-year limitation for recovery of a penalty under this section [Code 1942, § 731] is applicable to an action to recover double rent under Code 1942, § 947. *Sherrill v. Stewart*, 197 Miss. 880, 21 So. 2d 11 (1945), error overruled, 197 Miss. 900, 21 So. 2d 477 (1945).

“Liquidated damages” of an additional equal amount for nonpayment of overtime compensation under the Federal Fair Labor Standards Act constitutes a “penalty” within the meaning of this section [Code 1942, § 731] so that recovery therefor is barred if the action is not commenced within one year. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

In an action on the bond of a county superintendent of education and on pay certificates issued by him in an amount in excess of the school receipts or budget estimates for the current fiscal year, it was proper to hold that the liability imposed by the statute upon the superintendent to holders of the certificate was a “penalty,” and that therefore action thereon was barred by limitation when not commenced within one year after the cause of action accrued. *State ex rel. Rogers v. Newton*, 191 Miss. 611, 3 So. 2d 816 (1941).

In shipper’s action for freight charges exceeding those authorized by Railroad Commission and for 100 per cent penalty, one-year limitation statute barred penalty. *Gulf & S.I.R.R. v. Laurel Oil & Fertilizer Co.*, 172 Miss. 630, 158 So. 778 (1935), error overruled, 172 Miss. 654, 159 So. 838 (1935), corrected, 172 Miss. 657, 160 So. 564 (1935).

Motion against sheriff on official bond is barred by this section [Code 1942, § 731]. *Bank of Hickory v. May*, 119 Miss. 239, 80 So. 704 (1919).

## 3. Actions not subject to limitation.

Supreme Court of Mississippi overruled *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788 (Miss. 1998), to the extent that the remedies provided in Miss. Code Ann. § 95-5-10(1) are subject to the limitations period set out in Miss. Code Ann. § 15-1-33. *Stockstill v. Gammill*, 943 So. 2d 35 (Miss. 2006).

Hospital was a subdivision of state for purposes of its suit against doctor for unpaid rent, and was thus not subject to one-year statute of limitations; county board of supervisors and city board of aldermen passed resolutions authorizing purchase and lease of office by hospital for express purpose of recruiting doctors to county and city, and office was purchased and leased pursuant to local and private legislation. *Murphree v. Aberdeen-Monroe County Hosp.*, 671 So. 2d 1300 (Miss. 1996).

Mississippi Constitution Article 4 § 104 directs that statute of limitations in civil cases shall not run against state or any subdivision thereof; therefore, one year statute of limitations provided in § 15-1-33 is inoperative when suit is brought

on behalf of state against School Board and Superintendent for violation of conflict of interest statute. *State ex rel. Pittman v. Ladner*, 512 So. 2d 1271 (Miss. 1987).

Code 1942, § 731 applies only to suits for a penalty or forfeiture based on a penal statute and is not applicable to a suit on a fidelity bond. *Latham v. United States Fid. & Guar. Co.*, 267 So. 2d 895 (Miss. 1972).

In a suit to cancel as cloud on title claim asserted by husband by virtue of inheritance from his deceased spouse, where it was finally adjudicated that the husband had pleaded guilty to manslaughter in the death of his wife, the suit was not one for penalty or forfeiture on a penal statute required to be brought within one year from the date of offense. *Henry v. Toney*, 217 Miss. 716, 64 So. 2d 904 (1953).

Action under the Federal Fair Labor Standards Act to recover overtime compensation is not an action to recover a "penalty" within the meaning of this section [Code 1942, § 731], and therefore is not barred although not commenced within one year. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

Reasonable attorney's fees allowed in action to recover overtime compensation under Federal Fair Labor Standards Act does not constitute "penalty" within meaning of this section [Code 1942, § 731], and therefore is not barred although the action was commenced after the one-year limitation period. *Southern Package Corp. v. Walton*, 196 Miss. 786, 18 So. 2d 458 (1944), cert. denied, 323 U.S. 762, 65 S. Ct. 93, 89 L. Ed. 609 (1944).

Statute making insurance agent of company unauthorized to do business in State personally liable on policy held remedial, not penal, as regards insured, hence insured's suit thereunder was not within one-year limitation on actions for penalty. *Wilkinson v. Goza*, 165 Miss. 38, 145 So. 91 (1932).

State revenue agent's suit for penalties for violating the anti-trust laws not barred by this section [Code 1942, § 731]. *Nugent & Pullen v. Robertson*, 126 Miss. 419, 88 So. 895 (1921).

Personal liability of directors for illegal payment of dividends not barred by this section [Code 1942, § 731]. *Metzger v. Joseph*, 111 Miss. 385, 71 So. 645 (1916).

Delayage charge fixed by railroad commission for detention of cars in transit, not penalty within this section [Code 1942, § 731]. *Keystone Lumber Yard v. Yazoo & Miss. V.R. Co.*, 97 Miss. 433, 53 So. 8 (1910).

Action for actual damages against clerk for failure to give defaulting taxpayer notice of expiration of exemption period not barred by this section [Code 1942, § 731]. *McClendon v. Whitten*, 95 Miss. 124, 48 So. 964 (1909).

A suit for interest paid upon a usurious contract is not a suit to recover a penalty within the statute. *Commercial Bank v. Auze*, 74 Miss. 609, 21 So. 754 (1897).

#### 4. Pleading.

In civil suit to recover penalty, defense of limitation must be specifically plead. *Yazoo & Miss. V. Ry. v. Kirk*, 102 Miss. 41, 58 So. 710, Am. Ann. Cas. 1914C, 968 (1912), suggestion of error sustained, 102 Miss. 56, 58 So. 834, Am. Ann. Cas. 1914C, 968 (1912).

### RESEARCH REFERENCES

**Am Jur.** 36 Am. Jur. 2d, Forfeitures and Penalties §§ 42, 87 et seq.

**CJS.** 54 C.J.S., Limitations of Actions § 96.

## § 15-1-35. Limitations applicable to actions for certain torts.

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.



**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (6); 1857, ch. 57, art. 7; 1871, § 2152; 1880, § 2673; 1892, § 2742; 1906, § 3102; Hemingway's 1917, § 2466; 1930, § 2302; 1942, § 732; Laws, 1983, ch. 394, eff from and after July 1, 1983.

**Cross References** — Limitations applicable to malpractice actions generally, see § 15-1-36.

Actionable words generally, see §§ 95-1-1 through 95-1-5.

Limitations of prosecutions generally, see §§ 99-1-5 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Applicability.
3. Accrual.
4. Assault and battery.
5. Slander and libel.
6. Menace.
7. Pleading.
8. Failure to employ.
9. Invasion of privacy.
10. Intentional infliction of emotional distress.
11. Malicious prosecution.
12. Discovery rule.

### 1. In general.

Because it was clear that for a violation of Miss. Code Ann. § 97-3-107(4) to occur the offending conduct had to be intentional, and Miss. Code Ann. § 15-1-35 applied to all intentional torts that were substantially like those enumerated, stalking was subject to the one-year statute of limitations of § 15-1-35; because the employee did not file her complaint within one year of last alleged action by her supervisor, it was time-barred. *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961 (Miss. Ct. App. 2006).

Insured's claims against the insurer and its investigator were intentional torts subject to the one year statute of limitations, Miss. Code Ann. § 15-1-35; the investigator's acts of following the insured night and day, following her to public and private locations, and appearing at her home and place of employment, were deliberate acts and since the insured was unaware of any stalking by the investigator after his arrest on March 11, 2000, the one year statute of limitations accordingly ran from March 11, 2000, and the insured filed her claims more than one year after that date. *Lynch v. Liberty Mut. Ins. Co.*, 909 So. 2d 1289 (Miss. Ct. App. 2005).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. *Jackpot Miss. Riverboat, Inc. v. Smith*, 874 So. 2d 959 (Miss. 2004).

The listing of intentional torts in § 15-1-35 was intended to be inclusive. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

There can be no escape from bar of statute of limitations applicable to intentional torts by mere refusal to style the cause brought in the recognized statutory category and thereby circumvent the prohibition of the statute. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

Once *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938, was decided, public was fairly on notice that in Mississippi one-year limitations period might well be chosen over 6-year limitations period as more appropriate period for actions under 42 USCS § 1983. *Hanner v. Mississippi*, 833 F.2d 55 (5th Cir. 1987).

This section [Code 1942, § 732] provides an inclusive listing of intentional torts recognized in Mississippi. *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624 (Miss. 1970).

### 2. Applicability.

Though appellant contended that she had negligence claims against a casino that were not time-barred, all of her in-



stances of alleged negligence were part of her false arrest claim; thus, the one-year statute of limitations for intentional torts, Miss. Code Ann. § 15-1-35 (2003), applied to bar her suit. *Brown v. Harrah's Entm't, Inc.*, 14 So. 3d 827 (Miss. Ct. App. 2009).

In a products liability case in which a driver asserted a claim for intentional tort/conduct and she filed her complaint almost two years after her head-on collision, her intentional tort/conduct claim was barred by the one-year limitations period in Miss. Code Ann. 15-1-35. *Williams v. Daimler Chrysler Corp.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 55123 (N.D. Miss. July 18, 2008), affirmed by 310 Fed. Appx. 747, 2009 U.S. App. LEXIS 5870 (5th Cir. Miss. 2009).

Customer's claim for defamation was untimely where, as was obvious from the professed date of accrual of the customer's alleged defamation, and the date he alleged the cause of action within his amended complaint, the time limitation specified in Miss. Code Ann. § 15-1-35 had expired. *Hudson v. Palmer*, 977 So. 2d 369 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 95 (Miss. 2008).

Wrongful death claim against the corporations was time-barred and summary judgment was properly granted in favor of the corporations on the wife's wrongful death claim where the statute of limitations expired before litigation commenced. *May v. Pulmosan Safety Equip. Corp.*, 948 So. 2d 483 (Miss. Ct. App. 2007).

Dismissal by the district court of the football player who allegedly caused injury to plaintiff's son's eye during football practice was proper where the appellate court determined that plaintiff's claim stated an intentional tort, and the applicable statute of limitations had run because the amended complaint was filed on February 2, 2001, well over a year from the September 14, 1999 incident. *Priester v. Lowndes County*, 354 F.3d 414 (5th Cir. 2004), cert. denied, — U.S. —, 125 S. Ct. 153, 160 L. Ed. 2d 44 (2004).

One-year statute of limitation of Miss. Code Ann. § 15-1-35 applied to all actions substantially similar to the eight intentional torts enumerated in that statute, but four of psychologist's eight claims

were improperly dismissed on statute of limitation grounds as the wife and second husband were diligently substituted for fictitious parties four days after the psychologist ascertained their identities upon learning of their alleged involvement in a letter-writing campaign against them upon deposing another party, and the claims against them related back to the timely filing of the original complaint. *Gasparrini v. Bredemeier*, 802 So. 2d 1062 (Miss. Ct. App. 2001).

Section 15-1-35 does not cover all intentional tortious conduct, but applies only to the torts enumerated in the statute; thus, § 15-1-35 did not apply to a claim for malicious interference with business relations. *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324 (Miss. 1992).

Discriminatory discharge action under federal civil rights law (42 USCS § 1981) is not barred by one year statute of limitations for enumerated intentional torts, but is governed by residual statute of limitations which provides 6-year limitation period. *Kozam v. Emerson Elec. Co.*, 711 F. Supp. 313 (N.D. Miss. 1989).

One year statute of limitations in § 15-1-35 applies to all 42 USCS § 1981 claims brought in Mississippi. *Dillard v. Vicksburg Medical Ctr., Inc.*, 695 F. Supp. 880 (S.D. Miss. 1988).

One year statute of limitations is applicable to claims under 42 USCS § 1981 arising after Supreme Court's decision in *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 while longer statute of limitations applies for claims arising before such decision. *Dillard v. Vicksburg Medical Ctr., Inc.*, 695 F. Supp. 880 (S.D. Miss. 1988).

One year statute of limitations is applicable to claims under 42 USCS § 1981 arising after Supreme Court's decision in *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 while longer statute of limitations applies for claims arising before such decision. *Dillard v. Vicksburg Medical Ctr., Inc.*, 695 F. Supp. 880 (S.D. Miss. 1988).

One-year statute of limitations would be applied to all § 1981 claims; reasoning applied to § 1983 actions would likely be applied to § 1981 actions, and therefore actions accruing before decision in *Wilson*

v. Garcia (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938, would have a limitations period of (1) longer pre-Wilson period, commencing at time of action accruing, or (2) post-Wilson one-year period, commencing with date of Wilson decision, whichever expires first. *Byrd v. Travenol Lab., Inc.*, 675 F. Supp. 342 (N.D. Miss. 1987).

Decision determining that § 15-1-35 applies to all 42 USCS § 1983 actions brought in Mississippi should not apply retroactively. *Young v. Biggers*, 820 F.2d 727 (5th Cir. 1987), reh'g denied, 826 F.2d 1399 (5th Cir. 1987).

Section 15-1-35 is not applicable to invasion of privacy claim; such claim is not listed specifically in statute and cannot be defined to fall squarely within any category included therein. *Blackwell v. Hustler Magazine, Inc.*, 633 F. Supp. 870 (S.D. Miss. 1986).

All § 1983 actions brought in Mississippi are governed by Mississippi Code § 15-1-35, Mississippi's one-year statute of limitations for intentional torts. *Storey v. United States*, 629 F. Supp. 1174 (N.D. Miss. 1986).

Defendant's motion to dismiss was denied and one-year statute of limitations set forth in § 15-1-35 was inapplicable in civil rights action by pro se prisoner who submitted complaint and application to proceed in forma pauperis in timely manner but where prisoner had no control over when Magistrate would allow complaint to be filed, thus for purposes of statute of limitation operable date was upon receipt by Court Clerk. *Smith v. Ouzts*, 629 F. Supp. 1001 (S.D. Miss. 1986).

One-year statute of limitations prescribed by § 15-1-35 for intentional torts does not apply to federal civil rights action arising from police officer's alleged conduct in smashing plaintiff's glasses, beating him, and cursing at him. *Simons v. City of Columbus*, 593 F. Supp. 876 (N.D. Miss. 1984), aff'd, 805 F.2d 1031 (5th Cir. 1986).

Wrongful or fraudulent foreclosure of property action is case action governed by 6 year statute of limitations (§ 15-1-49), not by one year statute of limitations applicable to specified intentional torts

(§ 15-1-35). *Southern Land & Resources Co. v. Dobbs*, 467 So. 2d 652 (Miss. 1985).

In action against bail bondsmen and their surety alleging false imprisonment and malicious prosecution based upon allegedly improper arrest of plaintiff for jumping bail, applicable statute of limitations is 6-year period set forth in § 15-1-49 rather than one-year period set forth in § 15-1-35, since, although action is grounded in tort, it springs from underlying bond agreement between bail bondsmen and plaintiff. *Mathis v. Indemnity Ins. Co. of N. Am.*, 588 F. Supp. 489 (S.D. Miss. 1983).

The Mississippi six-year catch-all statute (Code § 15-1-49) controlled an action pursuant to 42 USCS § 1983 against a city, its police department and various policemen asserting deprivation of constitutional right to freedom from physical abuse and intimidation which action allegedly occurred when in the course of arresting and jailing the plaintiff two policemen hurled him head first into the concrete floor and wall of a cell. *Morrell v. City of Picayune*, 690 F.2d 469 (5th Cir. 1982).

Assuming arguendo that an insurance adjuster illegally intruded upon the privacy of plaintiffs after their son had been critically injured in an automobile accident, such intrusion would constitute an intentional tort and, as such, would be barred by the one year statute of limitations. *Andrews v. GAB Bus. Servs., Inc.*, 443 F. Supp. 510 (N.D. Miss. 1977).

Action under federal civil rights statute against sheriff and constable to recover damages for unfounded arrest of plaintiff, beating suffered at time of arrest, and failure to summon physician to treat wounds suffered by plaintiff, was subject to the 6 year statute of limitations. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976).

Civil rights action brought by motorist against highway patrolman and surety on their official performance bond arising out of an incident of alleged physical abuse is an action on contract governed by the state's six year limitation statute rather than an action for intentional tort governed by a one year statute. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976).

A cause of action against four highway patrolmen and their surety, alleging that



the plaintiff had been beaten and abused by the highway patrolmen, was essentially an action against a public officer and the surety on his bond, was accordingly an action in contract, and was governed by the six year statutory limitation for written contracts, § 15-1-49, and not the one year statutory limitation period for tort actions, § 15-1-35. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976).

This section [Code 1942, § 732] is not applicable to an action for trespass on land. *Bush v. City of Laurel*, 234 Miss. 93, 105 So. 2d 562 (1958).

The section [Code 1942, § 732] does not apply to actions against a railroad company for personal injuries. *Bell v. Kansas City, M. & B.R. Co.*, 68 Miss. 19, 8 So. 508 (1891).

### 3. Accrual.

Excess insurer's fraud and other tort claims against parties involved in settling medical malpractice claims against two doctors were barred under the limitations periods in Miss. Code Ann. §§ 15-1-35, 15-1-49, which were not tolled under Miss. Code Ann. § 15-1-67 because a letter from counsel for one of the doctors, which letter was written one year before the insurer filed suit, invited the excess insurer to discuss the withdrawal of the doctor's consent to settle, which the excess insurer alleged led to its payment obligations on behalf of another doctor whose primary coverage was exhausted, and counsel's letter did not attempt to conceal anything from the excess insurer. *Nat'l Union Fire Ins. Co. v. Blasio*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 42669 (N.D. Miss. May 23, 2008).

Where investors alleged that investment companies were aware of their agent's conversion of the investors' funds before the criminal activity was publicly disclosed, neither fraudulent concealment nor equitable estoppel applied to toll the limitations periods; after the agent's misconduct was discovered, the investors delayed filing their complaints against the companies until well after the limitations periods expired and there was no conduct of the companies that caused the investors' undue delay. *Joe v. Minn. Life Ins. Co.*, 337 F. Supp. 2d 821 (S.D. Miss. 2004).

While the minor's savings statute, Miss. Code Ann. § 15-1-59 (Rev. 2003), applied to wrongful death suits, once suit was filed in the child's behalf, the one-year statute of limitations, Miss. Code Ann. § 15-1-35 (1995), began running; since plaintiff guardian, instead of filing an amended complaint in federal court, filed a new suit, alleging intentional torts for the first time, those claims were time-barred under § 15-1-35. *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Where the employee was exonerated of embezzlement on June 21, 2000, and filed her complaint on June 20, 2001, the employee's malicious prosecution claim was filed one day before it would have expired, and therefore, the trial court was in error in granting the employer's motion for summary judgment. *Coleman v. Smith*, 841 So. 2d 192 (Miss. Ct. App. 2003).

In an action for malicious prosecution arising out of an earlier theft prosecution, the right of action accrues when the trial court recalls the case from the files and enters a nolle prosequi. *Bankston v. Pass Rd. Tire Ctr., Inc.*, 611 So. 2d 998 (Miss. 1992).

Action for wrongful death brought by statutory heirs of decedent, alleging that decedent came into contact with toxic substances during his employment with defendant, resulting in his death, was time-barred where approximately 8 ½ years elapsed between decedent's death and filing of present action; negligence actions being governed by § 15-1-49 (6 years), actions based on intentional infliction of emotional distress being controlled by § 15-1-35 (one year), and breach of warranty actions governed by § 75-2-725 (6 years), whether defendants' acts were characterized as intentional or negligent, longest possible limitations period under Mississippi law would be 6 years. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

For actions in Mississippi brought under 42 USCS § 1983 accruing before *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938, appropriate limitations period shall be either (1) longer pre-Wilson period, commencing at time action accrued, or (2) post-Wilson one-year period, commencing with date of



Wilson decision, whichever expires first. *Hanner v. Mississippi*, 833 F.2d 55 (5th Cir. 1987).

Section 1981 action accrued on Supreme Court's denial of certiorari in 1978 and was timely filed where filing took place in 1983. *Byrd v. Travenol Lab., Inc.*, 675 F. Supp. 342 (N.D. Miss. 1987).

In action for malicious prosecution arising out of an earlier cattle theft prosecution, the right of action did not accrue when the trial court entered an order retiring the case to the files in November 1971, but accrued when the trial court recalled the case from the files and entered a nolle prosequi in April 1972, and action brought in February 1973 was not barred by Code 1942, § 732. *Childers v. Beaver Dam Plantation, Inc.*, 360 F. Supp. 331 (N.D. Miss. 1973).

Although plaintiff charged defendants with negligence and asserted such negligence as a basis for his demand, his action was in essence, one to recover on the intentional torts of abuse of criminal process, libel and slander, and since such rights accrued more than 1 year prior to the commencement of the action, they were barred by Code 1942, § 32. *Childers v. Beaver Dam Plantation, Inc.*, 360 F. Supp. 331 (N.D. Miss. 1973).

It is well settled law in Mississippi that a cause of action begins to run from the time of injury and not from the time of its discovery unless the running of the statute of limitations is tolled by the operation of Code 1942, § 742 (fraudulent concealment of a cause of action). *Wilson v. Retail Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972).

#### 4. Assault and battery.

Plaintiff retired Mississippi Air National Guard (MSANG) colonel's 42 U.S.C.S. § 1985 allegations of threats, violence, and intimidation against defendant MSANG officials could not be combined with a single assault and battery to constitute a "continuing tort, thus, assault and battery claims were barred by Miss. Code Ann. § 15-1-35's one-year limitations period. *Bryant v. Military Dep't*, 597 F.3d 678 (5th Cir. 2010), writ of certiorari denied by 131 S. Ct. 287, 178 L. Ed. 2d 141, 2010 U.S. LEXIS 6263, 79 U.S.L.W.

3201, 31 I.E.R. Cas. (BNA) 480 (U.S. 2010).

Allegations of threats, violence, and intimidation comprising plaintiff's claims against the Mississippi Air National Guard under 42 U.S.C.S. § 1985 could not be combined with a single incident of assault and battery to constitute a "continuing tort"; thus, plaintiff's assault and battery claim was time barred under Miss. Code Ann. § 15-1-35 because the claim was made more than one year after the incident occurred. *Bryant v. Military Dep't*, 597 F.3d 678 (5th Cir. 2010), writ of certiorari denied by 131 S. Ct. 287, 178 L. Ed. 2d 141, 2010 U.S. LEXIS 6263, 79 U.S.L.W. 3201, 31 I.E.R. Cas. (BNA) 480 (U.S. 2010).

Plaintiff former Mississippi Air National Guard service member's assault claim against defendant Guard officials was time barred under Miss. Code Ann. § 15-1-35 because the assault allegedly occurred in 2003 and suit was filed in 2005, and while the service member argued that the assault and battery was part of a pattern of threats, harassment, and intimidation which was of a continuing nature, the assault and battery was not itself a continuing tort. *Bryant v. Miss. Military Dep't*, 519 F. Supp. 2d 622 (S.D. Miss. 2007), *affirmed* by 597 F.3d 678, 2010 U.S. App. LEXIS 3221, 30 I.E.R. Cas. (BNA) 654 (5th Cir. Miss. 2010) *supra*, *aff'd*, 2010 U.S. App. LEXIS 3221 (5th Cir. Miss. 2010).

Employee's claim of assault against her supervisor was barred by Miss. Code Ann. § 15-1-35 because the alleged torts occurred no later than September 7, 2001, and therefore any action should have been filed by September 7, 2002; however, the employee did not file the claim until March 26, 2003. *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961 (Miss. Ct. App. 2006).

Plaintiff, who brought claims for assault and battery and for intentional infliction of emotional distress that should have been filed on or before July 30, 2000 did not comply with the limitation period enunciated in Miss. Code § 15-1-35, where plaintiff's complaint was filed with the court on August 13, 2002; therefore, unless the statute of limitations was tolled in some manner, plaintiff's claims

were time barred. *Hampton v. Gannett Co.*, 296 F. Supp. 2d 716 (S.D. Miss. 2003).

The limitation period on actions for assault and battery and intentional infliction of emotional distress is one year and trial court did not err in dismissing action raising claims under those theories where plaintiff's complaint was not received in the mail by the trial court clerk until more than one year following the incident giving rise to the alleged causes of action. *Slaydon v. Hansford*, 830 So. 2d 686 (Miss. Ct. App. 2002).

An action arising from an appendectomy was one for assault and battery and, therefore, was barred by the one year statute of limitations contained in the statute where the plaintiff alleged that she did not know she was going to undergo surgery prior to its occurrence and that any documents signed by her which consented to the surgery were against her will because she was under the influence of heavy sedation and "excruciating sickness." *Goleman v. Orgler*, 771 So. 2d 374 (Miss. Ct. App. 2000).

A cause of action for assault and battery was barred by the statute of limitations where the action was not brought within one year of the accrual of the cause of action. *Disney v. Horton*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5359 (N.D. Miss. Apr. 13, 2000).

An action for false arrest or malicious prosecution is subject to the one-year period of limitations set forth in § 15-1-35 even though these torts are not specifically enumerated in the statute. *City of Mound Bayou v. Johnson*, 562 So. 2d 1212 (Miss. 1990).

Combined actions of two former employees of defendant publishing company were time barred by 1-year statute of limitations in § 15-1-35 where one employee sought to hold former employer vicariously liable for alleged assault and battery by fellow employee and second employee sought to recover for alleged slanderous statements made to new employer by president of former employer. *EEOC v. Southern Pub. Co.*, 732 F. Supp. 682 (S.D. Miss. 1988).

Cause of action based upon wrongful death statute (§ 11-7-13), being predicated upon defendant's intentional torts,

is governed by one year statute of limitations, rather than 6 year statute of limitations, as actions filed pursuant to wrongful death statute must be brought within corresponding prescription statute for which cause of action is predicated. *Veselits ex rel. Cruthirds v. Veselits*, 653 F. Supp. 1570 (S.D. Miss. 1987), *aff'd*, 824 F.2d 391 (5th Cir. 1987).

One year statute of limitations applied to prisoners § 1983 claim alleging he had been assaulted. *Smith v. Ouzts*, 629 F. Supp. 1001 (S.D. Miss. 1986).

A medical malpractice action based on the theory of lack of informed consent, was in tort and subject to the general six-year statute of limitations as set out in Code 1942, § 722, rather than the one-year statute of limitations on assault and battery claims as set out in Code 1942, § 732. *Ross v. Hodges*, 234 So. 2d 905 (Miss. 1970).

This section [Code 1942, § 732], governing the commencement of actions for assault and battery, applies to corporations. *Sears, Roebuck & Co. v. Ingram*, 206 So. 2d 204 (Miss. 1968).

An action for damages against a foreign corporation arising from personal injuries allegedly sustained by the plaintiff as a consequence of assault and battery committed by an employee of the corporation was barred by the one-year statute of limitations, where the corporation was at all times amenable to the personal service of process of the courts of the state. *Sears, Roebuck & Co. v. Ingram*, 206 So. 2d 204 (Miss. 1968).

Suit for personal injuries growing out of assault by state highway patrolman during the course of his duty as such patrolman, in which surety on patrolman's official bond was joined as defendant, was a suit upon the bond and not an action for assault and battery subject to the one-year limitation statute. *Alexander v. Carsley*, 199 Miss. 881, 25 So. 2d 709 (1946).

Limitation of one year held inapplicable in action against sheriff and surety for damages by reason of having been shot and wounded by deputy. *State ex rel. Smith v. Smith*, 156 Miss. 288, 125 So. 825 (1930).

The one-year statute of limitations set forth in § 15-1-35 applied to an action for



assault and battery against a police officer and the municipality whom he served, arising out of alleged police brutality during an arrest. The public policy considerations implicit in § 15-1-35 apply where the offender is a police officer and the corporation sought to be held liable is a municipal corporation, as well as in the case of private parties. To the extent they hold to the contrary, *State Ex Rel Smith v. Smith* (Miss. 1930) 125 So. 2d 825 and *Alexander v. Carsley* (Miss. 1946) 25 So. 2d 709 stand modified. *City of Mound Bayou v. Johnson*, 562 So. 2d 1212 (Miss. 1990).

If unsoundness of mind of one suing for damages for assault and battery began before expiration of day of injury, limitation did not begin until removal of disability. *Pannell v. Glidewell*, 146 Miss. 565, 111 So. 571 (1927).

### 5. Slander and libel.

Under Miss. Code Ann. 15-1-35, the former employee had until March 2, 2007, one year from the date of his termination on March 2, 2006, to file his defamation claim against his former employer, a manager, and a store services company. Because he did not file his claim until March 5, 2007, it was barred by the one-year limitations period in § 15-1-35. *Davis v. Belk Stores Servs.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 487 (S.D. Miss. Jan. 6, 2009).

Former state university student's defamation claims against the university, a state board of trustees, and several professors was time barred under the one-year limitations period in Miss. Code Ann. § 15-1-35 where the student did not file his suit until almost 13 months after the alleged defamatory acts occurred. *Washington v. Jackson State Univ.*, 532 F. Supp. 2d 804 (S.D. Miss. Mar. 15, 2006), appeal dismissed by 244 Fed. Appx. 589, 2007 U.S. App. LEXIS 18811 (5th Cir. Miss. 2007).

One-year statute of limitations under Miss. Code Ann. § 15-1-35 on the founder's defamation, invasion of privacy, and intentional infliction of emotional distress claims began to run at the latest on February 15, 2000 for the first article, and on April 20, 2001 for the second article, and thus, the statute of limitations expired on

February 15, 2001, for the founder's claims related to the first article, and expired on April 20, 2002, for the founder's claims related to the second article; therefore, because the founder did not file his lawsuit until September 3, 2002, dismissal of his claims against the publisher was appropriate; no genuine issue of material fact existed, and the publisher was entitled to judgment as a matter of law. *Lane v. Strang Communs. Co.*, 297 F. Supp. 2d 897 (N.D. Miss. 2003).

Libel claims against a coroner filed more than one year after the last publication of allegedly defamatory statements about the cause of death of a convalescent center patient were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred because, although the discovery rule applied to toll the statute for several months until the completion of an investigation of the cause of the patient's death, the filing of a state court action only tolled the one-year statute of limitations under Miss. Code Ann. § 15-1-35 during the 120 days in which the plaintiffs could serve the coroner. *River Oaks Convalescent Ctr., Inc. v. Coahoma County*, 280 F. Supp. 2d 565 (N.D. Miss. 2003).

Libel claims against a coroner filed more than one year after the last publication of allegedly defamatory statements about the cause of death of convalescent center patients were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred because the continuing injury doctrine, based on lawsuits filed by patients' family members against the center and its owner arising out of the coroner's statements, did not apply to toll the one-year statute of limitations under Miss. Code Ann. § 15-1-35 because the suits constituted a "continual ill effect" rather than a "continual unlawful act." *River Oaks Convalescent Ctr., Inc. v. Coahoma County*, 280 F. Supp. 2d 565 (N.D. Miss. 2003).

The discovery rule applies to defamation actions in that limited class of libel cases in which, because of the secretive or inherently undiscoverable nature of the publication the plaintiff did not know, or with reasonable diligence could not have discovered, that he or she had been defamed. *Staheli v. Smith*, 548 So. 2d 1299 (Miss. 1989).



Combined actions of two former employees of defendant publishing company were time barred by 1-year statute of limitations in § 15-1-35 where one employee sought to hold former employer vicariously liable for alleged assault and battery by fellow employee and second employee sought to recover for alleged slanderous statements made to new employer by president of former employer. *EEOC v. Southern Pub. Co.*, 732 F. Supp. 682 (S.D. Miss. 1988).

Action by plaintiff against former employer for slander was time-barred where publication took place more than one year prior to institution of action, despite fact that plaintiff did not discover defamatory statements until more than one year after they were made. *EEOC v. Southern Pub. Co.*, 732 F. Supp. 682 (S.D. Miss. 1988).

In an action for libel, the statute of limitations runs from the date the allegedly defamatory material is published which, for a mass distributed publication, occurs when the periodical is substantially distributed to the public. *Wildmon v. Hustler Magazine, Inc.*, 508 F. Supp. 87 (N.D. Miss. 1980).

It was error for the trial court to dismiss a slander suit as barred by the one-year statute of limitations where the slander cause of action had accrued on December 9, 1976, at which time false charges against plaintiff were repeated in open court by defendant, and where, on December 9, 1977, plaintiff filed his declaration against defendant; however, another count of the declaration alleging a cause of action for libel was barred by the statute of limitations where such cause of action had accrued on August 20, 1976. *Ladner v. Arrington*, 374 So. 2d 831 (Miss. 1979).

Although plaintiff charged defendants with negligence and asserted such negligence as a basis for his demand, his action was in essence, one to recover on the intentional torts of abuse of criminal process, libel and slander, and since such rights accrued more than 1 year prior to the commencement of the action, they were barred by Code 1942, § 732. *Childers v. Beaver Dam Plantation, Inc.*, 360 F. Supp. 331 (N.D. Miss. 1973).

In an action for damages for slander of title, the right to sue therefor accrued at

the time of the execution and filing for record of the deeds and not at the time when defendant falsely and maliciously made assertions constituting a disparagement of the title. *Walley v. Hunt*, 212 Miss. 294, 54 So. 2d 393 (1951).

In an action for libel against a newspaper, the statute of limitations begins to run from the date of the first publication. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

The cause of action accrues where the paper is first published. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

Where original petition alleged that defamatory words spoken by railroad's special agent were, "Don't you think Wales (meaning plaintiff) was into that brass stealing?" amendment, filed more than one year after alleged cause of action accrued, alleging in addition to original petition that special agent stated "I think they ought to have fired him before," and that statements were made in the presence of another person, held to introduce a new cause of action which was barred by one-year statute of limitations. *Illinois Cent. R.R. v. Wales*, 177 Miss. 875, 171 So. 536 (1937).

If a suit for libel contained in a letter sent by mail be brought after one year from publication, the statute cannot be voided by showing a concealment of the cause of action predicated of any act of the writer at the place where the letter was mailed. *McCarlie v. Atkinson*, 77 Miss. 594, 27 So. 641, 78 Am. St. R. 540 (1900).

## 6. Menace.

Tort of intentional infliction of emotional distress is of same type of tort as menace and therefore covered by one-year statute of limitations and not by residual 6 year statute of limitations. *Guthrie v. J.C. Penney Co.*, 803 F.2d 202 (5th Cir. 1986).

An action seeking to recover for the use of threats of criminal prosecution, in a letter, to enforce the payment of a purported civil debt, which the plaintiff charged was in violation of Code 1942, § 2365, was barred by the statute of limitations applicable to an action for menace, the complaint having been filed more than

a year after the letter was received. *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624 (Miss. 1970).

A letter from an insurer to the parents of a minor boy alleged to have participated in the damaging of buses, which letter sought payment of a proportionate share of the damage and stated that in the event of nonpayment the matter would be referred to juvenile officials for court action, fell squarely within the purview of this section [Code 1942, § 732] under the category of “menace.” *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624 (Miss. 1970).

### 7. Pleading.

Failure to affirmatively plead the one-year statute dealing with civil suits based upon an assault results in a waiver of that defense. *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898 (Miss. 1981).

When main facts are set out in the original pleading, and an amendment is made which merely elaborates upon those facts and sets forth additional incidental facts not changing the original picture presented, although those incidental facts may be necessary to the statement of a good cause of action, amendment introduces no new cause in such sense as to let in plea of statute of limitations. *Illinois Cent. R.R. v. Wales*, 177 Miss. 875, 171 So. 536 (1937).

### 8. Failure to employ.

This section did not apply where the record showed that the plaintiff was hired by the defendant, although she never actually worked because she was instructed not to report to work on her start date. *Levens v. Campbell*, 733 So. 2d 753 (Miss. 1999).

Where plaintiff, recipient of certain scholarship funds as financial assistance for medical school costs and tuition, was required to fulfill 4 year service obligation at approved health care facility, and signed private practice assignment agreement with health care facility, with such agreement stating that it would be “negotiable at the end of one year”, and accepted employment there, but was terminated 10 months later with the termination being memorialized as a non-renewal of employment agreement, § 15-1-35 was not applicable to portion of com-

plaint alleging termination of his employment, rather appropriate provision was “catch all” statute of limitations § 15-1-49. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

### 9. Invasion of privacy.

Claim of invasion of privacy had to be brought within one year of its accrual; where, at the very best, the customer alleged invasion of privacy occurred more than one year after the cause of action accrued, the customer’s claim was barred. *Hudson v. Palmer*, 977 So. 2d 369 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 95 (Miss. 2008).

The statute applies to actions for invasion of privacy. *McCorkle v. McCorkle*, 811 So. 2d 258 (Miss. Ct. App. 2001).

A cause of action for invasion of privacy was barred by the statute of limitations where the action was not brought within one year of the accrual of the cause of actions. *Disney v. Horton*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5359 (N.D. Miss. Apr. 13, 2000).

### 10. Intentional infliction of emotional distress.

In Mississippi, intentional infliction of emotional distress claims are governed by the one-year statute of limitations found in Miss. Code Ann. § 15-1-35. *Bristow v. Baskerville*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 129131 (S.D. Miss. Dec. 6, 2010), vacated by 2011 U.S. Dist. LEXIS 41860 (S.D. Miss. Apr. 12, 2011).

Trial court did not err in granting a former employer’s motion for summary judgment in former employees’ action alleging intentional infliction of emotional distress because the employees’ claim was barred by the one-year statute of limitations found in Miss. Code Ann. § 15-1-35; the tort of intentional infliction of emotional distress is of like kind or classification as the torts enumerated in § 15-1-35, and it too carries a one-year statute of limitations, and to the extent the *Norman v. Bucklew*, 684 So. 2d 1246, 1256 (Miss. 1996) holds otherwise, it is expressly overruled. *Jones v. Fluor Daniel Servs. Corp.*, 32 So. 3d 417 (Miss. 2010).



Because a former employee testified that there were continuing, unlawful acts of intentional infliction of emotional distress, the one-year statute of limitations in Miss. Code Ann. § 15-1-35 did not bar his intentional infliction of emotional distress claims against his former employer, a manager, and a store services company. *Davis v. Belk Stores Servs.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 487 (S.D. Miss. Jan. 6, 2009).

Arrestee's intentional infliction of emotional distress claim against a police officer was time barred under the one-year limitations period in Miss. Code Ann. § 15-1-35 where the incident underlying the cause of action occurred well over one year before the arrestee filed suit until June 17, 2005. *Ayers v. City of Holly Springs*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 30852 (N.D. Miss. Feb. 29, 2008).

Because there was repeated wrongful conduct by defendant attorney, the continuing tort doctrine applied, and the trial court did not err in tolling the statute of limitations until the date of the divorce decree. Therefore, a former husband/client's claim for intentional infliction of emotional distress for the adulteress affair between the attorney and the husband's former wife was filed within the applicable one-year statute of limitations under Miss. Code Ann. § 15-1-35. *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008).

Where borrowers signed a loan agreement in 1995 and brought suit against the lender in 2001, claim for intentional infliction of emotional distress, which was subject to the one-year statute of limitations, was time-barred because the intentional act that formed the basis of the claim involved the alleged misrepresentations or omissions made in 1995, at the time of the execution of the loan agreement. *CitiFinancial Mortg. Co. v. Washington*, 967 So. 2d 16 (Miss. 2007).

In a Title VII racial discrimination case in which the complained-of actions took place in 2004 and the employee's suit was filed in 2006, any intentional infliction of emotional distress claim was barred by the statute of limitations in Miss. Code Ann. § 15-1-35. Furthermore, any state tort claim grounded in negligence asserted by the employee would be barred by

the exclusive remedy provision of the Mississippi Workers' Compensation Law. *Fortenberry v. Gulf Coast Cmty. Action Agency, Inc.*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 89831 (S.D. Miss. Dec. 5, 2007).

Customer's claim of intentional infliction of emotional distress related to claims for defamation, invasion of privacy, or fraud; as with his claim for invasion of privacy, the customer alleged his claim of intentional infliction of emotional distress more than a year later, and therefore his claim of intentional infliction of emotional distress was barred. *Hudson v. Palmer*, 977 So. 2d 369 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 95 (Miss. 2008).

Employee's claim of intentional infliction of emotional distress against her supervisor was barred by Miss. Code Ann. § 15-1-35 because the evidence indicated that the last instance of the supervisor's conduct occurred on September 10, 2001, and the employee did not file her complaint until January 2003. *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961 (Miss. Ct. App. 2006).

Employee's claim for the intentional infliction of emotional distress was barred by the one-year limitation of the statute of limitations, Miss. Code Ann. § 15-1-35 and the continuing tort doctrine did not apply because the harm alleged reverberated from one wrongful act. *Bellum v. PCE Constructors Inc.*, 407 F.3d 734 (5th Cir. 2005), writ of certiorari denied by 546 U.S. 1139, 126 S. Ct. 1150, 163 L. Ed. 2d 1002, 2006 U.S. LEXIS 794, 74 U.S.L.W. 3406, 11 Wage & Hour Cas. 2d (BNA) 704 (2006).

The limitation period on actions for assault and battery and intentional infliction of emotional distress is one year and trial court did not err in dismissing action raising claims under those theories where plaintiff's complaint was not received in the mail by the trial court clerk until more than one year following the incident giving rise to the alleged causes of action. *Slaydon v. Hansford*, 830 So. 2d 686 (Miss. Ct. App. 2002).

Even assuming that the statute applied to the plaintiff's action for intentional infliction of emotional distress, the action



was commenced in a timely manner where the defendant's wrongful conduct began in August 1994, with the first commitment proceeding, and continued until September 1997, with the culmination of the second commitment proceeding, and the complaint was filed just seven months after the second commitment application was filed; further, though the first commitment hearing and its related subsequent events prior to the second commitment hearing occurred outside the limitation period, the violation was closely related to the violations occurring within the limitation period and recovery was permitted on the theory that all violations were part of one continuing act. *McCorkle v. McCorkle*, 811 So. 2d 258 (Miss. Ct. App. 2001).

### 11. Malicious prosecution.

Arrestee's malicious prosecution claim against a police officer was time barred under the one-year limitations period in Miss. Code Ann. § 15-1-35 where the arrestee was found not guilty of charges of making a threat against the officer on December 4, 2003, but did not file suit

until June 17, 2005. *Ayers v. City of Holly Springs*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 30852 (N.D. Miss. Feb. 29, 2008).

### 12. Discovery rule.

Secretive nature of extra-marital affairs rendered plaintiff wife's injuries latent such that the discovery rule applied to her alienation of affection and negligent and intentional infliction of emotional distress claims against her husband's extramarital partner so factual issues remained as to the date she discovered the affair. *Bristow v. Baskerville*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 129131 (S.D. Miss. Dec. 6, 2010), vacated by 2011 U.S. Dist. LEXIS 41860 (S.D. Miss. Apr. 12, 2011).

Though the discovery rule is not explicitly codified in Miss. Code Ann. § 15-1-35 which provides the one-year statute of limitations for an intentional infliction of emotional distress claim, courts have nonetheless applied the discovery rule to claims governed by that statute. *Bristow v. Baskerville*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 129131 (S.D. Miss. Dec. 6, 2010), vacated by 2011 U.S. Dist. LEXIS 41860 (S.D. Miss. Apr. 12, 2011).

## RESEARCH REFERENCES

**ALR.** Necessity and sufficiency of allegations in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause. 14 A.L.R.2d 264.

When cause of action accrues, for purpose of starting the running of the statute of limitations against an action for malicious prosecution. 87 A.L.R.2d 1047.

Scope of limitation statutes specifically governing assault and battery. 90 A.L.R.2d 1230.

What constitutes "publication" of libel in order to start running of period of limitations. 42 A.L.R.3d 807.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor. 57 A.L.R.3d 927.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body. 70 A.L.R.3d 7.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident. 71 A.L.R.3d 849.

Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident. 72 A.L.R.3d 1065.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution. 30 A.L.R.4th 572.

Limitation of actions: time of discovery of defamation as determining accrual of action. 35 A.L.R.4th 1002.

Defamation action as surviving plaintiff's death, under statute not specifically covering action. 42 A.L.R.4th 272.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 A.L.R.4th 216.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice. 70 A.L.R.4th 535.

Application of "discovery rule" to postpone running limitations against action for damages from assault. 88 A.L.R.4th 1063.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Actionability of malicious prosecution under 42 USCS § 1983. 79 A.L.R. Fed. 896.

**Am Jur.** 32 Am. Jur. 2d, False Imprisonment § 74.

**CJS.** 54 C.J.S., Limitations of Actions §§ 87-89.

## **§ 15-1-36. Limitations applicable to malpractice action arising from medical, surgical or other professional services.**

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, com-

mence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.



(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(15) No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

**SOURCES:** Laws, 1976, ch. 473; Laws, 1978, ch. 464, § 1; Laws, 1979, ch. 347; Laws, 1983, ch. 482, § 1; Laws, 1989, ch. 311, § 2; Laws, 1998, ch. 573, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 5, eff from and after Jan. 1, 2003.

**Editor's Note** — Laws, 1989, ch. 311, § 7, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

## JUDICIAL DECISIONS

1. In general.
2. Construction.
3. Discovery rule.
4. Accrual.
5. Applicability.
6. Particular cases.
7. Notice.

### 1. In general.

Dismissal for failure to provide notice under Miss. Code Ann. § 15-1-36(15) (Rev. 2003) ordinarily should be without prejudice. *Williams v. Skelton*, 6 So. 3d 428 (Miss. 2009).

Second complaint filed by a patient in a medical malpractice action was not untimely because pursuant to Miss. Code Ann. §§ 15-1-36(15) and 15-1-57 the two-year statute of limitations was tolled for the 60 day period during which the patient was required to give notice of his claim to a doctor and medical center. *Cald-*

*well v. Warren*, 2 So. 3d 751 (Miss. Ct. App. 2009).

Notice requirement of Miss. Code Ann. § 15-1-36(15) is a pre-suit prerequisite to a claimant's right to file suit. *Thomas v. Warden*, 999 So. 2d 842 (Miss. 2008).

Circuit court erred in dismissing the doctor as a defendant from the beneficiaries' wrongful death claim where the time allowed by the medical malpractice statute of limitations had not yet expired when the doctor was served with the amended complaint. *Long v. Mem'l Hosp. at Gulfport*, 969 So. 2d 35 (Miss. 2007).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained

because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense plaintiffs' failure to comply with the statute. *Caldwell v. N. Miss. Med. Ctr., Inc.*, 956 So. 2d 888 (Miss. 2007).

In a patient's negligence action, in granting the motion to amend the complaint four years after the initial suit to add the health care provider as a new party, it appeared obvious that the new "fraudulent concealment" argument was advanced as a "savings" option, because without it the statute of limitation on negligence actions would have barred any action; because the trial court erred in granting the motion to amend the complaint, the issue of whether or not the amended complaint would relate back became moot. *Medicomp, Inc. v. Marshall*, 878 So. 2d 193 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 671, 160 L. Ed. 2d 508 (2004).

A failure to understand the degree of permanency of an injury does not cause the statute of limitation to toll. *Barry v. Thaggard*, 785 So. 2d 1107 (Miss. Ct. App. 2001).

The six-year statute of limitations contained in § 15-1-49 does not apply to an action for medical malpractice; instead, the two-year statute of limitations contained in this section applies to such an action. *Goleman v. Orgler*, 771 So. 2d 374 (Miss. Ct. App. 2000).

Interlocutory appeal from the circuit court would be granted to determine whether the 6 year statute of limitations provided by Mississippi Code § 15-1-49, or the medical malpractice statute of limitations found in Mississippi Code § 15-1-36, applies to a medical malpractice action in which plaintiff alleged injury resulting from defendants' negligence in leaving a surgical needle in his heart during surgery performed on June 28, 1974, but of which plaintiff was unaware until June

21, 1982. *Kilgore v. Barnes*, 490 So. 2d 895 (Miss. 1986), appeal decided, 508 So. 2d 1042 (Miss. 1987).

In a medical malpractice action, physician's motion for summary judgment should be denied where the evidence in support of the motion failed to show that there were no factual issues as to whether the patient discovered within the 2 year limitations period that he had been injured by physician's failure to resect tumor. *Smith v. Sanders*, 485 So. 2d 1051 (Miss. 1986).

## 2. Construction.

When drafting Miss. Code Ann. § 15-1-36(15), the Mississippi Legislature did not incorporate any given exceptions to the rule that would alleviate the prerequisite condition of prior written notice. Simply stated, "shall" is mandatory, while "may" is discretionary. *Thomas v. Warden*, 999 So. 2d 842 (Miss. 2008).

## 3. Discovery rule.

Trial court erred in granting summary judgment to a radiologist on the grounds that the statute of limitations, Miss. Code Ann. § 15-1-36(1), had expired prior to the patient's amending her complaint, because the patient was not aware of the radiologist's existence or role in her treatment until she requested medical records. *Stringer v. Trapp*, 30 So. 3d 339 (Miss. 2010).

In an issue certified to the Mississippi Supreme Court pursuant to Miss. R. App. P. 20(a), the court interpreted the application of the limitations period of Miss. Code Ann. § 15-1-36, to be tolled until plaintiff patient, through reasonable diligence, learned of the alleged negligence of her treating physician, and not just learned of her injury. *Huss v. Gayden*, 991 So. 2d 162 (Miss. 2008).

Under Miss. R. App. P. 20, a divided federal appellate panel of the U.S. Court of Appeals for the Fifth Circuit certified to the Mississippi Supreme Court questions as to when the two-year limitations period in Miss. Code Ann. § 15-1-36 began to run, under the discovery rule, in a medical malpractice suit alleging that a woman's latent heart disease was caused by a doctor's negligent administration of a drug



intended to halt pre-term delivery. *Huss v. Gayden*, 508 F.3d 240 (5th Cir. 2007).

In medical negligence cases, courts must focus their inquiry on when a patient, exercising reasonable diligence, should have first discovered the negligence, rather than the injury; therefore, summary judgment was properly granted to a doctor's estate in a medical malpractice case based on the discovery rule under Miss. Code Ann. § 15-1-36 since the patient was aware of an injury arising out of the prescription of certain drugs after his discharge from a hospital in 2001, and this discovery rule was different than the latent injury focus in Miss. Code Ann. § 15-1-49. *Sutherland v. Estate of Ritter*, 959 So. 2d 1004 (Miss. 2007).

Circuit court properly denied the doctors' motion for summary judgment on the wife's wrongful death claim where, pursuant to the discovery rule, Miss. Code Ann. § 15-1-36(2), certain information about the husband's condition were not given to the wife, and the wife acted diligently by trusting the doctors and waiting over two years before requesting the husband's medical records. *Neglen v. Breazeale*, 945 So. 2d 988 (Miss. 2006).

Medical malpractice case was not barred by the two-year statute of limitations under Miss. Code Ann. § 15-1-36 because the discovery rule applied where a patient visited a physician eight different times after surgery to complain about pain and loss of function in her hand; a subsequent surgery by a specialist revealed a nerve wrapped around a screw in the patient's arm; the patient's actions showed that she was diligent in discovering the source of her problem. *Flores v. Elmer*, 938 So. 2d 824 (Miss. 2006).

Because a patient knew of her injury the date her exploratory surgery occurred, the discovery rule did not apply to toll the running of the statute of limitations in Miss. Code Ann. § 15-1-36. *Joiner v. Phillips*, 953 So. 2d 1123 (Miss. Ct. App. 2006).

In a medical malpractice case, the patient's late knowledge of the "specifics" of his injuries, based on information provided by a subsequent examining doctor, was insufficient to toll running of the two-year statute of limitation, where the record showed he had been well aware of

pain, swelling, and numbness at the site of the surgery, and he had failed to engage in due diligence to discover the causative relationship between injury and the operating physician's conduct. Thus, summary judgment for the physician was proper. *Simpson v. Lovelace*, 892 So. 2d 284 (Miss. Ct. App. 2004).

Although the plaintiff did not file suit until more than two years after her husband's death, the statute of limitations was tolled until she was able to secure her husband's medical records, since she exercised reasonable diligence in getting those records and could not reasonably have been expected to know of the defendant's tortious conduct without the records. *Sarris v. Smith*, 782 So. 2d 721 (Miss. 2001).

The discovery rule applies in medical malpractice cases involving latent injuries and diseases. *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992).

A cause of action for medical malpractice involving negligence which occurred in 1964 but was not discovered until 1985 was not time-barred by either § 15-1-36 or § 15-1-49 where the complaint was filed within 2 years of the discovery of the injury. *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992).

The 2-year statute of limitation does not begin to run until the patient discovers or should discover that he has a cause of action. *Smith v. Sanders*, 485 So. 2d 1051 (Miss. 1986).

Where a patient is aware of his injury 2 years immediately prior to filing his claim, but does not discover and could not have discovered with reasonable diligence the act or omission which caused the injury, an action does not accrue until the latter discovery is made. *Smith v. Sanders*, 485 So. 2d 1051 (Miss. 1986).

In a medical malpractice action against a dentist for alleged nerve damage to his patient, the two year statute of limitations period under § 15-1-36 began to run on the date on which the patient could reasonably have discovered the permanent nerve damage resulting from the dentist's treatment. *Pittman v. Hodges*, 462 So. 2d 330 (Miss. 1984).

#### 4. Accrual.

In a malpractice suit, a trial court erred in not granting doctors', hospital's, and



clinic's motion for summary judgment because the applicable statute of limitations had run; the matter accrued when a patient first suspected negligence, and the patient consulted with her sister who was a physician. *Jackson Clinic for Women, P.A. v. Henley*, 965 So. 2d 643 (Miss. 2007).

Two-year statute of limitations applicable to medical malpractice actions does not commence running until patient discovers or should have discovered that he has cause of action; action accrues when patient could reasonably be held to have knowledge of injury itself, cause of injury, and conduct of medical practitioner. *Fortenberry v. Memorial Hosp.*, 676 So. 2d 252 (Miss. 1996).

Patient's medical malpractice action alleging failure to diagnose presence of tumor during emergency room admission accrued on date that another physician determined location and size of tumor, not on date tumor was removed and pathology report was received. *Fortenberry v. Memorial Hosp.*, 676 So. 2d 252 (Miss. 1996).

A wrongful death action arising in the context of medical negligence is not measured from the date the decedent knew or should have known about the act of negligence, but rather, the cause of action does not accrue until the death of the negligently injured person. *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992).

The accrual of a medical malpractice action against a surgeon was not affected by the surgeon's instructing a nurse that her operative record was incorrect and needed changing, or by the surgeon's failure to inform the plaintiff's counsel during discovery of this conversation with the nurse, and thus the action was barred by § 15-1-36, where there was no showing that the surgeon's actions prevented the plaintiff's counsel from discovering all of the surgeon's conduct in his treatment of the patient. *Shutze v. Pace*, 557 So. 2d 776 (Miss. 1990).

### 5. Applicability.

Patient's fraudulent conduct claims did fall under medical malpractice statute of limitations contained in Miss. Code Ann. § 15-1-36(2) because the claims arose out of the course of a medical, surgical, or other professional service as it involved a doctor's assessment, treatment, and ad-

vice, it required expert medical testimony, and it occurred in the context of a physician-patient relationship. *Chitty v. Terracina*, 16 So. 3d 774 (Miss. Ct. App. 2009).

In a patient's medical malpractice suit, which was governed by Mississippi's limitations periods in Miss. Code Ann. § 15-1-36, and Tennessee substantive law, because the suit was filed before the three-year limitations period in Tenn. Code Ann. § 29-26-116(a)(3) expired, Mississippi's treatment of foreign statutes of repose as substantive was not implicated. *Huss v. Gayden*, 571 F.3d 442 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 1892, 176 L. Ed. 2d 365, 2010 U.S. LEXIS 2614, 78 U.S.L.W. 3546 (U.S. 2010).

Patient's medical malpractice claim was untimely filed, Miss. Code Ann. §§ 15-1-36(15) and 15-1-57 because the sixty-day notice period during which the patient was barred from filing suit extended the two-year statute of limitations by only sixty days, and the patient's complaint was filed after the sixty days had expired. *Blessitt v. King's Daughters Hosp.*, 18 So. 3d 878 (Miss. Ct. App. 2009).

Order dismissing a patient's action against a hospital on the ground that the suit was a medical malpractice action and the two-year statute of limitations in Miss. Code Ann. § 15-1-36(1) applied was upheld because the patient's fall from an x-ray table occurred while the hospital was performing a medical, professional, or surgical service. *Howell v. Garden Park Cmty. Hosp.*, 1 So. 3d 900 (Miss. Ct. App. 2008).

Where an employee killed co-workers after being referred to counseling by the employer and an employee assistance provider (EAP), the EAP was not entitled to summary judgment as to negligence claims because pre-suit notice and an expert certification were not required since the claims were for ordinary negligence, not medical malpractice; for the same reason, the statute of limitations for medical malpractice claims did not apply. *Tanks v. NEAS, Inc.*, 519 F. Supp. 2d 645 (S.D. Miss. 2007).

Notice requirements of Miss. Code Ann. § 15-1-36 apply only to licensed facilities. *Saul v. Jenkins*, 963 So. 2d 552 (Miss. 2007).

Additional determinations needed to be made as to the licensure status of a nursing home facility in a negligence suit brought by a patient; the notice provision of Miss. Code Ann. § 15-1-36(15) did not apply to non-licensed facilities. *Saul v. Jenkins*, 963 So. 2d 552 (Miss. 2007).

Pre-suit notice requirement imposed by Miss. Code Ann. § 15-1-36(15), which mandates that health care defendants must be notified before a malpractice suit is filed against them, is substantive in nature for Erie purposes, is applicable in federal district court diversity actions, and is not preempted because it does not conflict with Fed. R. Civ. P. 3, 4, 8, which relate to the commencement of an action but do not say anything about pre-suit notice; just as the notice requirement of Miss. Code Ann. § 15-1-36(15) is substantive in nature, so is the requirement that malpractice suits must be dismissed if proper notice is not provided as required by § 15-1-36(15). *Redmond v. Astrazeneca Pharms. LP*, 492 F. Supp. 2d 575 (S.D. Miss. 2007).

Patient's amended complaint, adding a doctor and clinic as defendants, could not be treated for purposes of the added parties as an original complaint; because only the motion to amend the complaint pursuant to Miss. R. Civ. P. 15(c) was considered filed before the expiration of the two-year statute of limitations, under Miss. Code Ann. § 15-1-36, when the trial court denied the motion to amend, the practical effect was that no amended complaint had ever been filed. *Wilner v. White*, 929 So. 2d 315 (Miss. 2006).

In an appeal of dismissal of a medical malpractice case due to limitations, the judgment was reversed because it was timely filed within the statute of limitations; the most reasonable interpretation of Miss. Code Ann. § 15-1-36(15) and § 15-1-57 tolled the two-year statute of limitations for 60 days. *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005).

Grant of summary judgment in favor of the medical center and others in the individual's medical malpractice action was appropriate because his claim was time-barred by Miss. Code Ann. § 15-1-36. The claim was filed almost 10 years after receiving authorization and approximately

18 years after his treatment. *Johnson v. Blackwood*, 919 So. 2d 1053 (Miss. Ct. App. 2005).

Statute applied in medical malpractice suit where the tortious act occurred three years before the effective date of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11, thereby leaving a patient two years in which to file suit. *Bailey v. Almefty*, 807 So. 2d 1203 (Miss. 2001).

The 2-year statute of limitations set forth in § 15-1-36, rather than the general 6-year limitation period of § 15-1-49, applied to a medical malpractice action against a nurse and a company that supplied nursing personnel, where the company's sole basis for liability was the fact that it was the nurse's employer; since § 15-1-36 specifically names nurses among those covered and the company's liability was predicated solely upon the doctrine of respondeat superior, the bar of the suit against the nurse likewise barred the action as to the company. Under § 15-1-3, § 15-1-36 barred both the right of action against the nurse and the company and also barred any remedy against both parties. *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778 (Miss. 1991).

The 2-year medical malpractice statute of limitations, set forth in § 15-1-36, applied to a situation where a nurse failed to raise the rails of a bed for a patient under heavy sedation, resulting in the patient falling out of the bed and being injured. A nurse's decision as to whether bedrails should be utilized entails a degree of knowledge concerning the patient's condition, medication, and history. The rails themselves are but another instrumentality by which the safety of patients may be insured. This plainly calls for the rendition of a medical or professional service, thus the medical malpractice statute of limitations applies to such a situation. *Bell v. West Harrison County Dist.*, 523 So. 2d 1031 (Miss. 1988).

Medical malpractice action was not barred by statute of limitations where alleged negligent act occurred on June 28, 1974, foreign object was discovered in lining of patient's heart on June 21, 1982, and action was filed on June 14, 1984, because enactment of specific statute of limitations, § 15-1-36, dealing with mal-



practice tort claims, controlled over general statute, § 15-1-49; specific statute defined date of accrual of action as being date of alleged act, omission, or neglect, or date injury would or with reasonable diligence might have been first known or discovered, and provided that it applied to claims which accrued on or after July 1, 1976; fact that different definition of accrual may have been accepted with respect to general 6-year statute of limitations was beside point, because that definition had been superseded by specific statute of limitations. *Kilgore v. Barnes*, 508 So. 2d 1042 (Miss. 1987).

Section 15-1-36 imposing 2-year limit from date negligence was discovered or might with reasonable diligence have been known or discovered does not apply to cases arising before statute's enactment in 1976; as to such actions, time-of-injury rule applies. *Vidrine v. Enger*, 752 F.2d 107 (5th Cir. 1984).

## 6. Particular cases.

In a medical malpractice action, the two year limitations period of Miss. Code Ann. § 15-1-36(5) (2003) applied to complaints that alleged that the decedents were of unsound mind and did not regain soundness of mind prior to death. As the one year limitations period of § 15-1-36(6) conflicted with § 15-1-36(5), § 15-1-36(5) was applicable to prevent forfeiture. *Estate of Johnson v. Graceland Care Ctr. of Oxford, LLC*, — So. 3d —, 2010 Miss. LEXIS 282 (Miss. June 3, 2010), opinion withdrawn by, substituted opinion at, remanded by 41 So. 3d 692, 2010 Miss. LEXIS 427 (Miss. 2010).

Doctor was entitled to summary judgment in a medical malpractice action, because the statute of limitations began to run on the day that the patient was diagnosed with Guillian-Barre Syndrome and lupus and the second action was filed nearly five months after the end of the limitations period, even if the period was tolled by the patient's pre-suit notice to the doctor. *Miller v. Myers*, 38 So. 3d 648 (Miss. Ct. App. 2010).

In a medical malpractice case in which two doctors, a medical association, and a medical center filed Fed. R. Civ. P. 12(b)(6) motions to dismiss, arguing the personal representative did not have the authority

to place them on notice under Miss. Code Ann. § 15-1-36 because she had not received judicial authority to place them on notice of her intent to file suit as a conservator at the time notice was given, the personal representative provided them with 60 days notice. While the personal representative had to receive judicial authorization before filing suit, Miss. Code Ann. § 93-13-27 did not require a personal representative or a conservator to obtain judicial authorization before sending a notice of intent letter. *LaFarge v. Kyker*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 85656 (N.D. Miss. Sept. 18, 2009).

In a medical malpractice case in which the first action filed by the survivors and heirs of the deceased was clearly filed within the two-year statute of limitations found in Miss. Code Ann. § 15-1-36(2), but was dismissed pursuant to Miss. Code Ann. § 15-1-36(15) because they had not provided the required notice to the hospital and the healthcare provider prior to filing and the hospital and the healthcare provider filed a motion for summary judgment to dismiss the second medical malpractice suit as untimely, the Saving Statute, Miss. Code Ann. § 15-1-69, applied to the second filing, and it was not untimely. The first case had been duly commenced. *Herrington v. Promise Specialty Hosp.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 90509 (S.D. Miss. Sept. 30, 2009).

Trial court properly granted a hospital's motion to dismiss a medical malpractice suit, finding no good cause for the failure of a patient's family to serve a summons upon the hospital during the 120-day time period, under Miss. R. Civ. P. 4(h), and finding that the two-year statute of limitations, under Miss. Code Ann. § 15-1-36(2), had expired. *Lucas v. Baptist Mem. Hosp. - N. Miss., Inc.*, 997 So. 2d 226 (Miss. Ct. App. 2008).

Substitution of a son as the party in a wrongful death case was improper because a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. *Tolliver ex rel. Wrongful Death Beneficiaries of*



*Green v. Mladineo*, 987 So. 2d 989 (Miss. Ct. App. 2007).

Consumer's malpractice claims against medical providers, who prescribed prescription medication that the consumer alleged caused serious side effects, were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because the consumer failed to comply with the pre-suit notice requirement imposed by Miss. Code Ann. § 15-1-36(15). *Redmond v. Astrazeneca Pharms. LP*, 492 F. Supp. 2d 575 (S.D. Miss. 2007).

On August 19, 2001, the patient went into premature labor and gave birth to stillborn twins; she waited until May 18, 2004 to properly file her negligence claim against the doctors. The circuit court granted the doctors' motion for summary judgment, because the patient failed to comply with the notice requirements of Miss. Code Ann. § 15-1-36, and the statute of limitations barred the patient's claim. *Stallworth v. Sanford*, 921 So. 2d 340 (Miss. 2006).

Federal appeals court reversed a \$3.5 million jury award to a patient who suffered pulmonary edema and congestive heart failure after taking a drug prescribed to halt premature childbirth; her medical malpractice claim was time-barred under Miss. Code Ann. § 15-1-36, and the magistrate judge who tried the case erred by holding that her doctors waived the defense by failing to raise it in a pretrial dispositive motion. *Huss v. Gayden*, 465 F.3d 201 (5th Cir. 2006), vacated by, remanded by 571 F.3d 442, 2009 U.S. App. LEXIS 12665 (5th Cir. Miss. 2009).

Because the two-year statute of limitations in Miss. Code Ann. § 15-1-36(15) was extended 60 days pursuant to Miss. Code Ann. § 15-1-57, the individual's claim for malpractice against a medical center was timely when it was filed two years and 30 days after the date of injury. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274 (Miss. 2006), remanded by 23 So. 3d 1080, 2009 Miss. LEXIS 474 (Miss. 2009).

Summary judgment was properly awarded to a doctor in a patient's medical malpractice action where the patient's amended complaint, in which she added the doctor as a defendant, was not a proper Miss. R. Civ. P. 9(h) substitution,

because the amended complaint had not replaced a John Doe defendant with the doctor, and the amended complaint did not relate back to the date of the original pleading under Rules 9(h) and 15(c)(2). *Santangelo v. Green*, 920 So. 2d 521 (Miss. Ct. App. 2006).

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants. *Wilner v. White*, 929 So. 2d 343 (Miss. Ct. App. 2005), reversed by 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Where defendant waited for twenty-seven years before suing doctors who negligently operated on his leg causing a misalignment of his femur, the suit was dismissed as barred by the 'statute of limitations. Because defendant noticed the misalignment shortly after the operation, he failed to exercise due diligence in bringing suit. *Russell v. Williford*, 907 So. 2d 362 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2005).

Court properly dismissed a wife's medical malpractice action against a medical center as barred by the two-year statute of limitation provided in Miss. Code Ann. § 15-1-36(1) because there was no merit to the wife's claim that the statute did not start running until the day she received an expert opinion from an oncologist. *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004).

Where patient sued a hospital for negligence, but more than four years later, the patient filed a motion to amend the complaint seeking to add defendant health care provider as a new party to the

suit, because negligence was the only cause of action the patient was advancing at the time of trial, the statute of limitation under Miss. Code Ann. § 15-1-36 had run prior to the filing of the amended complaint; as to relation back, the appellate court held there was simply no basis in the record upon which the trial court could have made a finding of fraudulent concealment from the patient's pleadings that would have justified the tolling of the statute of limitations, and the judgment in favor of the patient was reversed. *Medicomp, Inc. v. Marshall*, 878 So. 2d 193 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 671, 160 L. Ed. 2d 508 (2004).

In a medical negligence case, and an interlocutory appeal by a medical clinic, the personal representative specifically pled reliance on a "former" attorney's advice as an element of the defense to the medical clinic's motion for summary judgment and as a means to toll the statute of limitations. As such, the personal representative used the attorney-client privilege as a sword, and effectively waived the privilege as it related to the testimony the personal representative gave. *Jackson Med. Clinic for Women, P.A. v. Moore*, 836 So. 2d 767 (Miss. 2003).

Patient's timely filing of medical malpractice complaint, with specific instructions to clerk to withhold issuing process, tolled statute of limitations for 120-day period after filing of complaint during which service on defendants was required. *Fortenberry v. Memorial Hosp.*, 676 So. 2d 252 (Miss. 1996).

Good cause was shown why medical malpractice plaintiff did not complete service on emergency room physician within specified time period, and thus dismissal of action was not warranted, notwithstanding fact that plaintiff failed to seek third extension of time for completing service, where plaintiff inquired several hospitals and all defense counsel as to whereabouts of physician, plaintiff asked state medical license board concerning his whereabouts, upon expiration of second extension of time, physician wrote letter advising court that he would approach court on issue of process upon locating

physician, and physician was finally located by investigator hired by plaintiff. *Fortenberry v. Memorial Hosp.*, 676 So. 2d 252 (Miss. 1996).

The filing of a medical malpractice complaint within the 2-year limitation period provided in § 15-1-36 commenced the action and tolled the statute of limitations, even though process was not issued or obtained on the defendants until 105 days later. *Erby v. Cox*, 654 So. 2d 503 (Miss. 1995).

In a medical malpractice action arising from the defendant's alleged negligence in performing a tubal ligation, an amendment stating a claim for breach of an oral guarantee that the patient would not become pregnant related back to the date of the original complaint and was therefore not barred by the statute of limitations, since her claim sounded in tort, it arose out of the same occurrence, and the defendant was put on notice. *Hudson v. Parvin*, 582 So. 2d 403 (Miss. 1991).

The trial court erred in ruling that the statute of limitations barred a medical malpractice action commenced in March 1980 where the defendant did not diagnose the plaintiff's cancer until May 1978 and there was nothing in the record to indicate that the plaintiff could have known or discovered her cancer by the exercise of reasonable diligence before that time. *Tribou v. Gunn*, 410 So. 2d 378 (Miss. 1982).

## 7. Notice.

Dismissal of two doctors in a medical-malpractice action brought by the patient and her spouse was inappropriate pursuant to Miss. Code Ann. § 15-1-36(15) because the patient's rejoinder of the doctors as defendants via an amended complaint after statutory notice was provided cured the initial failure to give notice. *Hans v. Mem'l Hosp.*, 40 So. 3d 1270 (Miss. Ct. App. 2010).

Plaintiff's testimony regarding his usual practice and procedure for mailing letters was insufficient to establish that notice was served in compliance with Miss. Code Ann. § 15-1-36(15) and Miss. R. Civ. P. 5, in the absence of evidence showing that the required notice letter had actually been stamped and placed in



the mail. *Brewer v. Wiltcher*, 22 So. 3d 1188 (Miss. 2009).

Although a second amended malpractice action could be filed under the savings statute, Miss. Code Ann. § 15-1-69 since a letter did not substantially comply with the notice provisions of Miss. Code Ann. § 15-1-36(15), the 60 day tolling period was not triggered, the statute of limitations had run, and the action should have been dismissed with prejudice. *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009).

Trial court properly dismissed plaintiffs' medical negligence action for failure to comply with the notice requirement of Miss. Code Ann. § 15-1-36(15); because defendants did not have 60 days' prior written notice of the intention to begin the action, the lawsuit was not lawfully filed, and it was of no legal effect. *Thomas v. Warden*, 999 So. 2d 842 (Miss. 2008).

Because Miss. Code Ann. § 15-1-36(15) clearly and unambiguously stated that no action against a health care provider could be commenced without providing a 60-day pre-suit notice and because the personal representative of a decedent's estate failed to provide any written notice to a nursing care facility concerning her intent to commence a wrongful death suit, the nursing care facility was entitled to a dismissal. *Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister*, 992 So. 2d 1179 (Miss. 2008).

Summary judgment was granted in favor of the doctor where the patient failed to give proper notice, Miss. Code Ann. § 15-1-36(15) as the doctor's name should have been known to the patient prior to the commencement of the lawsuit and no written notice was given to the doctor as required; the patient's failure to provide notice to the doctor was properly fatal to continuation of the suit, and dismissal with prejudice was proper. *Andrews v. Arceo*, 988 So. 2d 399 (Miss. Ct. App. 2008).

Lawsuit for medical negligence was properly dismissed because an individual did not comply with the requisite 60-day waiting period provided in Miss. Code Ann. § 15-1-36(15) because the suit was

filed only 37 days after sending the notice of intent to sue, and the premature filing of the suit was in violation of the mandates of § 15-1-36(15), despite the complaint not being served on the doctors until after the 60-day period, because § 15-1-36(15) specifically provided that commencement of the suit, as distinguished from the service of process, could not have begun until after 60 days had passed since the doctors were given notice of the intention to sue. *Williams v. Skelton*, 6 So. 3d 433 (Miss. Ct. App. 2008), affirmed by, remanded by 6 So. 3d 428, 2009 Miss. LEXIS 138 (Miss. 2009).

Plaintiff's medical malpractice complaint should have been dismissed because she wholly failed to provide any written notice to any medical provider concerning her intention to commence suit, as required under the plain language of Miss. Code Ann. § 15-1-36(15); although plaintiff had the constitutional right to seek redress in the state courts for the death of her daughter under the First Amendment, she also had the responsibility to comply with § 15-1-36(15). *Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006).

Trial court erred in not granting a physician's and a hospital's motion to dismiss in a medical malpractice case when the executrix of the deceased patient's estate failed to comply with the notice provisions of Miss. Code Ann. § 15-1-36(15). *Arceo v. Tolliver*, — So. 2d —, 2006 Miss. LEXIS 385 (Miss. Aug. 3, 2006), opinion withdrawn by, substituted opinion at 949 So. 2d 691, 2006 Miss. LEXIS 650 (Miss. 2006).

In a medical malpractice action, where a patient contended that she sent a doctor notice of her claims at the best available address, that she received a response letter from the doctor's malpractice insurer stating that it would forward a copy of the notice to the doctor, and that she did not file suit until 88 days after the date on the response letter, the patient substantially complied with the medical malpractice notice provision contained in Miss. Code Ann. § 15-1-36(15). *Carpenter v. Reinhard*, 345 F. Supp. 2d 629 (N.D. Miss. Nov. 22, 2004).



## RESEARCH REFERENCES

**ALR.** Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner. 80 A.L.R.2d 320.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 A.L.R.2d 368.

Applicability, to negligence action against hospital, of statute of limitations applicable to malpractice and related actions against physicians, surgeons, and the like. 89 A.L.R.2d 1180.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice. 8 A.L.R.3d 1336.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body. 70 A.L.R.3d 7.

Medical malpractice: amendment purporting to change the nature of the action or theory of recovery, made after statute of limitations has run, as relating back to filing of original complaint. 70 A.L.R.3d 82.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner. 70 A.L.R.3d 114.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures. 93 A.L.R.3d 218.

When statute of limitations begins to run in dental malpractice suits. 3 A.L.R.4th 318.

Time of discovery as affecting running of statute of limitations in wrongful death action. 49 A.L.R.4th 972.

Medical malpractice: applicability of "foreign object" exception in medical malpractice statutes of limitation. 50 A.L.R.4th 250.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice. 70 A.L.R.4th 535.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice. 70 A.L.R.4th 600.

Liability of osteopath for medical malpractice. 73 A.L.R.4th 24.

"Dual Capacity Doctrine" as basis for employee's recovery for medical malpractice from company medical personnel. 73 A.L.R.4th 115.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes. 43 A.L.R.5th 87.

Medical malpractice statutes of limitation minority provisions. 71 A.L.R.5th 307.

Insurance agents or brokers as professionals or nonprofessionals for purposes of malpractice statutes of limitations. 121 A.L.R.5th 365.

Timeliness of action under medical malpractice statute of repose, aside from effect of fraudulent concealment of patient's cause of action. 14 A.L.R.6th 301.

Effect of Fraudulent or Negligent Concealment of Patient's Cause of Action on Timeliness of Action Under Medical Malpractice Statute of Repose. 19 A.L.R.6th 475.

When does cause of action accrue for medical malpractice claim under Civil Rights Act of 1871 (42 USCS § 1983). 52 A.L.R. Fed. 780.

**Am Jur.** 25 Am. Jur. 2d, Drugs § 240.

51 Am. Jur. 2d, Limitation of Actions §§ 121 et seq.

61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers §§ 139 et seq.

19A Am. Jur. Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 278.3 (complaint, petition, or declaration-podiatric malpractice); Forms 351 et seq. (limitations of action).

4 Am. Jur. Trials, Solving Statutes of Limitation Problems §§ 34 et seq.

26 Am. Jur. Proof of Facts 3d 185, Discovery Date in Medical Malpractice Litigation.

Jackson, Legislative reform of statutes of limitations in Mississippi: proposed interpretations, possible problems. 9 Miss College LR 231, Spring 1989.

**CJS.** 54 C.J.S., Limitations of Actions §§ 205, 206.

70 C.J.S., Physicians, Surgeons, and Other Health Care Providers §§ 80.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 887, December 1979.

1982 Mississippi Supreme Court Review: Torts: Statute of Limitations in Medical Malpractice Cases. 53 Miss. L. J. 175, March 1983.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Missis-

issippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

### § 15-1-37. Limitations applicable to actions to recover property sold by order of chancery court or pursuant to decree of partition.

An action shall not be brought to recover any property (a) sold by order of a chancery court, where the sale is in good faith and the purchase money paid, or (b) partited in kind or sold for partition where the purchase money is paid, unless such action is brought within two years after possession is taken by the purchaser under the sale of the property or by the taker under the decree of partition.

**SOURCES:** Codes, 1857, ch. 57, art. 29; 1871, § 2173; 1880, § 2693; 1892, § 2760; 1906, § 3122; Hemingway's 1917, § 2486; 1930, § 2315; 1942, § 745; Laws, 1954, ch. 218, § 1, eff 60 days after passage (approved April 20, 1954).

**Cross References** — Sales under decrees of chancery courts, see §§ 11-5-91 to 11-5-117.

Provision for suspension of inconsistent laws regarding foreclosure of mortgaged property in certain emergency situations, see § 89-1-319.

### JUDICIAL DECISIONS

1. In general.
2. Defects subject to limitation.
3. Good faith. \*
4. —Subsequent purchasers.
5. Purchase price, payment of.
6. Persons affected.
7. Rights and interests affected.

#### 1. In general.

Where the chancery court approved the sale of the first parcel of the ward's land in 1994 and approved the sale of the remaining acres of the ward's land in 1998, and the petition to set aside these deeds was not filed until 2004, after the ward passed away, without question the petition to set aside the deeds fell outside of the statute of limitations; however, both the conservatorship and the subsequent land sales were correctly deemed invalid by the lower court because procedural requirements were not met, and thus the statute of limitations did not apply. *Russell v. Allen (In re Allen)*, 962 So. 2d 737 (Miss. Ct. App. 2007).

In a suit to set aside a final decree confirming a sale of land by a special commissioner for division of proceeds in a partition suit, the trial court erred in sustaining both a special demurrer raising the affirmative defenses of limitations of actions, laches and bona fide purchaser for value, and a motion to dismiss raising the affirmative defenses of *res judicata*, laches and estoppel, where none of the facts upon which the special demurrer and motion to dismiss could dependably rest had been averred in the complaint. Complainants' affirmative allegations that one or more of them had been in possession since the sale and that none of them had accepted the proceeds of the partition sale also raised a question of fact to be determined upon proof. *Mosby v. Gandy*, 375 So. 2d 1024 (Miss. 1979).

In a suit by a devisee to remove and cancel clouds on her title to an undivided 1-2 interest in minerals in land which was sold at an execution sale, the 2-year stat-



ute of limitations on actions to recover property sold by order of the chancery court was inapplicable since "order of the chancery court" contemplates an order entered after compliance with Code 1972, § 91-7-195, providing that a petition may be filed with the court by creditors of a decedent having registered claims against an estate for sale of land or personal property of the decedent for the payment of debts, and Code 1972, § 91-7-197, providing that all interested parties shall be cited by summons or publication specifying the time and place of the hearing on the petition. *Simmons v. Abney*, 292 So. 2d 168 (Miss. 1974).

This section [Code 1942, § 745] barred an attack on the validity of a 1942 sale of interest of minors in certain land which sale was made by a special commissioner of the chancery court pursuant to that court's decree. *Conner v. Conner*, 238 Miss. 471, 119 So. 2d 240 (1960).

This section [Code 1942, § 745] as it read in 1909 was inapplicable to partition proceedings. *Hollingsworth v. Central Oil Co.*, 236 Miss. 779, 112 So. 2d 518 (1959).

Where an attempted foreclosure of a vendor's lien was void as to the owners of recorded mineral deeds, who were not made parties to the proceedings, this section [Code 1942, § 745] did not preclude such owners from attacking the foreclosure sale. *Anderson v. Boyd*, 229 Miss. 596, 91 So. 2d 537 (1956).

Two-year statute of limitations for recovery of property sold by order of court does not apply, unless purchase money was paid and sale was made in good faith. *Dendy v. Commercial Bank & Trust Co.*, 143 Miss. 56, 108 So. 274 (1926).

This section [Code 1942, § 745] does not apply to a suit to cancel as a cloud defendant's title, acquired through a sale under a decree in partition proceedings. The ten years' statute applies. *Foster v. Gulf Coast Canning Co.*, 71 Miss. 624, 15 So. 931 (1894).

## 2. Defects subject to limitation.

Possession of land sold at guardian's sale, which was made in good faith, having been taken more than two years prior to institution of suit attacking validity of the sale, it was too late to complain even if there had been irregularities in the sale.

*Jones v. Crawford*, 201 Miss. 798, 30 So. 2d 513 (1947).

This section [Code 1942, § 745] has no application to land erroneously described in the decree of sale. *Cusimano v. Spencer*, 194 Miss. 509, 13 So. 2d 27 (1943).

Where chancellor had jurisdiction of minor heirs and subject-matter in administratrix' petition for leave to sell, any defects in process and insufficiency of time held not to prevent application of two years' limitations. *Neely v. Craig*, 162 Miss. 712, 139 So. 835 (1932).

Where court having full constitutional jurisdiction has acted under procedure adjudged sufficient, and parties have been served with notice and have failed to act within period prescribed, court's judgment cannot be collaterally attacked. *Neely v. Craig*, 162 Miss. 712, 139 So. 835 (1932).

Commissioner's sale to grandfather who was next friend of plaintiff, in partition suit, who paid the then reasonable value of the land, not void but voidable at plaintiff's election within the time allowed. *Memphis Stone & Gravel Co. v. Archer*, 120 Miss. 453, 82 So. 315 (1919).

This section [Code 1942, § 745] is inapplicable where chancery court without jurisdiction to make order of sale. *Moore v. Flurry*, 87 Miss. 707, 40 So. 226 (1906).

The section [Code 1942, § 745] applies as well to sales made in disregard of the Constitution as to those in violation of statutes. *Bradley v. Villere*, 66 Miss. 399, 6 So. 208 (1889).

This section [Code 1942, § 745] is applicable in case the court were without jurisdiction to appoint the guardian who made the sale. *Hall v. Wells*, 54 Miss. 289 (1877); *Jeffries v. Dowdle*, 61 Miss. 504 (1884).

This section [Code 1942, § 745] applies even if notice were not given to the parties defendant. *Summers v. Brady*, 56 Miss. 10 (1878).

The section [Code 1942, § 745] was meant to cure all defects, no matter from what cause, whether before or after decree, unless suit for the land be brought within the prescribed time. *Morgan v. Hazlehurst Lodge*, 53 Miss. 665 (1876).

This section [Code 1942, § 745] applies to invalidities which have crept into sales made in good faith, where the purchase-money has been paid. *Richardson v. Brooks*, 52 Miss. 118 (1876).



### 3. Good faith.

Suit to set aside sales by a guardian in good faith under authority of the court is barred by running of statutory period since the ward's majority. *Floyd v. Floyd*, 239 Miss. 69, 121 So. 2d 133 (1960).

In the absence of an allegation and proof that the sale was not in good faith, good faith would be presumed. *Hollingsworth v. Central Oil Co.*, 236 Miss. 779, 112 So. 2d 518 (1959).

Where a purchaser is not one in good faith, this section [Code 1942, § 745] is not applicable. *Box v. House*, 212 Miss. 154, 54 So. 2d 218 (1951).

Where sale of land to pay debts is shown to have been made under a solemn decree of chancery court, with proper notice and appearance by all parties in interest, and that decree of confirmation was unappealed from, the presumption is that chancery court had acted in good faith in ordering the sale and that administratrix was guilty of no bad faith in conducting the sale and conveying the property to the purchaser, the court necessarily adjudicating that the property had brought a fair price in confirming the sale. *Gill v. Johnson*, 206 Miss. 707, 40 So. 2d 600 (1949).

This section [Code 1942, § 745] only applies where the purchase is in good faith, and the burden of proof of good faith is on the purchaser. *Shannon v. Summers*, 86 Miss. 619, 38 So. 345 (1905); *Jeffries v. Dowdle*, 61 Miss. 504 (1884).

### 4. —Subsequent purchasers.

Where throughout the proceeding of an administrator's action to sell real estate for payment of a decedent's debts, including the decree of sale and commissioner's deed, one acre of the three acres of land owned by decedent at her death was erroneously described, this section [Code 1942, § 745] would not protect a bona fide purchaser of the land as to such misdescribed acre of land, notwithstanding that the sale was in good faith and the purchase money paid and that the purchaser was in possession for more than two years. *Cusimano v. Spencer*, 194 Miss. 509, 13 So. 2d 27 (1943).

This section [Code 1942, § 745] cannot be invoked by subsequent vendees as innocent purchasers for value, where the

original purchaser did not act in good faith and it was manifest from the record of the proceedings that the sale was made in disregard of the constitution applicable thereto. *Shannon v. Summers*, 86 Miss. 619, 38 So. 345 (1905).

Where the proceedings are regular on the record, even if the sale were not in good faith, yet if the land has passed to a bona fide purchaser, he acquires title independently of the section. [Code 1942, § 745]. *Sanders v. Sorrell*, 65 Miss. 288, 3 So. 661 (1888).

The good faith of a purchaser from a purchaser has nothing whatever to do with the application of the statute. *Jeffries v. Dowdle*, 61 Miss. 504 (1884).

### 5. Purchase price, payment of.

Where throughout the proceedings of an administrator's action to sell real estate to pay decedent's debts, including decree of sale and commissioner's deed, one acre of the three acres of land sold was erroneously described, this section [Code 1942, § 745] would not protect a bona fide purchaser of the land as to such misdescribed acre, notwithstanding that the sale was in good faith, that the purchase money was paid and that the purchaser was in possession for more than two years. *Cusimano v. Spencer*, 194 Miss. 509, 13 So. 2d 27 (1943).

Where the holder of a trust deed acquired the property at foreclosure sale upon his compliance with his bid by paying the back taxes and crediting the debt with the balance of his bid, such payment and credits were a payment of consideration, under the statute [Code 1930, § 2315]. *Hubbard v. Massey*, 192 Miss. 95, 4 So. 2d 230 (1941), error overruled, 192 Miss. 111, 4 So. 2d 494 (1941).

Payment of agreed cash price and deed-ing of agreed quantity of land, as price of other land purchased in good faith, held "payment of purchase price" within statute [Code 1942, § 745]. *Neely v. Craig*, 162 Miss. 712, 139 So. 835 (1932).

Chancery court's power of providing for payment in part of debts in commodities or land, where minors' interests are involved, ought to be exercised with great caution. *Neely v. Craig*, 162 Miss. 712, 139 So. 835 (1932).

Creditor purchasing at judicial sale may make payment within meaning of limitations statute by applying debt due him in payment of bid. *Pennington v. Purcell*, 155 Miss. 554, 125 So. 79 (1929).

A purchaser under a decree of the chancery court cannot defend under this section [Code 1942, § 745] unless he has made actual payment of the purchase money, and a subterfuge or sham payment will not aid him. *Gibson v. Currier*, 83 Miss. 234, 35 So. 315, 102 Am. St. R. 442 (1903).

A purchaser at execution sale who has not paid the entire purchase money, but has been credited with a part of it on an individual debt due him from the executor, cannot invoke this section [Code 1942, § 745]. *Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. R. 588 (1900).

#### 6. Persons affected.

Ejectment suit by devisees under will was barred by this section [Code 1942, § 745] where, more than two years prior thereto, real estate of testator was sold by decree of chancery court to pay debts in absence of sufficient personalty therefor, at which time sale was duly confirmed, the purchaser went into the actual possession of the property after having paid the purchase money and received a deed therefor. *Gill v. Johnson*, 206 Miss. 707, 40 So. 2d 600 (1949).

The fact that the widow and adopted daughter of an intestate were not parties to a proceeding against the administratrix to foreclose a deed of trust on realty constituting a part of the estate, did not save them from the bar of the statute, since they were not necessary parties where the estate had been declared insolvent, the realty was in the possession of the administratrix, who was also the widow of the decedent but was made a party only as

administratrix, and the daughter advised her regarding the foreclosure matters. *Hubbard v. Massey*, 192 Miss. 95, 4 So. 2d 230 (1941), error overruled, 192 Miss. 111, 4 So. 2d 494 (1941).

Bar set up by statute against action to recover property sold by chancery court's order applies only against parties to record or their privies. *Pennington v. Purcell*, 155 Miss. 554, 125 So. 79 (1929).

Statute limiting the time for recovery of land sold under chancery order inapplicable to attack by infant, because of bad faith of next friend, of sale for partition. *Smith v. Strickland*, 139 Miss. 1, 103 So. 782 (1925).

Limitations do not run against remaindermen while life tenant lives; this section [Code 1942, § 745] inapplicable to suit by remaindermen to cancel deed and recover land sold under erroneous order of court. *Clark v. Foster*, 110 Miss. 543, 70 So. 583 (1916).

Chancery court was without jurisdiction to order sale of real estate at suit of life tenant against infant remaindermen, and statute of limitations did not commence to run against action of ejectment by remaindermen until termination of the life estate. *Hoskins v. Ames*, 78 Miss. 986, 29 So. 828 (1901).

This section [Code 1942, § 745] does not debar a minor interested in lands sold in partition proceedings from filing a bill of review at any time within two years after coming of age, since it does not apply to such proceedings. *Martin v. Gilleyler*, 70 Miss. 324, 12 So. 254 (1893).

#### 7. Rights and interests affected.

Two-year statute cannot be invoked by purchaser at commissioner's sale and at execution sale to bar right to foreclose paramount lien. *Pennington v. Purcell*, 155 Miss. 554, 125 So. 79 (1929).

### RESEARCH REFERENCES

**Am Jur.** 47 Am. Jur. 2d, Judicial Sales § 214.

**CJS.** 50A C.J.S., Judicial Sales §§ 80-86.

54 C.J.S., Limitations of Actions §§ 57, 60, 61, 66.



## § 15-1-39. Limitations applicable to actions involving certain trusts.

Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after, saving, however, to all persons under disability of infancy or unsoundness of mind, the like period of time after such disability shall be removed. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

**SOURCES:** Codes, 1857, ch. 57, art. 31; 1871, § 2175; 1880, § 2696; 1892, § 2763; 1906, § 3125; Hemingway's 1917, § 2489; 1930, § 2316; 1942, § 746.

**Cross References** — Jurisdiction of chancery court over estates, see § 9-5-83.

### JUDICIAL DECISIONS

1. In general.
2. Existence of trust.
3. Express trust.
4. Implied and constructive trusts.
5. Other cases of equitable cognizance.

#### 1. In general.

Beneficiaries' action was not purely and exclusively equitable and they sought no equitable relief and did not seek to impose a constructive trust; the beneficiaries sought purely legal relief, namely compensatory and punitive money damages, such that the cause of action and the remedy of the case were not purely and exclusively equitable and the chancellor did not err in applying the general six-year statute of limitations of Miss. Code Ann. § 15-1-49. *Winters v. AmSouth Bank*, 964 So. 2d 595 (Miss. Ct. App. 2007).

Trial court could limit evidence of alleged wrongdoing on part of fiduciary to acts occurring less than ten years prior to date suit was filed, which was applicable statute of limitations period. *Wholey v. Cal-Maine Foods, Inc.*, 700 So. 2d 291 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

The 10-year limitation of § 15-1-39 is applicable to both express and implied trusts. However, the application of § 15-1-39 is limited in that the cause of action and the remedy of the case must be purely and exclusively equitable or the general

6-year statute of limitations will be applied. *Wholey v. Cal-Maine Foods, Inc.*, 530 So. 2d 136 (Miss. 1988).

In an action seeking to compel a perfect inventory, void certain conveyances, partition property, and establish a claim against an estate, the chancellor improperly sustained a plea of the statute of limitations § 15-1-39 as to a trust, where there was no proof to support the same. *Maxwell v. Yuncker*, 419 So. 2d 580 (Miss. 1982).

Whatever may be the rule elsewhere, it is settled in this state that no statute of limitations runs against a legatee or distributee pending the administration of the estate. *Peebles v. Acker*, 70 Miss. 356, 12 So. 248 (1892).

#### 2. Existence of trust.

The delivery by a donor to a bank in trust of certain promissory notes secured by mortgage notwithstanding the bank's incapacity to act as trustee, and the subsequent assumption by the donor of the note and actions in connection therewith for the benefit of the beneficiary constituted a trust in regard to the notes and their intended security not cognizable by the courts of common law within the purview of the ten-year statute of limitations, so that an action brought within ten years against the donor's executors for loss of such notes by his unauthorized act was not barred. *Yandell v. Wilson*, 182 Miss. 867, 183 So. 382 (1938).



Bequest providing that devisees should deliver to widow annually 1 bale of cotton, was not a trust within this section [Code 1942, § 746], since the implied promise to deliver such cotton constituted a contract, and suit for breach must be brought within 6 years. *Roberts v. Burwell*, 117 Miss. 451, 78 So. 357 (1917).

Since a vendor could have brought an action at law for the purchase money, his action to enforce his lien did not rest upon the existence of a trust not cognizable by the courts of the common law, and, accordingly, this section [Code 1942, § 746] was not applicable. *Washington v. Soria*, 73 Miss. 665, 19 So. 485, 55 Am. St. R. 555 (1896).

### 3. Express trust.

Where a deceased legal guardian of her son who is non compos mentis used the proceeds from sale of property of the ward, to purchase land in her own name, this did not create an express trust in favor of her ward and a suit commenced more than thirty-one years after the purchase, that being the time when the cause of action arose, was barred by the statute of limitations. *Sullivan v. Nobles*, 211 Miss. 330, 51 So. 2d 736 (1951).

Where it appeared that on the death of one partner, the surviving partner agreed to hold the shares of two of the decedent's heirs as an active trust for their benefit until demand was made by them for payment of the principal, that all of the parties to the agreement had died and the estate of the surviving partner had been administered, with due notice given to creditors, a bill by the heirs of the heirs of the first deceased partner, seeking a money decree from the administratrix and beneficiaries of the surviving partner more than twenty-one years after the making of the agreement and more than ten years after the death of the beneficiaries, was barred by this statutory limitation. *Whitaker v. Davenport*, 193 Miss. 523, 10 So. 2d 202 (1942).

Where the purpose of a trust agreement was to meet the needs of the beneficiaries during their lives, the object expired upon their deaths, thereby maturing the obligation, and setting the statute of limitations running without any repudiation on the

part of the trustee. *Whitaker v. Davenport*, 193 Miss. 523, 10 So. 2d 202 (1942).

A will which expressly charges the estate with the payment of debts, and empowers the executor to sell the whole or any part of the estate for payment of such debts, creates in equity an express trust, covered by the provisions of this section. [Code 1880 § 2696]. *Abbay v. Hill*, 64 Miss. 340, 1 So. 484 (1887).

The section [Code 1880, § 2696] does not run until there be a cause of action. Hence, it does not run in cases of express trust which are subsisting and acknowledged. *Cooper v. Cooper*, 61 Miss. 676 (1884).

A legacy which is made by the will an express charge on real estate devised constitutes an express trust, cognizable only in equity as to enforceability against the realty, and is, therefore, subject to this section. *Templeton v. Tompkins*, 45 Miss. 424 (1871).

### 4. Implied and constructive trusts.

In an action by a widow to recover 50 percent of various mineral rights purchased by her deceased husband in a joint venture with defendant's deceased husband in which the theory of recovery was an implied trust or right to a partnership accounting, the chancery court erroneously granted judgment for plaintiff, where the cause of action was barred by the applicable ten year statutes of limitation at least as early as 1962, which was 10 years after the death of defendant's husband. *Stebbins v. Hayes*, 379 So. 2d 898 (Miss. 1980).

A partition suit filed in 1967, and based upon the alleged existence of a trust arising in 1942 by implication of law, and in which there was no allegation or suggestion of fraud or concealment, the deeds evidencing the transactions having been placed upon the public records, was barred by the statute of limitations, the statute having begun to run upon the date in 1942 on which a right first accrued to have the trust judicially established. *Calloway v. Showers*, 231 So. 2d 797 (Miss. 1970).

Any claim that an administratrix' decedent, the heir to certain estate property, might have had to the acquisition of various properties by defendant coheirs which

were acquired during the decedent's minority and for which no claim was filed more than 10 years after he reached his majority was clearly barred by the section [Code 1942, § 746] inasmuch as there was no fraud shown in the acquisition of such property or any wrongful concealment of the transaction. *Barrett v. Turner*, 229 So. 2d 563 (Miss. 1969).

Where a father remained in possession of land, which he had conveyed by warranty deed to his son in 1937 allegedly as security for an indebtedness, and exercised complete dominion over the land until his death, and thereafter the father's heirs retained possession of the land and dealt with it as part of the father's estate until 1951, and the son recognized the equitable ownership of the heirs subject to his right of reimbursement for the loans made to the father until his refusal to divide with them money received from the oil, gas and mineral leases which he executed in 1955, an action by the heirs in 1956 against the son to establish a resulting trust for the benefit of the heirs was not barred by this section. *Trigg v. Trigg*, 233 Miss. 84, 101 So. 2d 507 (1958).

The repudiation of an implied or constructive trust is not necessary to set the statute of limitations in operation, but the statute begins to run from the time the act or acts were committed by which the actor became chargeable. *Thames v. Holcomb*, 230 Miss. 387, 92 So. 2d 548 (1957).

Since a grantee, who had promised to reconvey to other heirs their interest in realty if they would convey the property to him in order that he could obtain a loan thereon, was under a duty to reconvey the property upon the date of obtaining the loan, the cause of action of the heirs, who were all adults, on the implied or constructive trust accrued on that date, so that an action brought thereon more than 20 years thereafter was barred. *Thames v. Holcomb*, 230 Miss. 387, 92 So. 2d 548 (1957).

Where the purchaser of property buys it with the money of another, the trust thereby created in favor of the party whose money is thus used is an implied, resulting or constructive trust, and not an express trust, and is subject to the statute of limitations. *Sullivan v. Nobles*, 211 Miss. 330, 51 So. 2d 736 (1951).

No repudiation of an implied or constructive trust is necessary to set the statute of limitations in operation, the statute, in the absence of fraud and concealment, running from the time when the act was done by which the party became chargeable as trustee by implication, which is to say, from the time when the cestui que trust could have enforced his right by suit. *Rimmer v. Austin*, 191 Miss. 664, 4 So. 2d 224 (1941).

Limitation in case of "trust" applicable to express and implied trusts. *Hook v. Bank of Leland*, 134 Miss. 185, 98 So. 594 (1924).

Limitation in case involving trust applicable to action by ward's heir to cancel certificate of ward's stock to third party. *Hook v. Bank of Leland*, 134 Miss. 185, 98 So. 594 (1924).

Ten-year statute applies to suits to enforce implied trusts. *Robinson v. Strauther*, 106 Miss. 754, 64 So. 724 (1914).

Suit attacking foreclosure proceedings was barred where purchaser had taken the land under adverse claim of right thereto and had continuously claimed it for more than ten years, whether complaint should be viewed as a bill of review, as a suit in equity for land, or as a bill to enforce an implied trust. *Alabama & V. Ry. Co. v. Thomas*, 86 Miss. 27, 38 So. 770 (1905).

A defendant who, having received money from a testator in his lifetime to invest for his benefit, invested it in lands for his own benefit holds it as constructive trustee for legatees to whom the right was bequeathed, and a suit to enforce the trust will not be barred until the limitation prescribed by this section [Code 1942, § 746] shall have expired. *Patton v. Pinkston*, 86 Miss. 651, 38 So. 500 (1905).

##### 5. Other cases of equitable cognizance.

This section [Code 1942, § 746] does not apply in a suit by a cotenant to remove as a cloud on title the claims of a cotenant who purchased at a tax sale. *Smith v. Smith*, 211 Miss. 481, 52 So. 2d 1 (1951).

Action to cancel assignment of insurance policy, being one of exclusive equitable cognizance, must be brought within 10



years after action accrues. *Garner v. Townes*, 134 Miss. 791, 100 So. 20 (1924).

## RESEARCH REFERENCES

**ALR.** When statute of limitations starts to run against enforcement of constructive trust. 55 A.L.R.2d 220.

**CJS.** 54 C.J.S., Limitations of Actions §§ 97, 98, 200 et seq.

**Law Reviews.** 1979 Mississippi Su-

preme Court Review: Torts. 50 Miss. L. J. 887, December 1979.

1989 Mississippi Supreme Court Review: Torts. 59 Miss. L. J. 939, Winter, 1989.

## § 15-1-41. Limitations applicable to actions arising from deficiencies in constructions, or improvements to real property.

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity.

This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury.

This limitation shall not apply to actions for wrongful death.

The provisions of this section shall only apply to causes of action accruing from and after January 1, 1986; and any cause of action accruing prior to January 1, 1986, shall be governed by Chapter 350, Laws of 1972.

**SOURCES:** Codes, 1942, § 720.5; Laws, 1966, ch. 397, § 1; Laws, 1972, ch. 350, §§ 1, 2; Laws, 1985, ch. 332; Laws, 1985, ch. 505, § 5; Laws, 1994, ch. 626, § 3, eff from and after July 1, 1994.

**Editor's Note** — Laws of 1972, ch. 350 referred to in this section was former § 15-1-41, which provided for a limitation period of (10) ten years rather than the present (6) six years for the actions contemplated in the section. The last sentence of the first paragraph of present § 15-1-41 did not appear in the Chapter 350 version, and that chapter's last paragraph read "The provisions of this section shall apply to causes of action accruing prior to June 1, 1972, but shall not revive any cause of action barred under existing law as of that date."



## JUDICIAL DECISIONS

1. In general.
2. Constitutionality.
3. Applicability.

**1. In general.**

Six-year limitation of Miss. Code Ann. § 15-1-41 is not affected by the date of accrual, and by extension not tolled by Miss. Code Ann. § 15-1-67; therefore, summary judgment was properly granted to a builder and a manufacturer in a property damage case arising from leaky roofs on chicken houses where a lawsuit was not filed until 2004, despite the fact that the leaks began shortly after completion in 1995 or 1996. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 652 (Miss. Ct. App. 2007), reversed by, remanded by, overruled in part by 972 So. 2d 608, 2008 Miss. LEXIS 44 (Miss. 2008).

Concealment statute does not affect the statute of repose as the statute of repose operates independently of causes of action and by its nature bars hidden claims and accruals of causes of action are irrelevant to its operation. *Estes v. Bradley*, 954 So. 2d 455 (Miss. Ct. App. 2006).

Installation of a new roof is clearly an "improvement to real property" under Miss. Code Ann. § 15-1-41; therefore, summary judgment was properly granted to defendant builders because the plaintiff owner's argument that a roof was a mere repair was without merit. *Ferrell v. River City Roofing, Inc.*, 912 So. 2d 448 (Miss. 2005).

Homeowners' claim for flood damages allegedly caused by contractor's negligent construction and county's negligent inspection of their home were barred by Miss. Code Ann. §§ 15-1-41 and 14-1-49(1) because their action accrued when they first occupied the home and when they first asked the county to remedy the drainage problems. *Baldwin v. Holliman*, 913 So. 2d 400 (Miss. Ct. App. 2005).

Purpose of statute of repose for actions to recover damages for injuries arising out of any deficiency in construction of improvement to real property is to provide repose protection to parties such as architects, contractors, and engineers who are engaged in construction business. *McIn-*

*tyre v. Farrel Corp.*, 680 So. 2d 858 (Miss. 1996), answer to certified question conformed to, 97 F.3d 779 (5th Cir. 1996).

The term "accruing" in § 15-1-41 means the date marking the action which begins the period of prescription. *Rector v. Mississippi State Hwy. Comm'n*, 623 So. 2d 975 (Miss. 1993).

The amended 6-year version of § 15-1-41 did not bar all actions based on injuries occurring after January 1, 1986, if acceptance of the work occurred prior to January 1, 1980, which would have eliminated the then existing exposure for work accepted between January 1, 1976 and December 31, 1979. *Rector v. Mississippi State Hwy. Comm'n*, 623 So. 2d 975 (Miss. 1993).

Contention that, even if § 15-1-41 supported summary judgment, it supported only partial summary judgment because section does not apply to all of party's claims, lacked merit, as express language of section states that "no action" may be brought more than 6 years after occupancy of building which houses defective product. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Section 15-1-41 is much broader than most statutes of repose. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Occupancy or acceptance of the building or improvement made thereon is required as the beginning point for the tolling of the statute of limitations set forth in § 15-1-41. *McMichael v. Nu-Way Steel & Supply, Inc.*, 563 So. 2d 1371 (Miss. 1990).

Since § 15-1-41 does not define words "improvement to real property," they must be given their ordinary meaning, which is permanent addition that increases value of property and makes it more useful; suit by employee injured while attempting to climb down caged ladder was barred by 10-year statute of limitations, where ladder was integral part of building, providing means of moving from one level to another, was permanently affixed, and added value to refinery, and therefore was improvement to real property. *Collins v. Trinity Indus., Inc.*, 861 F.2d 1364 (5th Cir. 1988).

## 2. Constitutionality.

Section 15-1-41, which limits the time within which an action may be brought to recover damages for injuries arising from the design or construction of an "improvement to real property," does not violate the constitutional guarantee of equal protection, even though it does not apply to actions for wrongful death but applies to all other actions for damages caused by negligent construction. *Phipps v. Irby Constr. Co.*, 636 So. 2d 353 (Miss. 1993), reh'g denied.

It is not unconstitutional to allow wrongful death plaintiffs a better statute of limitations than that applied to personal injury plaintiffs under § 15-1-41. *Fluor Corp. v. Cook*, 551 So. 2d 897 (Miss. 1989).

Section 15-1-41 does not violate the equal protection clause of the Fourteenth Amendment on the basis that it limits actions against architects and contractors but excludes similarly situated persons such as owners and suppliers. *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988).

The ten-year limitation contained in § 15-1-41 does not violate either Article 3, § 24 or Article 4, § 87 of the Mississippi Constitution. *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320 (Miss. 1981).

## 3. Applicability.

Based on a review of the language of the statute, as well as the direction given by the state supreme court, the statute of repose did not commence until the builder was no longer in possession of the house. The builder sold the home to the homeowners on February 17, 1997, within six years of the filing of the complaint on February 12, 2003; therefore, the homeowners' claims were not barred by the six-year statute of repose found in Miss. Code Ann. § 15-1-41. *J. Criss Builder, Inc. v. White*, 35 So. 3d 541 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 34 So. 3d 1176, 2010 Miss. LEXIS 266 (Miss. 2010).

In the homeowners' suit for water damage, the Supreme Court of Mississippi held that a windows manufacturer was not covered by the six-year statute of repose set forth at Miss. Code Ann. § 15-1-41 as an entity which designed or

planned the construction of an improvement to real property. The evidence did not show that the windows manufacturer either supplied windows designed specifically for the homeowners' home or furnished specific instructions for the installation of the windows into the homeowners' home. *Winkel v. Windsor Windows & Doors*, 983 So. 2d 1055 (Miss. 2008).

Trial court erred in granting summary judgment to a manufacturer of poultry houses and a general contractor, in a suit brought by farmers, because, under either an equitable-estoppel theory or the fraudulent-concealment exception of Miss. Code Ann. § 15-1-67, the application of Miss. Code Ann. § 15-1-41 could be barred. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608 (Miss. 2008).

Miss. Code Ann. § 15-1-41 is not barred if fraudulent concealment is known, or with due diligence could have been discovered, within a six-year repose period. This holding balances the denial of repose protection to architects, contractors, and engineers who engage in fraudulent concealment, while requiring plaintiffs to exercise due diligence in pursuing their causes of action. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608 (Miss. 2008).

Trial court erred in dismissing the homeowners' claims that the original owners knew of the alleged defects in a home at the time they sold it to the subsequent owners based on the statute of repose as the claim was for misrepresentation as to the home's condition, not for any defective design, and thus the statute of repose did not apply. *Estes v. Bradley*, 954 So. 2d 455 (Miss. Ct. App. 2006).

Summary judgment was properly granted to defendant builders in a case involving a dispute over a roof because the action was untimely under Miss. Code Ann. § 15-1-41; § 15-1-41 applied to suits by owners against builders. *Ferrell v. River City Roofing, Inc.*, 912 So. 2d 448 (Miss. 2005).

Engineer was entitled to dismissal of landowners' claims for damages allegedly sustained as a result of the engineer's negligence in designing a bridge and a road more than six years earlier because these claims were subject to and barred by



the statute of repose set forth in Miss. Code Ann. § 15-1-41. *Scheinblum v. Lauderdale County Bd. of Supervisors*, 350 F. Supp. 2d 743 (S.D. Miss. 2004).

County board of supervisors and engineers were not entitled to dismissal of landowners' claims for damages allegedly sustained as a result of the board's and engineers' negligence more than six years earlier in reviewing and approving the subdivision map for a subdivision that flooded, on the ground that the claims were barred by the statute of repose set forth in Miss. Code Ann. § 15-1-41, because a subdivision map did not constitute an improvement to real property and, thus, these functions were not covered by the statute of repose. *Scheinblum v. Lauderdale County Bd. of Supervisors*, 350 F. Supp. 2d 743 (S.D. Miss. 2004).

The statute governs a situation in which a surety takes over a construction contract, and the owner sues the surety/contractor for damages arising from construction deficiencies. *Cooper Indus., Inc. v. Tarmac Roofing Sys.*, 276 F.3d 704 (5th Cir. 2002).

Miss. Code Ann. § 15-1-49, rather than this section, applied to an action by a subcontractor against a sub-subcontractor for the latter's failure to use American made parts as required by the general contract as the subcontractor sought contract damages for an alleged breach, rather than damages arising out of an injury to person or property. *Air Comfort Sys., Inc. v. Honeywell, Inc.*, 760 So. 2d 43 (Miss. Ct. App. 2000).

Motorist struck by passenger train could not maintain negligence claim based on elevated nature of crossing, as crossing had been in existence for at least 29 years such that statute of repose barred any claim based on negligent design, and even if motorist could not see oncoming vehicular traffic, road had ample room for passing cars to cross tracks simultaneously such that elevated crossing did nothing to prevent motorist from seeing oncoming train. *Woods v. Amtrak*, 982 F. Supp. 409 (N.D. Miss. 1997).

Large piece of industrial machinery may constitute "improvement to real property" within meaning of statute of repose for actions to recover damages for

injuries arising out of any deficiency in construction of improvement to real property. *McIntyre v. Farrel Corp.*, 680 So. 2d 858 (Miss. 1996), answer to certified question conformed to, 97 F.3d 779 (5th Cir. 1996).

Original equipment manufacturer is not entity that performs or furnishes design, planning, supervision of construction, or construction of improvement to real property within meaning of statute of repose for actions to recover damages for injuries arising out of any deficiency in construction of improvement to real property. *McIntyre v. Farrel Corp.*, 680 So. 2d 858 (Miss. 1996), answer to certified question conformed to, 97 F.3d 779 (5th Cir. 1996).

For purposes of Mississippi statute of repose related to actions involving improvements to real property, original manufacturer of "calendar" used in tire making process was not entity that performed or furnished "design, planning, supervision of construction, or construction" of improvement to real property, and thus was not entitled to benefit of statute. *McIntyre v. Farrell Corp.*, 97 F.3d 779 (5th Cir. 1996).

The supplier of a tile floor on which the plaintiff slipped and fell was not necessarily protected from liability under § 15-1-41 unless it provided the "design, planning, supervision of construction or construction" of the floor, since the plain language of § 15-1-41 does not indicate an intent to protect all those who supplied an "improvement to real property." *Wolfe v. Dal-Tile Corp.*, 876 F. Supp. 116 (S.D. Miss. 1995).

In an action for injuries to a plaintiff employee allegedly caused by the defendant's negligent design and construction of a walkway at a paper mill sold by the defendant to the plaintiff's employer, the 10-year statute of repose of former § 15-1-41 applied, rather than the 6-year limitation of the 1985 amendment to § 15-1-41, since the cause of action "accrued" when the employer accepted the mill from the defendant in 1984, not in 1992 when the plaintiff's injury occurred. *Stephens v. St. Regis Pulp & Paper Co.*, 863 F. Supp. 341 (S.D. Miss. 1994).

By express language, § 15-1-41 extends repose protection to any person furnishing



design, planning, supervision of construction or construction of improvement to real property, including manufacturers who furnish design for improvements to real property; thus it protects company in instant case which designed and manufactured fire-proofing materials which contained asbestos, which materials were included in building owned by plaintiff, where plaintiff brought action to recover cost of asbestos abatement program. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Fire-proofing materials, designed and manufactured by defendant, which contained asbestos, and which were incorporated and used in building constructed for plaintiff, constitute improvement to real property within customary meaning of such term; common definitions of term generally refer to permanent addition which increases value of property and makes it more useful, and there is little doubt that fire-proofing materials increased value of bank building and made it more useful. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

The 10-year statute of limitations for construction deficiencies set forth in § 15-1-41 applied to an action brought by the owner of a chicken house against the designer and contractor arising from the collapse of the chicken house approximately 12 years after it was built even though the owner had no reason to believe that anything was wrong with the chicken house until the time of the collapse. *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988).

Heat exchanger unit fell within statutory language of "improvement to real property," as part of petroleum refinery; although factual considerations may be involved in determining whether article of

property is improvement to real property, such considerations did not constitute genuine issue of material fact to preclude summary judgment in this case. *Smith v. Fluor Corp.*, 514 So. 2d 1227 (Miss. 1987).

The ten-year limitation period of § 15-1-41 does not apply to a builder/owner of premises in which a defective or unsafe condition is subsequently found, since the builder who is also the owner necessarily has equal access to control over the defective condition. *West End Corp. v. Royals*, 450 So. 2d 420 (Miss. 1984).

A home builder's potential exposure to a suit for negligence or breach of implied warranty in the construction of a home continues for 10 years under § 15-1-41, since the removal of the requirement of privity between builder and purchaser to maintain a viable cause of action prevents that statute of limitations from being gratuitously shortened in the case of a first purchaser selling the home to a third party. *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983).

The ten year limitation provision of Miss Code § 15-1-41 was applicable to a building owner's action against an architect, a roofing subcontractor, roof deck subcontractors, and a general contractor for alleged negligence in the design and construction of the roof on plaintiff's building. *Deville Furn. Co. v. Jesco, Inc.*, 697 F.2d 609 (5th Cir. 1983).

The ten-year limitation provision of Miss Code § 15-1-41 was applicable to a building owner's action against a general contractor, an architect, a roofing subcontractor and roof deck subcontractors alleging defendants negligently designed and constructed and used and supplied improper materials in the construction of a roof on plaintiff's commercial premises. *DeVillie Furn. Co. v. Jesco, Inc.*, 423 So. 2d 1337 (Miss. 1982).

## RESEARCH REFERENCES

**ALR.** What statute of limitation covers action for indemnity. 57 A.L.R.3d 833.

When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor. 57 A.L.R.3d 927.

Liability of wharf owner or operator for personal injuries to invitees or licensees

resulting from condition of premises or operation of equipment. 34 A.L.R.4th 572.

Time of discovery as affecting running of statute of limitations in wrongful death action. 49 A.L.R.4th 972.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations. 88 A.L.R.4th 851.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach

of building and construction contracts. 33 A.L.R.5th 1.

What constitutes "improvement to real property" for purposes of statute of repose or statute of limitations. 122 A.L.R.5th 1.

**Am Jur.** 4 Am. Jur. Trials, Statutes of Limitation § 20.

**Law Reviews.** 1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L. J. 49, March, 1985.

### **§ 15-1-43. Limitations applicable to actions founded on domestic judgments or decrees; renewal of judgment or decree; notice of renewal.**

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, or last renewal of judgment or decree, whichever is later.

A judgment or decree can be renewed only if, at the time of renewal, the existing judgment or decree has not expired. A judgment or decree may be renewed by the filing with the clerk of the court that rendered such judgment or decree a Notice of Renewal of Judgment or Decree substantially in the following form:

#### **NOTICE OF RENEWAL OF JUDGMENT OR DECREE**

(a) Notice is given of renewal of judgment that was rendered and filed in this action as follows:

- (i) Date that judgment was filed;
- (ii) Case number of such judgment;
- (iii) Judgment was taken against;
- (iv) Judgment was taken in favor of;
- (v) Current holder of such judgment;
- (vi) Current amount owing of such judgment; and

(vii) Certification that at the time of the filing of the notice the judgment remains valid and has not been satisfied or barred.

(b) If applicable, that a Notice of Renewal of Judgment or Decree has been previously filed with the clerk of the court that rendered such judgment on:

The renewal of such judgment is effective as of the date of the filing of the Notice of Renewal with the clerk of the court that rendered such judgment. The renewal of judgment shall be treated in the same manner as the previously rendered judgment. The circuit clerk shall enroll the Notice of Renewal showing the date of the filing of the Notice of Renewal, and the lien of the renewal of such judgment continues from the date of the enrollment of the existing judgment. The right to renew a judgment in any other manner allowed by law instead of using the above Notice of Renewal remains unimpaired.

At the time of the filing of the Notice of Renewal of Judgment, the judgment creditor or his attorney shall make and file with the clerk of the court



that rendered the judgment an affidavit setting forth the name and last-known post office address of the judgment debtor and the judgment creditor. Promptly upon the filing of the Notice of Renewal of Judgment, the clerk shall mail notice of the filing of the Notice of Renewal of Judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's attorney, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the Notice of Renewal of Judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the validity of the renewal of judgment if proof of mailing by the judgment creditor has been filed.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (13); 1857, ch. 57, art. 8; 1871, § 2153; 1880, § 2674; 1892, § 2743; 1906, § 3103; Hemingway's 1917, § 2467; 1930, § 2303; 1942, § 733; Laws, 2010, ch. 352, § 1; Laws, 2011, ch. 539, § 1, eff from and after July 1, 2011.

**Amendment Notes** — The 2010 amendment rewrote the section.

The 2011 amendment added the first sentence of the second paragraph; added (a)(vii); and substituted "enrollment of the existing judgment" for "enrollment of the original judgment" in the next-to-last sentence of the paragraph following the Notice.

**Cross References** — Enrollment of judgments in civil cases, see §§ 11-7-189.

Collateral attack on decree in chancery, see § 91-1-31.

## JUDICIAL DECISIONS

1. In general.
- 1.5. Applicability.
2. Issuance of execution.
3. Garnishment.
4. Computation of limitation period.
5. Extension of judgment lien.
6. Laches.

### 1. In general.

Chancery court was within its discretion to order a full accounting and the statute of limitations did not apply when it appeared that the conservator's records for the conservatorship were incomplete; a full accounting was necessary where the chancery court could not merely take the conservator at her word that the money was used for the ward's benefit and ordered the conservator to show proof that the checks and other items were actually used for her ward; the conservator was unable to do so. *Russell v. Allen* (In re Allen), 962 So. 2d 737 (Miss. Ct. App. 2007).

Trial court's 1994 order of dismissal without prejudice was not a judgment or decree and not subject to the seven-year

statute of limitations under Miss. Code Ann. § 15-1-43; instead subcontractor's claims were subject to the three-year statute of limitations under Miss. Code Ann. § 15-1-49, and were thus time-barred because they were not filed within three years after the date of the order of dismissal. *Haycraft v. Mid-State Constr. Co.*, 915 So. 2d 1117 (Miss. Ct. App. 2005).

The parties' 1981 settlement agreement required the ex-husband to give to the ex-wife one-half of all future stock dividends and bonuses. The chancery court applied Miss. Code Ann. § 15-1-43 (Rev. 1995) to limit the ex-wife's recovery to only dividends, and other benefits to the seven years prior to the commencement of the contempt action. *Nicholas v. Nicholas*, 841 So. 2d 1208 (Miss. Ct. App. 2003).

In a child support matter, more than seven years had passed since the eldest child had become 21; therefore, his claim was barred by the statute of limitations, but the claim of his sister was still viable, and the father did not waive the defense by failing to raise it as an affirmative defense in the pleadings when no pleading



was required and the defense of laches was inapplicable to the youngest child's claims. *Brown v. Brown*, 822 So. 2d 1119 (Miss. Ct. App. 2002).

The seven year statute of limitations contained in the statute does not apply to child support payments. *Glass v. Glass*, 726 So. 2d 1281 (Ct. App. 1998).

Statute of limitations, applicable to contempt action brought by divorced parent to enforce past due child support, is savings clause in favor of persons under disabilities (§ 15-1-59), not 7 year statute of limitations (§ 15-1-43), so long as child is minor. *Wilson v. Wilson*, 464 So. 2d 496 (Miss. 1985).

In an action by a debtor against a bank to cancel the principal and interest in a promissory note and a deed of trust securing the note, the trial court properly considered a defunct judgment which had been obtained by the bank against the debtor and her husband in determining the debtor's liability to the bank where the defunct judgment was a sufficient basis to form the consideration for a component part of a new obligation entered into by the debtor; however, the trial court erred in computing the amount of consideration to include interest on the principal of the judgment debt beyond the seven years after the rendition of the judgment as provided in § 15-1-43. Under the provisions of § 75-17-7 interest should have been charged at the rate of eight percent per year for seven years to determine the amount of the former legal obligation where the note leading to the earlier judgment had provided for interest of eight percent per year. *Keller v. Citizens Bank*, 399 So. 2d 1332 (Miss. 1981).

This statute [Code 1942, § 733] operates to limit the time to sue for past-due installments of alimony. *Rubisoff v. Rubisoff*, 242 Miss. 225, 133 So. 2d 534 (1961).

Judgment lien of United States obtained in proceeding in Federal district court is subject, under applicable Federal statutes, to state statutes (§§ 733, 735, 1554, 1555, Code of 1942) governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limita-

tion in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. *United States v. Williams-Richardson Co.*, 206 Miss. 378, 40 So. 2d 177 (1949).

Where an administrator failed to plead the bar to a scire facias against him, and it is sought to subject lands to the judgment, the heir may defend on the statute. *Champion v. Cayce*, 54 Miss. 695 (1877).

Where the plaintiff in the judgment, were he living, could not revive the same or have execution on it, the administrator cannot do so. *Palmer v. Jones*, 50 Miss. 657 (1874).

When the statute is once put in motion, it is not arrested by any subsequent disability; nothing but a positive statute will stop it. *Pollard v. Eckford*, 50 Miss. 631 (1874).

### 1.5. Applicability.

After a guardianship account was drained, the twenty-four-year-old ward sued the bank for breaching its duty by allowing the funds on deposit to be converted without a court order; the claim was barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, because it was not filed three years after he turned twenty-one. The chancery court's decree did not give the ward any affirmative relief that would make him a judgment creditor; therefore, Miss. Code Ann. § 15-1-43 was not the applicable statute of limitations. *Williams v. Duckett (In re Duckett)*, 991 So. 2d 1165 (Miss. 2008).

### 2. Issuance of execution.

Execution could issue within seven years after dissolution of decree obtained by judgment debtor enjoining execution on money decree, though original decree was barred. *Russ v. Stockstill*, 155 Miss. 368, 124 So. 359 (1929).

The issuance of execution within seven years after the rendition of a judgment, and within the same period prior to the institution of a suit thereon, will not save the bar, since the limitation runs from its rendition. *Berkson v. Cox*, 73 Miss. 339, 18 So. 934, 55 Am. St. R. 539 (1895); *Stith v. Parham*, 57 Miss. 289 (1879).

### 3. Garnishment.

A garnishee which failed to file an answer to a writ of garnishment as required

by § 11-35-25 and instead paid \$10 per week of the judgment debtor's salary directly to the attorney for the judgment holder was liable to the debtor for monies wrongfully withheld after expiration of the judgment where, although the judgment and execution thereon had expired after seven years as provided in §§ 15-1-3, 15-1-43 and although the judgment holder had failed to file another suit on the judgment prior to the expiration of the seven years as required by § 15-1-47 to extend the judgment lien, the garnishee continued to pay the \$10 per week to the judgment holder for two years after the judgment had lapsed. *Anderson-Tully Co. v. Brown*, 383 So. 2d 1389 (Miss. 1980).

Writ of garnishment could not be issued on old judgment after seven years, though suit on judgment was commenced before seven years expired, since execution and other process to enforce the lien must be issued on the new judgment. *Buckley v. F.L. Riley Mercantile Co.*, 155 Miss. 150, 124 So. 267 (1929).

Garnishment will not extend the lien of the judgment upon which it is founded. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035 (1922).

#### 4. Computation of limitation period.

Chancery court did not err in granting a wife an interest in a husband's retirement account to secure child support; thus, the statute of limitations on the wife's action based on a domestic judgment under Miss. Code Ann. § 15-1-43 was tolled by the child support exception of Miss. Code Ann. § 15-1-59 because the retirement funds, though put in the wife's name, were child support payments. *Carlson v. Matthews*, 966 So. 2d 1258 (Miss. Ct. App. 2007).

Limitations period under Miss. Code Ann. § 15-1-43 did not bar a contempt action to recover child support payments 12 years after a divorce decree was entered because the youngest child had until 2008 to bring the action under the savings clause of Miss. Code Ann. § 15-1-59. *Strack v. Sticklin*, 959 So. 2d 1 (Miss. Ct. App. 2006), writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Trial court chancellor properly found a petition for contempt was not barred by any statute of limitation because it was

not the assertion of a new claim but rather part of an ongoing effort to collect on a six-year-old child support judgment against the father; collecting past due child support and expenses fell within the seven-year period of limitation for enforcement of domestic judgments, Miss. Code Ann. § 15-1-43 (Rev. 1995). *Morrison v. Miss. Dep't of Human Servs.*, 852 So. 2d 578 (Miss. Ct. App. 2002).

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action (§ 15-1-69) would apply. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986).

Where the claimant commenced his suit in circuit court within twelve months after the money became due and payable to enforce a mechanic's and a materialman's lien and recovered a judgment establishing the lien, and then started a second suit after twelve months had expired for the purpose of having judgment declared prior to lien claimed under a deed of trust, the circuit court judgment on which relief was sought in the chancery court on the second suit, was not barred by the limitation until seven years after its rendition. *Vinson v. Cooley*, 54 So. 2d 750 (Miss. 1951).

Under § 2543, Code of 1942, which provides that whenever an offender has violated the condition of a suspended sentence the court is authorized to annul such suspended sentence and the offender shall be subject to arrest and court sentence service, as if no suspended sentence has been granted and for the full term of the original sentence that had not been served, the court may enforce the judgment and revoke the suspension of execution at any subsequent time, even after the original period of the sentence has passed. *Smith v. State*, 212 Miss. 497, 54 So. 2d 739 (1951).

Wife is entitled to recover from her husband's estate defaulted alimony pay-



ments and interest extending for a period seven years prior to husband's death, but this section [Code 1942, § 733] bars recovery for alimony in default for more than seven years before husband's death. *Schaffer v. Schaffer*, 209 Miss. 220, 46 So. 2d 443 (1950).

Where a decree of foreclosure was rendered in 1931 and provided for report of sale in the next term of court in 1932, but the sale was not effected nor was a decree rendered confirming it and providing for deficiency judgment until 1933, the limitation provided for by this section [Code 1942, § 733] did not start to run until the rendition of the second decree as regards an action commenced to collect on the deficiency judgment. *Roebke v. Love*, 186 Miss. 609, 191 So. 122 (1939).

Time, limited for issuance, is not extended by execution during defendant's absence from state; issuance not being commencement of action. *McGraw v. Mitchell*, 142 Miss. 357, 107 So. 423 (1926).

Fractions of days not considered in computing limitation period. *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866 (1916).

Suit begun October 31, 1914, on judgment rendered October 31, 1907, not barred. *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866 (1916).

### 5. Extension of judgment lien.

Since the judgment creditor did not challenge the trial court's jurisdiction to enter a default judgment against him in 1992 or contest the allegation, regarding the 1999 renewal, that he was a resident of Hinds County, the assignee was entitled to file his 1999 action for renewal of the judgment in the trial court in Hinds County, even though the original judgment was entered in the Chancery Court of Copiah County in 1985, as venue was permissible pursuant to Miss. Code Ann. § 15-1-43 in the court where the judgment was originally rendered or wherever else venue was proper, including the place where the judgment debtor was residing. *Lloyd v. Bank of the South*, 796 So. 2d 985 (Miss. 2001).

Since Miss. Code Ann. § 15-1-43 does not specify where a renewal of judgment suit may be brought, such judgments may

be sought by motion in the court where the judgment was originally rendered, or by a separate action wherever venue is proper, including the place where the defendant is residing. *Lloyd v. Bank of the South*, 796 So. 2d 985 (Miss. 2001).

The only effective method to extend the judgment lien is by filing another suit upon the judgment before the expiration of 7 years from the rendition thereof. *Kimbrough v. Wright*, 231 Miss. 855, 97 So. 2d 362 (1957).

Plaintiff's action in bringing suits and obtaining process before the lapse of seven years from the date of the rendition of previous successive judgments effectively stopped the running of a statute of limitations. *Kimrough v. Wright*, 231 Miss. 855, 97 So. 2d 362 (1957).

The lien of a judgment can be extended only by the filing of another suit thereon within seven years. A suit in the name of the assignee of a judgment within the prescribed time is a full compliance with the section [Code 1942, § 733]. *Street v. Smith*, 85 Miss. 359, 37 So. 837 (1905).

If a new lien be sought, a suit must be brought on the judgment within seven years. *Stith v. Parham*, 57 Miss. 289 (1879); *Buckner v. Pipes*, 56 Miss. 366 (1879); *Locke v. Brady*, 30 Miss. 21 (1855).

### 6. Laches.

Trial court did not err in applying the statute of limitations at Miss. Code Ann. § 15-1-43 to bar a mother's claim for child support arrearages as to her three oldest adult children where she failed to support the proposition that her complaint could relate back to a voided prior action and failed to cite any authority supporting the proposition that the statute of limitations did not begin to run until the youngest child was emancipated. *Ladner v. Logan*, 857 So. 2d 764 (Miss. 2003).

Chancery court found that the seven-year statute of limitation, Miss. Code Ann. § 15-1-43, on enforcing monetary judgments barred recovery of any unpaid alimony amount that accrued seven years prior to the commencement of the contempt action. The ex-husband took no issue with that limitation, but his argument that laches and/or equitable estoppel should have precluded his ex-wife from enforcing any of the 1981 settlement



agreement's financial provisions was rejected, since laches was inapplicable to those claims not barred by limitations, and the ex-husband had unclean hands so that equitable estoppel was not a defense. *Nicholas v. Nicholas*, 841 So. 2d 1208 (Miss. Ct. App. 2003).

Wife not demanding alimony within seven-year statutory period held guilty of laches, barring recovery of installments due more than seven years. *Hollis v. Bryan*, 166 Miss. 874, 143 So. 687 (1932).

## RESEARCH REFERENCES

**ALR.** Inclusion or exclusion of first and last day for purposes of statute of limitations. 20 A.L.R.2d 1249.

**Am Jur.** 46 Am. Jur. 2d, Judgments § 725.

**CJS.** 50 C.J.S., Judgments §§ 919-924 et seq.

**Law Reviews.** Hoffheimer, Mississippi Conflict of Laws. 67 Miss. L. J. 175, Fall, 1997.

## § 15-1-45. Limitations applicable to actions founded on foreign judgments or decrees.

All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after. However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 57, art. 6 (14); 1857, ch. 57, art. 9; 1871, § 2154; 1880, § 2675; 1892, § 2744; 1906, § 3104; *Hemingway's* 1917, § 2468; 1930, § 2304; 1942, § 734.

**Cross References** — Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

Effect on action barred in another state, see § 15-1-65.

## JUDICIAL DECISIONS

1. In general.
2. Limitation period as to residents.

### 1. In general.

Registration of a child support order was timely because the three-year statute of limitations applicable to the father under Mississippi law was tolled while the child remained a minor. The tolling applied to the mother and the State, though neither was under such a disability, and the child was twelve years old in January, 1999. *Shelnut v. Dep't of Human Servs.*, 9 So. 3d 359 (Miss. 2009).

Garnishment proceeding was no longer valid after the lapse of the judgment upon

which the garnishment was issued; because more than three years had passed, the statute of limitation in Miss. Code Ann. § 15-1-45 expired before the judgment creditor received its writ of garnishment, such that the garnishment was void ab initio and was unenforceable because it was not timely filed. *Nat'l Enters. v. Valsamakis*, 879 So. 2d 523 (Miss. Ct. App. 2004).

The statute did not apply to an action by a judgment creditor in which the allegation was that the judgment debtor had fraudulently conveyed real property to his son since the issue was not whether the judgment creditor timely and properly

filed its foreign judgment in a Mississippi court, but whether the judgment creditor timely filed its complaint against the judgment debtor and his son for a fraudulent conveyance. *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869 (Miss. 2001).

Statute of limitations on mother's action to enforce foreign judgment against father for child support arrearage was tolled by minority of children, even though mother was not under disability of minority. *Vice v. Department of Human Servs.*, 702 So. 2d 397 (Miss. 1997).

Mississippi is required by the United States Constitution, Art. IV, Sec. 1, to give full faith and credit to all final judgments of other states and federal courts unless (1) the foreign judgment was obtained as a result of some false representation without which the judgment would not have been rendered, or (2) the rendering court did not have jurisdiction over the parties or the subject matter; however, in order to challenge a foreign judgment on this ground, it is necessary that the challenge be timely and properly filed in Mississippi pursuant to § 15-1-45. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

A judgment is not a contract, and the seven years' limitation cannot be avoided by showing a new promise or acknowledgment in writing, as contemplated by Code 1880, § 2688. *Berkson v. Cox*, 73 Miss. 339, 18 So. 934, 55 Am. St. R. 539 (1895).

The section [Code 1871, § 2154] is subject to the exception in Code 1871, § 2157, as to the defendant's absence from the state. *Kennard use of McGehee v. Alston*, 62 Miss. 763 (1885).

## 2. Limitation period as to residents.

In a garnishment case in which (1) a lessor obtained a judgment against the lessees in 1990; (2) the lessor did not enroll the judgment in a Mississippi court within the three-year limitations period set forth in Miss. Code Ann. § 15-1-45; (3) the original judgment was revived as a new judgment under Ind. Code § 34-55-1-6; and (4) the lessor enrolled the judgment within the three-year limitations period set forth in Miss. Code Ann. § 15-1-45, the lessees had no viable claim for wrongful garnishment, malicious prosecution, abuse of process, negligence, gross negligence or intentional infliction of emo-

tional distress. *Smith v. RJH of Fla., Inc.*, 520 F. Supp. 2d 838 (S.D. Miss. Oct. 19, 2007).

Three-year Mississippi statute of limitation for enforcement of foreign judgments governed enforcement in Mississippi of Louisiana judgment ordering father to pay child support arrearage, since father was Mississippi resident at time Louisiana judgment was rendered; ten-year Louisiana statute of limitations for actions to enforce unpaid child support did not apply, even though mother and children resided in Louisiana during time father failed to pay support. *Vice v. Department of Human Servs.*, 702 So. 2d 397 (Miss. 1997).

The language "at the time of the institution of the action" in § 15-1-45 refers to the action in which the judgment was rendered. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

Although this section did not prohibit a divorced wife from bringing suit for past due child support payments pursuant to a 1969 Louisiana divorce decree, it was applicable only after September 1973, the time at which the husband's then past due monthly payments were reduced to a final judgment. *Hinds v. Primeaux*, 367 So. 2d 925 (Miss. 1979).

Where a judgment was rendered in Alabama against a nonresident of Mississippi on a cause of action which did not accrue in Mississippi, and the defendant thereafter became a resident of Mississippi, the statute of limitations ran from the date of the judgment rather than from the time the defendant became a resident of Mississippi. *United States Fid. & Guar. Co. v. Ransom*, 192 Miss. 286, 5 So. 2d 238 (1941).

Three-year limitation statute for bringing action on foreign judgment against citizens residing in state at filing suit held not violative of full faith and credit clause; state may prescribe reasonable statute of limitation for suing on foreign judgment. *Bosich v. Skermetti*, 146 Miss. 491, 112 So. 385, 52 A.L.R. 564 (1927).

Three-year limitation for commencement of action on foreign judgment against judgment debtor, who was resident at time of institution of action, refers to action in which judgment was rendered.

Gray v. Valley, 136 Miss. 886, 101 So. 855 (1924).

A plea of the statute of limitation of three years is bad if it fails to aver that the

defendant was a resident of this state at the time suit was instituted. Marx v. Logue, 71 Miss. 905, 15 So. 890 (1894).

## RESEARCH REFERENCES

**ALR.** Inclusion in domestic judgment or record, in action upon a judgment of a sister state of findings respecting the cause of action, on which the judgment in the sister state was rendered. 10 A.L.R.2d 435.

Conflict of laws as to time limitations governing action on foreign judgment. 36 A.L.R.2d 567.

## § 15-1-47. Lien of judgments limited.

A judgment or decree rendered in any court held in this state shall not be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time. However, the time during which the execution of a judgment or decree shall be stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of the period of seven years.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (13); 1857, ch. 57, art. 15; 1871, § 2159; 1880, § 2680; 1892, § 2750; 1906, § 3110; Hemingway's 1917, § 2474; 1930, § 2305; 1942, § 735.

**Cross References** — Judgment liens generally, see § 11-7-191.

## JUDICIAL DECISIONS

1. In general.
2. Garnishment.
3. Stay of execution, supersedeas or injunction.
4. Tolling of limitations period.

### 1. In general.

A hospital which was jointly owned by a city and a hospital district, and was governed by a board of trustees jointly appointed by the city council and the county board of supervisors, was a "subdivision [of the state] or municipal corporation thereof" within the meaning and contemplation of Art 4, § 104 of the Mississippi Constitution and § 15-1-51. Thus, the 7-year period of limitations governing judgment liens set forth in § 15-1-47 was inoperative against the hospital. Enroth v. Memorial Hosp., 566 So. 2d 202 (Miss. 1990).

Where defendants in ejectment suit had shown that the property involved therein

had been sold by order of the chancery court, the purchase money paid and possession taken by the purchaser under such sale, and had testified, without contradiction, as to their good faith, they had thereby sustained their plea of the bar of the statute of limitations unless the plaintiffs could show in rebuttal that the sale was not in good faith. Gill v. Johnson, 206 Miss. 707, 40 So. 2d 600 (1949).

Judgment lien of United States obtained in proceeding in Federal district court is subject, under applicable Federal statutes, to state statutes (§§ 733, 735, 1554, 1555, Code of 1942) governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. United States v. Wil-



liams-Richardson Co., 206 Miss. 378, 40 So. 2d 177 (1949).

A decree of a court of chancery establishing the arrears due on a life annuity charged upon lands is not within the operation of this provision (Code of 1857, Ch. 57, Art. XV, p. 401), to the effect that no judgment or decree rendered in any court held within the state shall be a lien upon the property of the defendant therein for a longer period of seven years from the rendition thereof. *Canal Bank v. Hudson*, 111 U.S. 66, 4 S. Ct. 303, 28 L. Ed. 354 (1884).

The general lien of a judgment can only be kept alive by a new action based upon the judgment. *Stith v. Parham*, 57 Miss. 289 (1879); *Buckner v. Pipes*, 56 Miss. 366 (1879).

## 2. Garnishment.

A garnishee which failed to file an answer to a writ of garnishment as required by § 11-35-25 and instead paid \$10 per week of the judgment debtor's salary directly to the attorney for the judgment holder was liable to the debtor for monies wrongfully withheld after expiration of the judgment where, although the judgment and execution thereon had expired after seven years as provided in §§ 15-1-3, 15-1-43 and although the judgment holder had failed to file another suit on the judgment prior to the expiration of the seven years as required by § 15-1-47 to extend the judgment lien, the garnishee continued to pay the \$10 per week to the judgment holder for two years after the judgment had lapsed. *Anderson-Tully Co. v. Brown*, 383 So. 2d 1389 (Miss. 1980).

Writ of garnishment could not be issued on old judgment after seven years, though suit on judgment was commenced before seven years expired. *Buckley v. F.L. Riley Mercantile Co.*, 155 Miss. 150, 124 So. 267 (1929).

Garnishment will not extend lien of the judgment upon which it is founded. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035 (1922).

## 3. Stay of execution, supersedeas or injunction.

Where a party appealed and obtained a bond styled "appeal bond with supersedeas" in an amount sufficient to effect supersedeas, and had the benefit of supersedeas in that execution of judgment was stayed, but there was no indication that the bonds were liable for the amount of judgment as required of supersedeas bonds by Code § 1973, such party was estopped, in a suit on the judgment which had been affirmed, from changing his position and contending that the bond did not toll the statute of limitations since it failed to include the conditions imposed by Code § 1163 requiring that the bond be conditioned that the appellant will satisfy the judgment or decree. *Breland v. International Paper Co.*, 233 So. 2d 827 (Miss. 1970).

## 4. Tolling of limitations period.

The statutory limitations period is tolled where the execution on the judgment has been stayed by a filing for bankruptcy. *Trustmark Nat'l Bank v. Pike County Nat'l Bank*, 716 So. 2d 618 (Miss. 1998).

## RESEARCH REFERENCES

**Am Jur.** 46 *Am. Jur. 2d*, Judgments §§ 422 et seq.

**CJS.** 50 *C.J.S.*, Judgments §§ 760, 761 et seq.

## § 15-1-49. Limitations applicable to actions not otherwise specifically provided for.

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until

the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

**SOURCES:** Codes, 1880, § 2669; 1892, § 2737; 1906, § 3097; Hemingway's 1917, § 2461; 1930, § 2292; 1942, § 722; Laws, 1989, ch. 311, § 3; Laws, 1990, ch. 348, § 1, eff from and after passage (approved March 12, 1990).

**Editor's Note** — Laws, 1989, ch. 311, § 7 effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

Laws, 1990, ch. 348, § 2 provides as follows:

"SECTION 2. If any section, paragraph, sentence, clause, phrase or any part of this act is declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses, phrases or parts of this act shall be in no manner affected thereby but shall remain in full force and effect."

**Cross References** — Exceptions for issues of moneyed corporations or banks, see § 15-1-79.

Statute of limitation in contracts for sale, see § 75-2-725.

Effect of bank's customer failure to discover and report forgery or alteration of item, see § 75-4-406.

## JUDICIAL DECISIONS

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- 1. In general.**  
Where plaintiff did not file his action to recover funds after defendant's check to him bounced until almost four years after

the check was first dishonored, plaintiff's action was barred by the statute of limitations in Miss. Code Ann. § 75-3-118(c), but the trial court's application of the statute of limitations in Miss. Code Ann. § 15-1-49 achieved the same result. *Bryan v. Aron*, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine *Russell v. Aron*, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

Since there was no specific statute of limitations for claims on written contracts, Miss. Code Ann. § 15-1-49 therefore applied; as the determination had been made that the neighbor's cause of action accrued under contract, not as an action to recover land, § 15-1-49 and the three year statute of limitations prescribed therein applied; as was correctly found by the chancery court, the neighbor's claim was time barred by the statute of limitations. *Lloyd v. Gibbes*, 910 So. 2d 587 (Miss. Ct. App. 2005).

A conversion action was timely commenced 3 ½-years after it accrued on May 23, 1989 pursuant to the limitations period in effect when the claim arose (§ 15-1-49); the mere failure of the legislature to retain the savings language when amending the statute to shorten the limitations period to 3 years did not express a "clear intent" that a shorter limitations period apply to already-accrued actions. *First Bank v. Eastern Livestock Co.*, 886 F. Supp. 1328 (S.D. Miss. 1995).

If no action on an anticipatory breach is brought before the time fixed by the contract for the beginning of the performance by the party who has committed such a breach, the period of statute of limitations begins to run only from the time so fixed by the contract. *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 52 So. 2d 650 (1951), suggestion of error overruled, opinion modified, 212 Miss. 67, 54 So. 2d 170 (1951).

Writing sufficient to take case out of statute providing that actions on open account or stated account not acknowledged by writing shall be commenced within three years must contain an acknowledgment of indebtedness, or promise to pay, in such terms as to render supplementary evidence unnecessary.

*Blount v. Miller*, 172 Miss. 492, 160 So. 598 (1935).

The six-year statute governs, among other things, written contracts express or implied. *Blodgett v. Pearl River County*, 134 Miss. 816, 98 So. 227 (1923).

Action for county taxes erroneously paid governed by 6-year statute of limitation; "provable by writing." *Blodgett v. Pearl River County*, 134 Miss. 816, 98 So. 227 (1923).

Action on paid or cancelled check or draft to recover specified amount from payee, is not one on a written instrument, and the six-year statute does not apply. *Wally v. L.N. Dantzler Lumber Co.*, 119 Miss. 700, 81 So. 489 (1919).

Action for loss of cotton seed is one on written contract although bill of lading did not specify amount to be transported. *Illinois Cent. R.R. v. Jackson Oil & Ref. Co.*, 111 Miss. 320, 71 So. 568 (1916).

A recital in a deed of a consideration proved not to have been paid is a promise in writing only, barred under this section [Code 1942, § 722], as in the case of written promises. *Fowlkes v. Lea*, 84 Miss. 509, 36 So. 1036, 2 Am. Ann. Cas. 466 (1904).

### 3. —Matters provable by writing.

In order for a cause of action to come within the purview of this section [Code 1942, § 722], it is not required that it shall be evidenced by writing and signed by the party sought to be charged; it is only necessary that the cause of action shall be provable by writing, and an obligation to pay the same shall arise either expressly or by law. *Blodgett v. Pearl River County*, 134 Miss. 816, 98 So. 227 (1923).

### 4. —Applicability.

With respect to his claim of wrongful termination, the former employee did not allege that he had a written contract of employment, and there was no proof that the employment relationship between the employee and his former employer, a manager, and a store services company was other than an unwritten contract. Therefore, Miss. Code Ann. § 15-1-49, the three-year statute of limitations applicable to an action for breach of a written contract of employment, did not apply to



the employee's claim. *Davis v. Belk Stores Servs.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 487 (S.D. Miss. Jan. 6, 2009).

This section, rather than § 15-1-29, applies to contracts for professional services. *Law Firm of Logan & Bise v. Stewart*, 732 So. 2d 255 (Miss. 1999).

In an action on a guaranty contract, the general six-year statute of limitations Code § 15-1-49 would be applied rather than the one-year statute of limitations regarding actions following the foreclosure of an installment note. *First Nat'l Bank v. Drummond*, 419 So. 2d 154 (Miss. 1982).

Where the action was one either in tort or for a wrongful breach of duty in a suit on a letter agreement, the three-year limitations statute applicable to open accounts did not apply, and the action was governed by the six-year statute of limitations. *Bentz v. Vardaman Mfg. Co.*, 210 So. 2d 35 (Miss. 1968).

Six-year statute of limitations is applicable to the liability of an insured for the payment of premiums, where such liability and the amount thereof were proved in writing. *Neely v. Johnson-Barksdale Co.*, 194 Miss. 529, 12 So. 2d 924 (1943).

A trainman's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainmen's union was based on written contract with union rather than on verbal contract of employment, and hence was subject to six-year rather than to three-year statute of limitations. *Moore v. Illinois Cent. R. Co.*, 180 Miss. 276, 176 So. 593 (1937).

Six-year period of limitations applicable to all actions for which no other period is prescribed held applicable to action against stockholders of insolvent bank for their double liability, and not three-year period applicable to actions on unwritten contracts, since double liability of a stockholder is provable by writing, and therefore is not an implied contract, but written contract with an implied promise to pay. *Rather v. Moore*, 179 Miss. 78, 173 So. 664 (1937).

Three-year statute of limitations would not be applicable to action against stockholders of insolvent State Bank for their double liability, even if such liability is

statutory, since liability is not a "penalty," and hence six-year statute would apply. *Rather v. Moore*, 179 Miss. 78, 173 So. 664 (1937).

In shipper's action for freight charges exceeding those authorized by Railroad Commission, three-year rather than six-year statute applied. *Gulf & S.I.R.R. v. Laurel Oil & Fertilizer Co.*, 172 Miss. 630, 158 So. 778 (1935), error overruled, 172 Miss. 654, 159 So. 838 (1935), corrected, 172 Miss. 657, 160 So. 564 (1935).

Three-year statute is inapplicable to action on written contract. *Vicksburg Waterworks Co. v. Yazoo & Miss. v. Ry.*, 102 Miss. 504, 59 So. 825 (1912).

A written acknowledgment of an open account converts it into "a stated account acknowledged in writing signed by the debtor" and the six years' limitation thereafter applies. *Tennessee Brewing Co. v. Hendricks*, 77 Miss. 491, 27 So. 526 (1900).

## 5. —Particular cases.

Documents signed by plaintiff employees in a Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C.S. § 2101 et seq., during orientation, setting forth their rate of pay and other information, did not constitute a written employment contract within the meaning of Miss. Code Ann. § 15-1-49; Miss. Code Ann. § 15-1-29 set forth the appropriate statute of limitations in the case. *Brewer v. Am. Power Source, Inc.*, 517 F. Supp. 2d 881 (N.D. Miss. 2007), affirmed by 291 Fed. Appx. 656, 2008 U.S. App. LEXIS 19338, 28 I.E.R. Cas. (BNA) 236 (5th Cir. Miss. 2008).

Homeowners' predatory lending practices claims were time barred under Miss. Code Ann. § 15-1-49(1) because their respective transactions occurred well over the three years before the suit was brought and the homeowners failed to show any affirmative act of fraudulent concealment under Miss. Code Ann. § 15-1-67 to toll the statute of limitations. *Carson v. McNeal*, 375 F. Supp. 2d 509 (S.D. Miss. 2005).

Home inspector overreached in his attempt to contractually create a private statute of limitations with two home buyers as the three-year statute of limitations under Miss. Code Ann. § 15-1-49 could

not be changed by contract; the attempt to change the statute of limitations was void under Miss. Code Ann. § 15-1-5 and was substantively unconscionable. *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005).

This section, rather than Miss. Code Ann. § 15-1-41, applied to an action by a subcontractor against a sub-subcontractor for the latter's failure to use American made parts as required by the general contract as the subcontractor sought contract damages for an alleged breach, rather than damages arising out of an injury to person or property. *Air Comfort Sys., Inc. v. Honeywell, Inc.*, 760 So. 2d 43 (Miss. Ct. App. 2000).

A store's setoff counterclaim against the shopping mall in which it was located was not barred by the 3-year statute of limitations set forth in § 15-1-29 where the store's setoff defense was based on allegedly fraudulent overcharges made by the mall which implied an action arising under the lease between the store and the mall, and therefore the store's fraud claim was subject to § 15-1-49's 6-year limitation period for an action on a written contract. *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938 (Miss. 1992).

In action against bail bondsmen and their surety alleging false imprisonment and malicious prosecution based upon allegedly improper arrest of plaintiff for jumping bail, applicable statute of limitations is 6-year period set forth in § 15-1-49 rather than one-year period set forth in § 15-1-35, since, although action is grounded in tort, it springs from underlying bond agreement between bail bondsmen and plaintiff. *Mathis v. Indemnity Ins. Co. of N. Am.*, 588 F. Supp. 489 (S.D. Miss. 1983).

In an action against a life insurer seeking recovery of double indemnity benefits that was filed more than four years subsequent to accrual of the claim, the trial court erred in concluding that the suit was barred by the three year statute of limitations governing accident and health insurance; although the policy, which was issued in connection with decedent's employment, was delivered to the insured rather than a master policy to the employer with a certificate to the employee, this fact did not remove the policy from

the group insurance class or convert it to an individual plan; as a group policy, it was specifically exempted from the three-year statute of limitations and was controlled instead by the six-year statute of limitations. *Williams v. Life Ins. Co.*, 367 So. 2d 922 (Miss. 1979).

Where under a sales representative agreement with a manufacturer, the manufacturer was to pay commissions on specified sliding scale for orders up to \$250,000 and special commission allowances were to be established by the manufacturer for jobs greater than that amount, the 6-year statute of limitations governing obligations on written contracts, was applicable rather than the 3-year statute governing actions on open account, notwithstanding that parole testimony was necessary to establish the amount due. *Beacham v. Beacham*, 243 So. 2d 62 (Miss. 1971).

Where complainant adequately averred in his bill of complaint an executory written contract to form a partnership, the performance of the necessary conditions precedent to its performance, actual formation of the partnership, actions of both parties under it, and its existence at the time of his deceased co-partner's death, the bill sufficiently charged facts reflecting continuance of the partnership to the co-partner's death, and the six-year statute of limitations was not applicable. *Kelly v. Windham*, 204 So. 2d 477 (Miss. 1967).

Action by seller against buyer on written order signed by buyer's president and seller's salesman, which gives accurate description of goods purchased, price and terms of sale, stipulates that all special terms must be incorporated in order and duplicate to be recognized and order is not subject to countermand, and under which goods were shipped and accepted by buyer, is controlled by six-year statute of limitations, and not by three-year statute of limitations (Code 1942, § 729). *Dixie Pine Prods. Co. v. Universal Ref. Prods. Co.*, 208 Miss. 45, 43 So. 2d 752 (1949).

Where agent of insurer under life policy containing double indemnity provision tendered check for benefit payable for natural death of insured and stated to beneficiary who was ignorant of circumstances



of insured's death that such amount was all insurer owed beneficiary, the beneficiary's acceptance of such amount and delivery of policy to insurer and failure for six years to make inquiry as to circumstances of insured's death, did not constitute "reasonable diligence" to determine cause of insured's death so as to toll limitations until discovery of true facts. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

Orders for funeral supplies setting forth description of goods purchased, price, and terms of sale, held "contracts provable by writing" upon acceptance by seller, so that action thereon, which was commenced within six years from maturity of items, was not barred by statute of limitations governing contracts not provable by writing. *Champion Chem. Co. v. Hank*, 174 Miss. 732, 165 So. 807 (1936).

Advances of money and supplies made by lessor to lessee constitute an "open account" so as to require action thereon within three years after cause of action accrued, notwithstanding deed of trust given by lessee provided that advancements should be secured by deed, since writing was insufficient to make debt one acknowledged in writing under six-year statute of limitations. *Blount v. Miller*, 172 Miss. 492, 160 So. 598 (1935).

Vendee's suit to recover money paid under oral contract of sale held governed by six-year limitation, in view of receipts setting out amounts received on account of the purchase price, which constituted sufficient acknowledgment in writing of a state of facts out of which the law implies an obligation to repay, and therefore obligation to repay did not rest in parole. *Milam v. Paxton*, 160 Miss. 562, 134 So. 171 (1931).

Where devisees are each required to deliver to widow one bale of cotton annually, bequest to widow is not a trust, and action for failure to deliver cotton is governed by 6-year statute of limitations, since the implied promise of each of the devisees to deliver one bale of cotton is to perform a contract, the terms of which are contained in the will, a written instrument. *Roberts v. Burwell*, 117 Miss. 451, 78 So. 357 (1917).

## 6. Deeds of trust.

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

This section [Code 1942, § 722] providing for six-year limitation period when no other period is prescribed, Code 1942, § 719, barring action on mortgage when debt it secures is barred and Code 1942, § 743, providing that completion of period of limitation bars action and defeats and extinguishes right, operate to extinguish on September 1, 1935, deed of trust given to secure note falling due on September 1, 1929, and, in absence of renewal, or institution of foreclosure proceedings, power of sale and all other rights conferred by deed of trust are utterly destroyed on that date. *Perkins v. White*, 208 Miss. 157, 43 So. 2d 897 (1950).

Where trust deed to farm was executed by all of heirs except children of deceased daughter, and part of money advanced was used to discharge ancestor's trust deeds, right of assignee of trust deed to subrogation to trust deed as to grandchildren's undivided interest was barred by six-year limitation, notwithstanding mortgagors' alleged fraudulent representation that grandchildren were not heirs, where grandchildren did not participate in fraud, and not being joint tenants, but tenants in common with mortgagors, were not their "privies;" term "privies" meaning those who stand in mutual or successive relationship to same rights of property. *Burton v. John Hancock Mut. Life Ins. Co.*, 171 Miss. 596, 157 So. 525 (1934), error overruled, 171 Miss. 605, 158 So. 474 (1935).

## 7. Covenants and conditions.

Where second deed is made to correct first deed, six-year statute against action on warranty begins to run from date of second deed. *Wade v. Barlow*, 99 Miss. 33, 54 So. 662 (1911).

Where a vendor sells for part cash and part to be paid in installments, reserving a lien as security, the six-year limitation



applies whether he proceeds on the promise contained in the deed or that implied by law from the vendee's acceptance of the deed. *Washington v. Soria*, 73 Miss. 665, 19 So. 485, 55 Am. St. R. 555 (1896).

#### 8. Demands for rent.

The six years' statute applies to the demand for rents asserted by a plaintiff in ejectment. *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

#### 9. Bills and notes, generally.

Code § 15-1-49, rather than § 15-1-23, applied in an action by a bank for a deficiency judgment on an instrument guaranteeing payment of a secured note. *First Nat'l Bank v. Drummond*, 686 F.2d 1117 (5th Cir. 1982).

The statute of limitations began to run as to each instalment due under the note from the time it falls due. *Davis v. Agents Fin. Corp.*, 249 Miss. 839, 164 So. 2d 449 (1964).

Note which fell due on September 1, 1929, became barred by limitation under this section [Code 1942, § 722] upon expiration of six years thereafter, or on September 1, 1935. *Perkins v. White*, 208 Miss. 157, 43 So. 2d 897 (1950).

This section [Code 1942, § 722] prescribes the period of limitation within which actions on promissory notes shall be commenced, as being six years next after the cause of action shall have accrued thereon. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

Mississippi statute of limitations controls in action in this state on note executed in Canada. *Philp v. Hicks*, 112 Miss. 581, 73 So. 610 (1917).

Where bank paid check to person other than drawer, under belief indorsement was genuine, six-year statute was applicable and began to run from date bank rendered drawer a statement showing check charged against it. *Masonic Benefit Ass'n of Stringer Grand Lodge v. First State Bank*, 99 Miss. 610, 55 So. 408 (1911).

The statute bars a note made in another state where the limit is ten years, although both maker and payee resided there at the time and the maker did not become a resident of this state until

nearly six years after maturity. *Wright v. Mordaunt*, 77 Miss. 537, 27 So. 640, 78 Am. St. R. 536 (1900).

#### 10. —Payable in installments.

Judgment for real estate seller was affirmed under Miss. Code Ann. § 15-1-29 and Miss. Code Ann. § 15-1-49 because, applying the three-year statute of limitations, the seller was entitled to collect installment payments beginning three years ago; the purchasers would have been unjustly enriched if allowed to retain possession of the property without being responsible for the remaining debt. *Kersey v. Fernald*, 911 So. 2d 994 (Miss. Ct. App. 2005).

Notwithstanding some evidence that the note sued on was a demand note, due three days after date, the chancellor was not manifestly wrong in holding that the note was in fact payable in installments, and was not barred by the statute of limitations, in view of the admission in the trust deed that the indebtedness was evidenced by promissory note payable in installments, and all the evidence and circumstances in the record showed that the note was in fact paid in installments. *Davis v. Agents Fin. Corp.*, 249 Miss. 839, 164 So. 2d 449 (1964).

Generally where a note is payable in installments the statute of limitations begins to run as to each installment from the time when it falls due. *Freeman v. Truitt*, 238 Miss. 623, 119 So. 2d 765 (1960).

#### 11. —Payable on demand.

The statute of limitations set forth in this section [Code 1942, § 722] began running on a demand promissory note on the date of its execution, unaffected by any clause therein providing for the payment of interest at a certain percentage per annum until paid. *United States Fid. & Guar. Co. v. Krebs*, 190 So. 2d 857 (Miss. 1966).

A promissory note, payable on demand after date with interest at rate of six per cent from date until paid, when considered together with deed of trust and with written agreement contemporaneously executed and delivered to payee, showed an intent that demand for payment be condition precedent to maturity of note and commencement of running of statute of

limitations. *Belhaven College v. Downing*, 216 Miss. 299, 62 So. 2d 372 (1953).

## 12. —Particular cases.

In a discriminatory lending suit filed by African American loan recipients against an auto financing corporation, the loan recipients' state law deceptive trade practices and common law claims were barred by the three-year statute of limitations in Miss. Code Ann. § 15-1-49(1), which was not tolled by the fraudulent concealment rule codified in Miss. Code Ann. § 15-1-67 because the loan recipients admitted that they knew the interest rates were high at the time they signed the loan documents, which clearly displayed the rates being charged. *Archer v. Nissan Motor Acceptance Corp.*, 633 F. Supp. 2d 259 (S.D. Miss. 2007), affirmed by 550 F.3d 506, 2008 U.S. App. LEXIS 25292 (5th Cir. Miss. 2008).

Holder was properly granted summary judgment because its 2005 action to recover funds due under the maker's promissory note, which was dated on September 7, 1999, was timely filed under the six-year statute of limitations in Miss. Code Ann. § 75-3-118(a), and the general three-year limitations period in Miss. Code Ann. § 15-1-49 did not apply. *Jordan v. BancorpSouth Bank*, 964 So. 2d 1205 (Miss. Ct. App. 2007).

In rejecting the argument that two loan officers were fraudulently joined to defeat diversity jurisdiction based on the statute of limitations, the court found that at least one of the loans at issue was not barred by the three year limitations period under Miss. Code Ann. § 15-1-49. *Clark v. Ben. Miss., Inc.*, 280 F. Supp. 2d 570 (S.D. Miss. 2003).

An agreement extending the maturity date of a promissory note was not void on the ground that the plaintiff, seeking a cancellation of a deed of trust securing such note, had signed it only after a casual reading thereof and that it did not reflect his intention, so as to make applicable the six-year statute of limitations. *Alliance Trust Co. v. Armstrong*, 185 Miss. 148, 186 So. 633 (1939).

This section [Code 1942, § 722] was not applicable to a suit in chancery brought by a bank to confirm its title to real estate and to cancel the former owner's claim to

the land after it had previously foreclosed the deed of trust on such land for default in payment of a note secured thereby and had become the purchaser of the land at foreclosure sale, notwithstanding that the suit was brought more than six years after the due date of the note, where the Chancellor held the foreclosure sale to be valid and did not grant the bank's alternative prayer for a further foreclosure if such foreclosure sale was valid, since if such sale was valid the purchaser was entitled to the relief granted at any date subsequent to the sale unless such relief should have become barred by some limitation of adverse possession. *Anthony v. Bank of Wiggins*, 183 Miss. 885, 184 So. 626 (1938).

This section [Code 1942, § 722] of the statute is not applicable to a situation where a donor delivered certain promissory notes secured by mortgage to a bank in trust for certain beneficiaries and, the bank being incapable of performing the trust, the donor assumed control of such notes for the benefit of the beneficiaries and through his unauthorized act the notes became valueless giving rise to an action against his executor, since there existed a trust in regard to the notes and their intended security not cognizable by the courts of the common law within the purview of the ten-year statute of limitations. *Yandell v. Wilson*, 182 Miss. 867, 183 So. 382 (1938).

Where note secured by deed of trust was extended from time to time, but fact of extensions was not noted on margin of record of deed of trust before remedy to enforce it appeared on face of record to be barred, or within six months thereafter, such extensions did not affect rights of subsequent purchasers for valuable consideration without notice of extensions. *Lampton-Reid Co. v. Allen*, 177 Miss. 698, 171 So. 780 (1937).

## 13. County and municipal obligations.

A cause of action against four highway patrolmen and their surety, alleging that the plaintiff had been beaten and abused by the highway patrolmen, was essentially an action against a public officer and the surety on his bond, was accordingly an action in contract, and was governed by



the six year statutory limitation for written contracts, § 15-1-49, and not the one year statutory limitation period for tort actions, § 15-1-35. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976).

The dismissal by a former sheriff and tax collector of his action against the county for compensation for alleged services did not destroy the right of his assignee, who was to obtain a portion of any recovery, and since the assignee's right was dependent upon the right of his assignor, assignee's action should have been brought within six years from the date of the expiration of the term of office of the former sheriff and tax collector, and, where it was not, the claim was barred. *Smith v. Copiah County*, 232 Miss. 838, 100 So. 2d 614 (1958).

Ex-sheriff's claim for additional fees for summoning jurors in circuit court and for other services rendered and not otherwise provided for in connection with said court during year 1940 is barred by six-year statute of limitations when his declaration is filed on August 18, 1947. *Forrest County v. Thompson*, 204 Miss. 628, 37 So. 2d 787 (1948).

The six-year statute of limitations was applicable to the right of a teacher in an agricultural high school to demand payment of salary from the proceeds of bonds to be issued by the county and to compel issuance of such bonds by mandamus upon failure of the board of supervisors (which was not shown to have ever been advised of the existence of the obligation until suit was filed), otherwise to do so. *Fuqua v. Board of Supvrs.*, 192 Miss. 6, 4 So. 2d 350 (1941).

Action by heirs of tax collector for commissions, brought within six years after filing and rejection of claim by supervisors, but more than six years after right to file claim accrued, held barred by limitations, in absence of showing that heirs had been legally restrained. *Grenada County v. Nason*, 174 Miss. 725, 165 So. 811 (1936).

Six-year statute of limitation held applicable to claim of county clerk for balance of salary alleged to be due him. *De Soto County v. Wood*, 150 Miss. 432, 116 So. 738 (1928).

Claim of member of board of supervisors for compensation is barred by six-year and

not three-year statute. *Madison County v. Collier*, 79 Miss. 220, 30 So. 610 (1905).

A claim against a county will be barred where an action is not brought thereon within six years after it is rejected by the commissioners. *Honea v. Monroe County Supvrs.*, 15 So. 789 (Miss. 1894).

#### 14. Judgments.

The statute applies to a divorced wife's suit for property awarded to her by the divorce decree. *Rubisoff v. Rubisoff*, 242 Miss. 225, 133 So. 2d 534 (1961).

This statute [Code 1942, § 722] applies to an action to recover damages for failure to turn over property as directed by a decree of divorce. *Rubisoff v. Rubisoff*, 242 Miss. 225, 133 So. 2d 534 (1961).

A suit upon a judgment within the statutory period is the only means by which the lien of the judgment can be extended. *Street v. Smith*, 85 Miss. 359, 37 So. 837 (1905).

In case of a recovery in an action by an assignee of a judgment to renew the same the judgment roll need not show the assignment or that the new judgment was based on the assigned one. *Street v. Smith*, 85 Miss. 359, 37 So. 837 (1905).

A judgment by default was taken, shown by the record to be void, the defendant not being summoned, and the case went off the docket. Eleven years thereafter plaintiff, treating the suit as pending, had the defendant summoned. Held, that as the original cause of action was barred, and the judgment, if valid, was also barred, defendant was protected by the statute. *Berkson v. Coen*, 71 Miss. 650, 16 So. 204 (1894).

#### 15. Torts, generally.

Death row inmates were not entitled to have the three-year statute of limitations for personal injury actions in Miss. Code Ann. § 15-1-49 tolled based upon fraudulent concealment under Miss. Code Ann. § 15-1-67 because there was no evidence that the State affirmatively concealed its protocol governing the manner in which it carried out executions or that the inmates did not know that a 42 U.S.C.S. § 1983 action was the proper method for challenging the State's lethal injection protocol. *Walker v. Epps*, 587 F. Supp. 2d 763 (N.D. Miss. 2008), affirmed by 550 F.3d



407, 2008 U.S. App. LEXIS 25327 (5th Cir. Miss. 2008).

Trial court properly granted summary judgment in favor of county hospital where an individual did not file suit against the hospital until more than two years after tripping on its sidewalk; the hospital's contract with a private management company to run the hospital did not exempt it from the Mississippi Tort Claims Act. Thus, the one year statute of limitations in Miss. Code Ann. § 11-46-11, and not the three year statute of limitations in Miss. Code Ann. § 15-1-49, applied. *Allstadt v. Baptist Mem. Hosp.*, — So. 2d —, 2004 Miss. App. LEXIS 847 (Miss. Ct. App. Aug. 24, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Mississippi follows general rule that tortious act gives rise to but single cause of action. *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 108 F.3d 335 (5th Cir. 1997).

Tort actions arising from contractual obligations should be controlled by and subject to the tort prescriptions of § 15-1-49. *Trammell v. State*, 622 So. 2d 1257 (Miss. 1993).

Wrongful or fraudulent foreclosure of property action is case action governed by 6 year statute of limitations (§ 15-1-49), not by one year statute of limitations applicable to specified intentional torts (§ 15-1-35). *Southern Land & Resources Co. v. Dobbs*, 467 So. 2d 652 (Miss. 1985).

Where the action was one either in tort or for a wrongful breach of duty in a suit on a letter agreement, the three-year limitations statute applicable to open accounts did not apply, and the action was governed by the six-year statute of limitations. *Bentz v. Vardaman Mfg. Co.*, 210 So. 2d 35 (Miss. 1968).

#### 16. —Contracts.

All of the growers were aware of the matters that were allegedly misrepresented to them by the farm well in excess of three years before the suits were filed; therefore, Miss. Code Ann. § 15-1-49 operated to bar the growers' claims. *Sander-son Farms, Inc. (Prod. Div.) v. Ballard*, 917 So. 2d 783 (Miss. 2005).

Trial court's 1994 order of dismissal without prejudice was not a judgment or decree and not subject to the seven-year statute of limitations under Miss. Code Ann. § 15-1-43; instead subcontractor's claims were subject to the three-year statute of limitations under Miss. Code Ann. § 15-1-49, and were thus time-barred because they were not filed within three years after the date of the order of dismissal. *Haycraft v. Mid-State Constr. Co.*, 915 So. 2d 1117 (Miss. Ct. App. 2005).

A bad faith breach of contract cause of action arising from an attorney's alleged failure to properly pursue an appeal alleged the tort of bad faith, not a breach of contract per se, and was therefore governed by the 6-year general limitation in § 15-1-49 rather than the 3-year statute of limitations in § 15-1-29 for actions based on unwritten contracts. *Hurst v. Southwest Miss. Legal Servs. Corp.*, 610 So. 2d 374 (Miss. 1992), overruled on other grounds, *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999).

#### 17. — Personal injuries.

Mother's motion to amend her complaint under Fed. R. Civ. P. 60 to add a medical retail store as a defendant in her action seeking damages for her son's injury in a wheelchair was denied because the mother voluntarily dismissed the store under Fed. R. Civ. P. 41(a)(2), the statute of limitations of Miss. Code Ann. § 15-1-49 had expired, and the court failed to perceive any legitimate basis for the mother's insistence that she was duped into believing that she had purchased the wheelchair by the "innocent seller" arguments of the store and the wheelchair's manufacturer under Miss. Code Ann. § 11-1-63. *Braswell v. Invacare Corp.*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 140025 (S.D. Miss. Oct. 21, 2010).

In a son's negligence action seeking damages for personal injuries from his father, the father was deemed to have waived his right to assert insufficiency of process due to the son's failure to serve process on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where the father asserted insufficient service as a defense in his answer but then proceeded to participate in discovery, engage in settlement

talks, and notice the son's deposition over the next two years and did not raise the service of process issue again until the three-year statute of limitations in Miss. Code Ann. § 15-1-49 expired. *Whitten v. Whitten*, 956 So. 2d 1093 (Miss. Ct. App. 2007).

In a personal injury case removed from state court, a company's motion to dismiss was granted because the company was not served within the 120-day period provided for by Miss. R. Civ. P. 4(h), and the worker failed to re-file his complaint within the three-year period provided for in Miss. Code Ann. § 15-1-49(1). *Riley v. Ga. Pac. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1626 (N.D. Miss. Jan. 5, 2006).

Discovery rule did not apply where the acts of abuse alleged by the victim were physical acts of which a person was generally aware when the event occurred; the victim was aware of the abuse at the time of its occurrence, and whether or not the victim was mentally capable of understanding the physical acts she endured when they occurred was not the critical inquiry with the discovery rule. *Doe v. Roman Catholic Diocese*, 947 So. 2d 983 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 90 (Miss. Jan. 25, 2007).

This section applied to an action for injuries sustained by a darkroom technician caused by exposure to toxic chemicals. *Cannon v. Mid-South X-Ray Co.*, 738 So. 2d 274 (Miss. Ct. App. 1999).

Under Mississippi law, recipient of intrauterine device had single cause of action which accrued when she discovered her pelvic inflammatory disease and its source, notwithstanding her attempt to characterize her subsequently diagnosed infertility as separate injury for accrual purposes. *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 108 F.3d 335 (5th Cir. 1997).

In a personal injury action against a city and city officials, the 6-year statute of limitations set forth in § 15-1-49, rather than the 2-year statute of limitations set forth in § 11-46-11(3) of the Tort Claims Act, applied since the Tort Claims Act had not yet taken effect. *Starnes v. City of Vardaman*, 580 So. 2d 733 (Miss. 1991).

A claim seeking damages for personal injuries was not barred by § 15-1-49, where the six-year statute of limitations expired on Sunday and the claim was filed on the following Monday. *Nelson v. James*, 435 So. 2d 1189 (Miss. 1983).

Plaintiff injured on drilling platform located on the outer continental shelf offshore of the coast of Louisiana cannot take advantage of Mississippi's 6-year limitations period by filing his personal injury action under the Outer Continental Shelf Land Act (43 USCS § 1331 et seq.) in Mississippi; the Act itself provides that the civil and criminal laws of the adjacent state apply. *Bonner v. Chevron U.S.A., Inc.*, 512 F. Supp. 1313 (S.D. Miss. 1981), aff'd, 668 F.2d 817 (5th Cir. 1982).

This section is applicable to strict products liability in tort actions and, in personal injury actions, the statute begins to run from the time that injuries are sustained. *Ford Motor Co. v. Broadway*, 374 So. 2d 207 (Miss. 1979).

Where a Tennessee resident, employed in that state and covered under its workmen's compensation laws, was injured in an automobile collision occurring in Mississippi and filed a third-party diversity action in Mississippi to recover his damages, the Mississippi six-year statute of limitations was controlling rather than the 18-month limitation imposed on third party actions by the Tennessee workmen's compensation law. *Graham v. Red Ball Motor Freight, Inc.*, 262 F. Supp. 49 (N.D. Miss. 1966).

## 18. —Wrongful death.

Wrongful death case was not time barred under Miss. Code Ann. § 15-1-49 because the savings provision in Miss. Code Ann. § 15-1-69 applied since a voluntary dismissal without prejudice in federal court was considered a matter of form where it was based on subject matter jurisdiction. Several beneficiaries continually and in good faith sought to have the merits of their case heard in Mississippi state court, they sought a Fed. R. Civ. P. 54(b) certified judgment to challenge a federal district court's subject matter jurisdiction, and they timely refiled their second cause of action within one year of the dismissal of the first case. *Marshall v.*



Kan. City S. Rys., 7 So. 3d 210 (Miss. 2009).

Miss. Code Ann. § 11-7-13 wrongful-death claims of the wrongful-death beneficiaries matured—and Miss. Code. Ann. § 15-1-49, the statute of limitations on those claims, began to run—on April 17, 2000, not because that was the day the decedent died, but rather because that was the first day (“if death had not ensued”) the decedent could have brought a claim. *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008).

When a tortfeasor negligently injures someone and a claim arises, the injured party generally has three years to bring a claim, pursuant to Miss. Code. Ann. § 15-1-49. If the injured party subsequently dies, the wrongful-death beneficiaries simply step into the shoes of the deceased person and may—assuming the deceased person brought no claim prior to death—bring claims the deceased person could have brought if death had not ensued. *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008).

Wrongful death claim against the corporations was time-barred and summary judgment was properly granted in favor of the corporations on the wife’s wrongful death claim where the statute of limitations expired before litigation commenced. *May v. Pulmosan Safety Equip. Corp.*, 948 So. 2d 483 (Miss. Ct. App. 2007).

Under Miss. Code Ann. § 11-7-13, wrongful death claims premised on negligence, strict liability, and breach of implied warranties were time-barred under the applicable three-year limitations period of Miss. Code Ann. § 15-1-49, because the claims accrued at the time of diagnosis of the decedent’s latent disease and there were no allegations of a confidential or fiduciary relationship to establish a breach of duty of disclosure of toxic substances for a fraudulent concealment claim. *Wells v. Radiator Specialty Co.*, 413 F. Supp. 2d 778 (S.D. Miss. 2006).

In a wrongful death case, an amendment of a complaint under Miss. R. Civ. P. 15(c) was properly denied because the causes of action did not arise out of the same nucleus of common facts; one dealt with the design and manufacturing of a vehicle, while the other dealt with the

failure to inspect and repair the vehicle before resale, and therefore, the statute of limitations had run on the proposed claim since relation back did not apply. *Russell v. Ford Motor Co.*, 960 So. 2d 495 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 387 (Miss. 2007).

Personal representatives’ amended complaint against a convenience store in a wrongful death action was dismissed because the minor’s savings statute, Miss. Code Ann. § 15-1-59, did not toll the general statute of limitations, Miss. Code Ann. § 15-1-49, which otherwise barred the wrongful death claim against the convenience store. *Anderson v. R & D Foods, Inc.*, 913 So. 2d 394 (Miss. Ct. App. 2005).

In November 1997, plaintiff brought suit for wrongful death, but the record reflected that she failed to properly serve process upon defendant within 120 days. Because process was not served within the 120-day period as provided by Miss. R. Civ. P. 4(h), the running of the statute of limitations resumed; further, the statute of limitations ran in March, 2000, some 14 months prior to defendant’s motion to dismiss and some 19 months prior to plaintiff’s filing of a second identical wrongful death action, and therefore, when plaintiff filed her second action, the three year statute of limitation set forth in Miss. Code Ann. § 15-1-49 had run. *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005).

Action for wrongful death brought by statutory heirs of decedent, alleging that decedent came into contact with toxic substances during his employment with defendant, resulting in his death, was time-barred where approximately 8 ½ years elapsed between decedent’s death and filing of present action; negligence actions being governed by § 15-1-49 (6 years), actions based on intentional infliction of emotional distress being controlled by § 15-1-35 (one year), and breach of warranty actions governed by § 75-2-725 (6 years), whether defendants’ acts were characterized as intentional or negligent, longest possible limitations period under Mississippi law would be 6 years. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

Addition to wrongful death complaint of allegation that bed sores contributed to



decedent's death did not constitute new cause of action and would not be barred by 6-year statute of limitations where 7 years had elapsed from time of decedent's death to plaintiff's seeking addition of allegation. *Hurst v. Beverly Enters.*, 724 F. Supp. 437 (S.D. Miss. 1989).

Factual allegation that bedsores contributed to nursing home patient's death, which was added to complaint against nursing home more than 7 years after patient's death, was not barred by 6-year statute of limitations where wrongful death action had been commenced within 6-year period. *Hurst v. Beverly Enters.*, 724 F. Supp. 437 (S.D. Miss. 1989).

Cause of action based upon wrongful death statute (§ 11-7-13), being predicated upon defendant's intentional torts, is governed by one year statute of limitations, rather than 6 year statute of limitations, as actions filed pursuant to wrongful death statute must be brought within corresponding prescription statute for which cause of action is predicated. *Veselits ex rel. Cruthirds v. Veselits*, 653 F. Supp. 1570 (S.D. Miss. 1987), *aff'd*, 824 F.2d 391 (5th Cir. 1987).

Prior to the enactment of § 15-1-36 in 1976, a cause of action for the wrongful death of a child in a medical malpractice context accrued to its parents as of the date of the child's death. *Jackson-Hinds Bank v. Mid-South Pools, Ltd.*, 196 So. 2d 91 (Miss. 1967).

### 19. —Infliction of emotional distress.

In Mississippi, the three year catch all statute of limitations found at Miss. Code Ann. § 15-1-49 applies to claims for alienation of affection and negligent infliction of emotional distress. *Bristow v. Baskerville*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 129131 (S.D. Miss. Dec. 6, 2010), vacated by 2011 U.S. Dist. LEXIS 41860 (S.D. Miss. Apr. 12, 2011).

In a Title VII racial discrimination case in which an employee's claim for negligent infliction of emotional distress was not barred by the three-year limitation period in Miss. Code Ann. § 15-1-49, the claim nonetheless failed since a claim for negligent infliction of emotional distress did not arise from acts of intentional discrimination. Furthermore, any state tort claim grounded in negligence asserted by the

employee would be barred by the exclusive remedy provision of the Mississippi Workers' Compensation Law. *Fortenberry v. Gulf Coast Cmty. Action Agency, Inc.*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 89831 (S.D. Miss. Dec. 5, 2007).

Where plaintiff's claims for negligence, including her claim for negligent infliction of emotional distress, must have been filed with the court on or before July 30, 2002, in order to comply with the limitation period set forth in Miss. Code Ann. § 15-1-49, plaintiff did not comply with the limitation period where plaintiff's complaint was filed with the court on August 13, 2002. Therefore, unless the statute of limitations was tolled in some manner, plaintiff's claims were time barred. *Hampton v. Gannett Co.*, 296 F. Supp. 2d 716 (S.D. Miss. 2003).

The statute of limitations applicable to intentional infliction of emotional distress is three years. *Hubbard v. Mississippi Conference of United Methodist Church*, 138 F. Supp. 2d 780 (S.D. Miss. 2001).

Causes of action for negligent infliction of emotional distress and negligently causing arrest of another are subject to 6-year statute of limitations rather than one-year statute of limitations, where causes of action do not charge intentional torts, and are more analagous to common law "case" actions than to trespass actions. *King v. Otasco, Inc.*, 861 F.2d 438 (5th Cir. 1988).

Tort of intentional infliction of emotional distress is of same type of tort as menace and therefore covered by one-year statute of limitations and not by residual 6 year statute of limitations. *Guthrie v. J.C. Penney Co.*, 803 F.2d 202 (5th Cir. 1986).

### 20. —Products liability.

In a product liability suit, pursuant to Miss. R. Civ. P. 9(h) and 15(c)(2), a patient's second amended complaint, which substituted a medical device manufacturer for an unknown defendant, related back to the date of the original complaint naming a fictitious defendant, and was thus timely under Miss. Code Ann. § 15-1-49, because the patient made a reasonably diligent inquiry into the identity of the manufacturer where the suit was filed one day before the three-year limitations

period in Miss. Code Ann. § 15-1-49 expired; less than three months elapsed between when the hospital that used the device on the patient supplied an erroneous manufacturer's name and when the patient sought to substitute that manufacturer's name for the fictitious party designation; and the patient sought to substitute the correct manufacturer for the first manufacturer within three weeks after learning that the manufacturer had actually made the device. *Scoggins v. Boston Sci. Corp.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 35507 (N.D. Miss. Apr. 22, 2008).

In a case involving a dispute over an allegedly defective roof, summary judgment was properly granted in favor of several builders because the action was untimely; Miss. Code Ann. § 11-1-63 and Miss. Code Ann. § 15-1-49 did not apply because an improvement to real property was not a product. *Ferrell v. River City Roofing, Inc.*, 912 So. 2d 448 (Miss. 2005).

Trial court erred in denying the company summary judgment as the employee and the clinic knew or reasonably should have known of her exposure to paint fumes on the very night the exposure occurred; the statute of limitations, Miss. Code Ann. § 15-1-49(2) barred the employee's action against the company and summary judgment for the company was appropriate. *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47 (Miss. 2005).

Consumers' motion to remand was granted because there was a possibility that the consumers could prevail in state court against defendant local retailers, who sold them the lead-based paint that allegedly caused them injury, since a cause of action might not have accrued until a physician diagnosed the problem and its cause under the applicable statute of limitations, Miss. Code Ann. § 15-1-49, and therefore, the local retailers were not fraudulently joined and diversity was not complete. *Jackson v. Phillips Bldg. Supply*, 246 F. Supp. 2d 538 (S.D. Miss. 2003).

Under Mississippi law, recipient of intrauterine device had single cause of action which accrued when she discovered her pelvic inflammatory disease and its source, notwithstanding her attempt to characterize her subsequently diagnosed

infertility as separate injury for accrual purposes. *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 108 F.3d 335 (5th Cir. 1997).

Under Mississippi law, cause of action for products liability accrues, and limitations period begins to run, when plaintiff can reasonably be held to have knowledge of injury or disease. *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 108 F.3d 335 (5th Cir. 1997).

Under Mississippi law, general rule under accrual statute governing products liability claims is that time of discovery of injury is also time when statute of limitations begins to run. *Kemp v. G.D. Searle & Co.*, 103 F.3d 405 (5th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 108 F.3d 335 (5th Cir. 1997).

Products liability action against manufacturer of drug stelazine was barred by 6-year statute of limitations in § 15-1-49, where last incidence of prescription of drug and onset of symptoms of side-effect condition occurred more than 6 years prior to commencement of suit; statute of limitations was not tolled because there was no evidence of fraudulent concealment of the plaintiff's condition. *Lindley v. Hamilton*, 883 F.2d 360 (5th Cir. 1989), reh'g denied, 892 F.2d 78 (5th Cir. 1989).

This section governed the tort aspect of an action alleging that a television set malfunctioned, causing a fire that destroyed most of plaintiffs' home, but was inapplicable to their breach of implied warranties claim; plaintiffs' negligence and strict liability in tort claims were not time-barred under this section, even though the television set had been manufactured and sold more than six years before the action was commenced, where there was no showing that plaintiffs knew or should have known of the alleged defect prior to the fire and the statute of limitations thus did not begin to run until the date of the fire. *Maly v. Magnavox Co.*, 460 F. Supp. 47 (N.D. Miss. 1978).

Although it is the general rule that an action in tort accrues at the time of the wrongdoing or at the "time of delivery"; in a products liability action the 6-year-statute provided by § 722 accrues when the



wrong is discovered or causes harm. *Alabama G.S.R.R. v. Allied Chem. Corp.*, 467 F.2d 679 (5th Cir. 1972).

### 21. —Alienation of affections.

Summary judgment was properly granted to a paramour in a husband's claim for alienation of affection, arising from the paramour's affair with the husband's wife, as the suit was not filed within three years of the latest accrual date, which was when the affair ended, pursuant to Miss. Code Ann. § 15-1-49; further, the discovery rule under § 15-1-49(2) or continuing tort doctrine were not applicable, as a phone call between the paramour and the wife did not constitute a latent injury or continuing conduct that tolled the limitations period. *Fulkerson v. Odom*, 53 So. 3d 849 (Miss. Ct. App. 2011).

Remand was necessary in an alienation of affection case because the limited facts in the record made it impossible to determine if Mississippi or Tennessee law should have applied; the appellate court was also unable to determine when the cause of action accrued under the three-year statute of limitations in Miss. Code Ann. § 15-1-49 since the affair had been over for several years when the husband had discovered it, the wife continued to reside in the marital home during the affair, and she continued a relationship with her husband, including having two other children, after the affair ended. *Hancock v. Watson*, 962 So. 2d 627 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 469 (Miss. 2007).

An action for alienation of affections was time-barred where (1) the claim accrued on November 4, 1994 when the husband, in open pursuit of a relationship with the defendant, moved out of the marital home and abandoned the marital relationship, and (2) the plaintiff filed her claim on December 2, 1997, approximately one month after the statute of limitations had run on the claim. *Carr v. Carr*, 784 So. 2d 227 (Miss. Ct. App. 2000).

Action for alienation of affections governed by 6-year statute. *Brister v. Dunaway*, 149 Miss. 5, 115 So. 36 (1927).

### 22. —Actions for deceit.

Where plaintiff borrowers alleged fraudulent and negligent inducement into

purchasing credit insurance in connection with loans, but alleged no post-sale act concealing that arrangement subsequent to the loans, they were not entitled to tolling under Mississippi's fraudulent concealment statute, Miss. Code Ann. § 15-1-67, on the claims against defendant insurers, and all of the claims were time-barred under Miss. Code Ann. § 15-1-49(1) because the last loan was dated September 15, 1999, and the action was not filed until December 28, 2002. *Jones v. Life of the S. Ins. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1414 (S.D. Miss. Jan. 4, 2006).

As all of plaintiffs' claims regarding credit life insurance appeared to be based on alleged misconduct that occurred during the formation of the insurance contracts, the statute of limitation began to run on the dates on which the various agreements were signed, all of which occurred more than three years prior to the filing of the suit, and were thus time-barred by Miss. Code Ann. § 15-1-49(1). *Agnew v. Wash. Mut. Fin. Group, LLC*, 244 F. Supp. 2d 672 (N.D. Miss. 2003).

Trial court did not err in dismissing with prejudice a fraud and misrepresentation case against an insurer because the claim was barred by the six-year statute of limitations in Miss. Code Ann. § 722 (1972); the cause of action was not tolled by Miss. Code Ann. § 15-1-67 because the insurer did nothing to prevent two insureds from discovering their cause of action. *Stephens v. Equitable Life Assur. Soc'y of the United States*, 850 So. 2d 78 (Miss. 2003).

The six-year statute of limitation applies to an action for deceit for a false representation as to the acreage or the number of feet in a tract of land sold. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

In suit by purchaser for false representations as to acreage of tract sold, evidence failed to establish that vendor fraudulently concealed false representations after sale, and hence suit begun more than seven years after sale was barred. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

### 23. —Damage to realty.

Where the homeowners knew as of July 1999 that there was an injury to their



property and that the association was responsible for at least part of the injury, but did not sue the association until September 2002, their claim was barred by the three-year statute of limitation in Miss. Code Ann. § 15-1-49. *Sims v. Bear Creek Water Ass'n*, 923 So. 2d 230 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 149 (Miss. 2006).

Person who purchased property subsequent to the construction of a pipeline under a right-of-way agreement would not be entitled, under Mississippi law, to recover any damage for injury to the land by reason of the construction, with the exception that if the pipeline was constructed negligently, and as a proximate result of such negligent construction, such person suffered injuries after the purchase of the property, recovery could be had to the extent that the injury flowing from such negligent construction was not permanent but continuing, damages for which would not be barred by the statute of limitations. *Michigan Wis. Pipeline Co. v. Moore*, 319 F. Supp. 753 (N.D. Miss. 1970).

Where some of the heirs had entered upon the land in 1942, tore down the house thereon and removed it from the tract of land owned by them, cut some of the timber and pulp wood from the land, which was hauled away and sold, the claim for the removal of the house and for cutting of the timber and pulp wood was barred by the statute of limitations. *London v. Braxton*, 233 Miss. 514, 102 So. 2d 683 (1958).

Action for wrongful use and occupation of a river bank by a railroad company in transferring its trains across the river is governed by the six-year statute of limitations and not the three-year statute. *Louisiana & Miss. R. Transf. Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930).

Six-year statute applies to action for damages to real property caused by construction of railroad side track. *Romano v. Yazoo & Miss. V. Ry.*, 87 Miss. 721, 40 So. 150 (1906).

#### 24. —Malpractice.

Where a client hired a law firm to pursue a medical malpractice claim on her behalf, where the law firm failed to effect service of process upon the health care

provider and the suit was dismissed for lack of prosecution, where the client filed a legal malpractice claim against the law firm, and where the trial court granted summary judgment in favor of the law firm after finding that the client's lawsuit was not timely filed pursuant to the three-year statute of limitations under Miss. Code Ann. § 15-1-49, the reviewing court held that the evidence submitted on summary judgment raised a genuine issue of material fact regarding when the client knew or, with reasonable diligence, could have discovered the alleged legal malpractice. The law firm failed to communicate the lack of service, and the client presented evidence that she lacked actual knowledge of the alleged malpractice prior to her new counsel's review of the case file; as such, summary judgment was improper. *Bennett v. Hill-Boren P.C.*, 52 So. 3d 364 (Miss. 2011).

Mississippi does not follow the continuous representation rule. Rather, the discovery rule is the proper test for deciding when the statute of limitations for a legal malpractice action begins to run. *Bennett v. Hill-Boren P.C.*, 52 So. 3d 364 (Miss. 2011).

Summary judgment was properly granted to the attorney on the client's legal malpractice claim as it was time barred, Miss. Code Ann. § 15-1-49; the seventy-one-day delay in raising the statute of limitations defense was not a substantial and unreasonable delay, and the client had a known injury as of May 23, 2002, and could pursue her claim without being directly told the attorney was negligent. *Spann v. Diaz*, 987 So. 2d 443 (Miss. 2008).

Where an employee killed co-workers after being referred to counseling by the employer and an employee assistance provider (EAP), the EAP was not entitled to summary judgment as to negligence claims because the statute of limitations for medical malpractice claims did not apply since the claims were for ordinary negligence, not medical malpractice; the residual three-year statute of limitations applied, and the suit was timely. *Tanks v. NEAS, Inc.*, 519 F. Supp. 2d 645 (S.D. Miss. 2007).

Although the statute of limitations was three years for a legal malpractice action,

a client's first complaint tolled the statute of limitations even though that complaint was not properly served, and a second complaint was subsequently filed. *Parmley v. Pringle*, 976 So. 2d 422 (Miss. Ct. App. 2007).

Two of clients' malpractice claims against attorneys were barred by the statute of limitations, Miss. Code Ann. § 15-1-49; however, the trial court had to determine on remand whether the other clients knew or should have known of alleged wrongdoing prior to January 1, 2001, and if so, their claims would also be time barred. *Channel v. Loyacono*, 954 So. 2d 415 (Miss. 2007).

In medical negligence cases, courts must focus their inquiry on when a patient, exercising reasonable diligence, should have first discovered the negligence, rather than the injury; therefore, summary judgment was properly granted to a doctor's estate in a medical malpractice case based on the discovery rule under Miss. Code Ann. § 15-1-36 since the patient was aware of an injury arising out of the prescription of certain drugs after his discharge from a hospital in 2001, and this discovery rule was different than the latent injury focus in Miss. Code Ann. § 15-1-49. *Sutherland v. Estate of Ritter*, 959 So. 2d 1004 (Miss. 2007).

In a legal malpractice case brought by a client against his attorney, the trial court properly applied the three-year statute of limitations under Miss. Code Ann. § 15-1-49; the statute of limitations began to run when the client became aware of the attorney's alleged misrepresentation, not when the client's conviction was invalidated. *Stringer v. Lowe*, 955 So. 2d 381 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 266 (Miss. 2007), writ of certiorari denied by 552 U.S. 860, 128 S. Ct. 143, 169 L. Ed. 2d 98, 2007 U.S. LEXIS 9354, 76 U.S.L.W. 3160 (2007).

Court properly dismissed a client's legal malpractice action as barred by the three-year statute of limitation because the client, who was incarcerated due to the attorney's failure to file an accounting, should have known of his deficient performance when she terminated him. *Champluvier v. Beck*, 909 So. 2d 1061 (Miss. 2004).

Grant of summary judgment in favor of the attorneys in the client's legal malpractice action was proper where the three-year statute of limitations began to run in 1995; thus, the 2001 action was time-barred. *Hymes v. McIlwain*, 856 So. 2d 416 (Miss. Ct. App. 2003).

The six-year statute of limitations contained in this section does not apply to an action for medical malpractice; instead, the two-year statute of limitations contained in § 15-1-36 applies to such an action. *Goleman v. Orgler*, 771 So. 2d 374 (Miss. Ct. App. 2000).

In a legal malpractice action arising from an attorney's failure to record a trust, the attorney's continued representation of the client on matters other than the failed trust did not toll the running of the limitations period. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

The discovery rule applies in medical malpractice cases involving latent injuries and diseases. *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992).

A cause of action for medical malpractice involving negligence which occurred in 1964 but was not discovered until 1985 was not time-barred by either § 15-1-36 or § 15-1-49 where the complaint was filed within 2 years of the discovery of the injury. *Williams v. Kilgore*, 618 So. 2d 51 (Miss. 1992).

The 2-year statute of limitations set forth in § 15-1-36, rather than the general 6-year limitation period of § 15-1-49, applied to a medical malpractice action against a nurse and a company that supplied nursing personnel, where the company's sole basis for liability was the fact that it was the nurse's employer; since § 15-1-36 specifically names nurses among those covered and the company's liability was predicated solely upon the doctrine of respondeat superior, the bar of the suit against the nurse likewise barred the action as to the company. Under § 15-1-3, § 15-1-36 barred both the right of action against the nurse and the company and also barred any remedy against both parties. *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778 (Miss. 1991).

Medical malpractice action was not barred by statute of limitations where alleged negligent act occurred on June 28,



1974, foreign object was discovered in lining of patient's heart on June 21, 1982, and action was filed on June 14, 1984, because enactment of specific statute of limitations, § 15-1-36, dealing with malpractice tort claims, controlled over general statute, § 15-1-49; specific statute defined date of accrual of action as being date of alleged act, omission, or neglect, or date injury would or with reasonable diligence might have been first known or discovered, and provided that it applied to claims which accrued on or after July 1, 1976; fact that different definition of accrual may have been accepted with respect to general 6-year statute of limitations was beside point, because that definition had been superseded by specific statute of limitations. *Kilgore v. Barnes*, 508 So. 2d 1042 (Miss. 1987).

In legal malpractice action against attorney who delayed in asserting federal tort claim until relevant limitations period had expired, fact that claim arose by virtue of oral contract securing attorney's services did not preclude application of 6 year statute of limitations governing torts, rather than 3 year statute of limitations governing contracts. *Hickox ex rel. Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987).

Interlocutory appeal from the circuit court would be granted to determine whether the 6 year statute of limitations provided by Mississippi Code § 15-1-49, or the medical malpractice statute of limitations found in Mississippi Code § 15-1-36, applies to a medical malpractice action in which plaintiff alleged injury resulting from defendants' negligence in leaving a surgical needle in his heart during surgery performed on June 28, 1974, but of which plaintiff was unaware until June 21, 1982. *Kilgore v. Barnes*, 490 So. 2d 895 (Miss. 1986), appeal decided, 508 So. 2d 1042 (Miss. 1987).

In a malpractice action against an attorney resulting from his issuance of defective title certificates, the six-year general statute of limitations under § 15-1-49 was applicable, rather than the three-year statute of limitations governing actions on unwritten contracts under § 15-1-29. *United Cos. Mtg. of Miss., Inc. v. Jones*, 465 So. 2d 1083 (Miss. 1985).

Action against attorney for negligence in preparing title certificate is governed by 6 year statute of limitations (§ 15-1-49), not by 3 year statute (§ 15-1-29). *United Cos. Mtg. of Miss., Inc. v. Jones*, 465 So. 2d 1083 (Miss. 1985).

In a legal malpractice action the six-year statute of limitations provided in § 15-1-49 governed the action rather than § 15-1-29, where plaintiffs clients' declaration charging that the attorney negligently conducted the legal representation of the plaintiffs by failing to list certain priority claims that could have been satisfied from the assets of the bankruptcy estate sounded in tort, regardless of the oral contract under which the attorney undertook legal representation of the plaintiffs. *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982).

A medical malpractice action based on the theory of lack of informed consent, was in tort and subject to the general six-year statute of limitations as set out in Code 1942, § 722, rather than the one-year statute of limitations on assault and battery claims as set out in Code 1942, § 732. *Ross v. Hodges*, 234 So. 2d 905 (Miss. 1970).

## 25. Causes or rights accruing in foreign state.

Mississippi's 6-year statute of limitations for tort actions, § 15-1-49, applied to a Mississippi lawsuit even though the tort occurred in Louisiana since Mississippi applies its own procedural law to actions filed in Mississippi courts. *Ford v. State Farm Ins. Co.*, 625 So. 2d 792 (Miss. 1993).

Mississippi's general statute of limitations is considered procedural and therefore applies to actions in Mississippi arising under laws of another jurisdiction. *Bastoe v. Sterling Drug, Inc.*, 683 F. Supp. 586 (S.D. Miss. 1988).

The Mississippi statute of limitations, § 15-1-49, applied to an action arising from a motor vehicle accident in Louisiana brought by Louisiana residents against a corporation organized under the laws of Mississippi but with its principal place of business in Louisiana. *Lee v. Swain Bldg. Materials Co.*, 529 So. 2d 188 (Miss. 1988).

The Mississippi general statute of limitations was applicable in a diversity ac-



tion for wrongful death arising out of an automobile accident in Tennessee. *Cummings v. Cowan*, 390 F. Supp. 1251 (N.D. Miss. 1975).

In a wrongful death action arising out of a plane crash in Belgium, the statute of limitations of Belgium, which had run prior to the bringing of the action, was held to be substantive law and thus applicable to the action brought in Mississippi. *Ramsay v. Boeing Co.*, 432 F.2d 592 (5th Cir. 1970).

Since the *lex fori* governs as to the remedy for the enforcement of a right in Mississippi under a contract executed in another state, recovery against the indorser of a note executed and delivered in Alabama more than six years prior to the action on the note was barred by the six-year statute of limitations of Mississippi, notwithstanding partial payment had been made during the six-year period, the Alabama six-year statute not being thereby rendered applicable. *Montgomery v. Yarbrough*, 192 Miss. 667, 6 So. 2d 925 (1942).

Where on former appeals, terminating in a decision by the Federal Supreme Court, the point raised by demurrer to insurer's plea involved the question whether a provision in a fidelity bond requiring any claim thereunder to be made within 15 months after the termination of the suretyship, "was subject to the law of Tennessee where the contract was made at a time when the insured was then located in Tennessee, or subject to the laws of Mississippi, to which insured had removed and where the defalcation occurred, and resulted in a determination that the laws of Tennessee governed, such determination did not preclude subsequent litigation as to the effect of such provision under Tennessee decisions as being a condition precedent to liability of the insurer or merely a postponement of the right to sue. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 189 Miss. 496, 195 So. 667 (1940), cert. denied, appeal dismissed, 311 U.S. 610, 61 S. Ct. 25, 85 L. Ed. 387 (1940).

Mississippi six-year statute, not three-year statute, applied to action for use and occupation of river bank controlled by Louisiana law. *Louisiana & Miss. R.*

*Transf. Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930).

Statute [Code 1942, § 722] applies to right of action accruing in foreign state. *Fisher v. Burk*, 123 Miss. 781, 86 So. 300 (1920).

Mississippi statute of limitations controls in action in this state on note executed in Canada. *Philp v. Hicks*, 112 Miss. 581, 73 So. 610 (1917).

The statute bars a note made in another state where the limit is ten years, although both maker and payee resided there at the time and the maker did not become a resident of this state until nearly six years after maturity. *Wright v. Mordaunt*, 77 Miss. 537, 27 So. 640, 78 Am. St. R. 536 (1900).

## 26. Persons affected.

Where bonds were purchased by a testator in 1916 and were to become due in 1936 and they were later bequeathed by the testator who died in 1939, without specific designation to his wife, and the wife died in 1948, leaving all her property to legatee, and neither the wife nor the legatee were aware of the existence of the bonds, an action by the legatee in 1949 was barred by the six-year statute of limitations. *Mitchell v. Town of Magee*, 51 So. 2d 198 (Miss. 1951).

The statute of limitations bars a wife's causes of action against her husband as if they were unmarried. *Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317 (1902).

## 27. Running of limitation period, generally.

In a dispute regarding misrepresentation of insurance coverage, the three-year statute of limitations in Miss. Code Ann. § 15-1-49 began to run when the insured received notice that his personal automobile claim, which arose from a serious collision that his son had while driving the insured's vehicle for personal reasons, was denied; thus, summary judgment should have been granted to the insurers as the insured did not sue until about six years later. *Oaks v. Sellers*, 953 So. 2d 1077 (Miss. 2007).

Bank's claims against an insurer, including fraudulent inducement in the purchase of a policy, were dismissed as time-barred under Miss. Code § 15-1-49,

because even if the bank had not examined the policy when it was purchased, or if its terms were not clear, the bank was put on notice that the single premium payment may not have been sufficient to keep the policy in force; neither the oral representations from the insurer's agent that a single payment would maintain the policy, the express assurances that payments were not due, nor the zero balance statements over six years constituted concealment to save the case pursuant to Miss. Code § 15-1-67. *Peoples Bank Asset & Trust Mgmt. Dep't v. Great W. Life & Annuity Ins. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16752 (S.D. Miss. Feb. 7, 2005).

Even if the insured had negligence claims, which were subject to the three-year statute of limitations found in Miss. Code Ann. § 15-1-49, her claims would still be barred; the insured's claim began to run at a time when she should reasonably have been aware that a tort had been committed; that day was March 11, 2000, when the investigator was arrested at the insured's place of employment, and her court action was not filed until April 10, 2003, more than three years after she should have been aware of the existence of a claim. *Lynch v. Liberty Mut. Ins. Co.*, 909 So. 2d 1289 (Miss. Ct. App. 2005).

There are two factors that must be proven before the provisions of Miss. Code Ann. § 15-1-67 can operate to toll the statute of limitations for a cause of action: the plaintiff must prove that (1) some affirmative act or conduct was done and prevented discovery of a claim; and (2) due diligence was performed on their part to discover it; and therefore an insured's action against his agent accrued upon the sale of the policies where he performed no additional act thereafter. *Williams v. Union Nat'l Life Ins. Co.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25159 (N.D. Miss. July 24, 2003).

Appellant tax sale purchaser raised the statute of limitations in his appeal of the lower court's decision that the tax sale of the landowners' property was void due to the lack of notice therefor; however, this issue was not raised as an affirmative defense, and was therefor not properly before the appellate court. *Alexander v. Womack*, 857 So. 2d 59 (Miss. 2003).

Borrower's misrepresentation and negligence claims against a credit insurer's employee were time-barred and the statute was not tolled under Miss. Code Ann. § 15-1-67 because the borrower received, but did not read, copies of all pertinent documents, which clearly stated that credit insurance was optional. *Bell v. Am. Gen. Fin., Inc.*, 267 F. Supp. 2d 582 (S.D. Miss. 2003).

Running of statute of limitations against tortfeasor does not bar claim against insurer. *Bailey v. State Farm Fire & Cas. Ins. Co.*, 621 F. Supp. 1016 (S.D. Miss. 1985).

This section is applicable to strict products liability in tort actions and, in personal injury actions, the statute begins to run from the time that injuries are sustained. *Ford Motor Co. v. Broadway*, 374 So. 2d 207 (Miss. 1979).

It is well settled law in Mississippi that a cause of action begins to run from the time of injury and not from the time of its discovery unless the running of the statute of limitations is tolled by the operation of Code 1942, § 742 (fraudulent concealment of a cause of action). *Wilson v. Retail Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972).

If no action on an anticipatory breach is brought before the time fixed by the contract for the beginning of the performance by the party who has committed such a breach, the period of statute of limitations begins to run only from the time so fixed by the contract. *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 52 So. 2d 650 (1951), suggestion of error overruled, opinion modified, 212 Miss. 67, 54 So. 2d 170 (1951).

An immediate action based upon an anticipatory breach is a different cause of action from that based on the nonperformance at the contract time, and limitation period does not begin to run upon nonperformance of contractual duty until the cause of action accrues and they duty of performance continues in spite of repudiation. *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 52 So. 2d 650 (1951), suggestion of error overruled, opinion modified, 212 Miss. 67, 54 So. 2d 170 (1951).

The general rule allows the injured promisee, if he elects after breach of the



contract to keep it alive, to compute the statute of limitations, not from the time of the breach by anticipatory repudiation, but from the time when ultimate payment of performance was promised, the death of the promisor. *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 52 So. 2d 650 (1951), suggestion of error overruled, opinion modified, 212 Miss. 67, 54 So. 2d 170 (1951).

Mere mistake, accident or ignorance of one not under disability is not sufficient to suspend the statute of limitations. *Mitchell v. Town of Magee*, 51 So. 2d 198 (Miss. 1951).

## **28. — Accrual of cause of action; miscellaneous.**

Discovery rule is codified with respect to the three year statute of limitations at issue in the alienation of affection and negligent infliction of emotional distress claims at Miss. Code Ann. § 15-1-49(2), which provides that in all actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. *Bristow v. Baskerville*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 129131 (S.D. Miss. Dec. 6, 2010), vacated by 2011 U.S. Dist. LEXIS 41860 (S.D. Miss. Apr. 12, 2011).

Both parties agreed that the general, catch-all three year statute of limitations set forth in Miss. Code Ann. § 15-1-49 (Rev. 2003) should have applied in the case, and the appellate court found that the owner implicitly consented to the association renting out his unit because he never responded to the letters sent to him, and he never voiced his disapproval of the rentals at the board meetings, or at any other time prior to filing his complaint in the present action. Because the owner never objected to the rentals until he filed his complaint in January 2000, even though he knew that the association was entering his unit without his consent as early as 1993, the appellate court found no error in the chancellor's finding that the owner's continued-trespass claim was untimely. *Robertson v. Chateau Legrand Prop. Owner's Ass'n*, 39 So. 3d 931 (Miss. Ct. App. 2009).

Order granting summary judgment based on insured's claims against an insurer being time-barred under Miss. Code Ann. § 15-1-49 was reversed because the triggering event could not be pinpointed as matter of law, but rather posed a question of fact as to when a reasonable policy holder should have realized from the available information that the policy would not or was not performing as allegedly promised and that the so-called vanishing premiums were a fiction. *Weathers v. Metro. Life Ins. Co.*, 14 So. 3d 688 (Miss. 2009).

Plaintiff employer's business tort and trade secret claims against defendant competitor, based on the employer's former employee, in violation of a non compete agreement, selling to his former customers, were time-barred under Miss. Code Ann. §§ 15-1-49, 75-26-13, because § 15-1-49(2)'s discovery rule did not toll the limitations period since the employer's representative testified that learning competing sellers' identities was not difficult. *State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450 (5th Cir. 2009).

For exhaustion of remedies purposes, a final order was not entered until an administrative law judge made a full resolution of a final decision because the parties in a worker's compensation dispute had reserved the issue of temporary and permanent disability for a hearing on the merits. *Bullock v. AIU Ins. Co.*, — So. 2d —, 2008 Miss. LEXIS 221 (Miss. May 8, 2008), opinion withdrawn by, substituted opinion at 995 So. 2d 717, 2008 Miss. LEXIS 595 (Miss. 2008).

Plaintiff's personal injury claims against the manufacturers of products that allegedly contained asbestos accrued when plaintiff was diagnosed with asbestosis on May 21, 2002, and when plaintiff filed the complaint on May 19, 2005, the claims were timely under the three-year statute of limitations in Miss. Code Ann. § 15-1-49. *Riley v. Ga. Pac. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Worker's asbestosis claim against a corporation for whom he had made products was dismissed for failure to timely serve



the complaint within 120 days under Miss. R. Civ. P. 4(h), which in turn caused the statute of limitations in Miss. Code Ann. § 15-1-49(1), (2), to resume running and expire, barring his claims under Fed. R. Civ. P. 12(b)(6). *Riley v. Ga. Pac. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1625 (N.D. Miss. Jan. 5, 2006).

Grant of summary judgment in favor of a paint manufacturer in a minor and mother's action for injuries resulting from lead-based paint was proper pursuant to Miss. Code Ann. § 15-1-49(1) and (2) because the claims accrued no later than 1994 and the statute of limitations thus expired no later than 1997. Based on the facts, the mother knew categorically in 1993 that the minor had suffered excessive exposure to lead, but she did not file her claims until 2000. *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 859 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 955 So. 2d 764, 2007 Miss. LEXIS 31 (Miss. 2007).

Consumers' civil antitrust claims, which were filed in April 2003, were time barred under Miss. Code Ann. § 15-1-49(2) where (1) the information was placed in the public domain as early as October 7, 1998, with the publication of a newspaper article, (2) from and after that date, the dissemination of the information increased in an ever widening circle, and (3) when the information was placed in the public domain, the doctrine of fraudulent concealment ceased to be applicable. *Carder v. BASF Corp.*, 919 So. 2d 258 (Miss. Ct. App. 2005).

Courts applying Mississippi law hold that the statute of limitations period for claims based on alleged misrepresentations begins to run upon the completion of the sale induced by such false representation or upon the consummation of the fraud or misrepresentation. *Donald v. Pioneer Credit Co.*, 374 F. Supp. 2d 495 (S.D. Miss. June 21, 2005).

Homeowners' claim for flood damages allegedly caused by contractor's negligent construction and county's negligent inspection of their home were barred by Miss. Code Ann. §§ 15-1-41 and 14-1-49(1) because their action accrued when

they first occupied the home and when they first asked the county to remedy the drainage problems. *Baldwin v. Holliman*, 913 So. 2d 400 (Miss. Ct. App. 2005).

Once someone who possesses uninsured motorist coverage knows, or reasonably should know, that the damages claimed to have been suffered exceed the limits of insurance available to the alleged tortfeasor, the cause of action against the uninsured motorist carrier has accrued, and it is at this point in time that a potential plaintiff has a legally enforceable claim against the uninsured motorist carrier. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 852 So. 2d 641 (Miss. Ct. App. 2003).

Under Mississippi law, cause of action does not accrue until injury occurs. *Wheeler v. Magdovitz*, 137 F.3d 299 (5th Cir. 1998).

Suits on claims such as that asserted in instant case, brought by FDIC to recover amounts owed by daughter both individually and as guarantor of loans, are required to be filed within 6 years after cause of action accrued, and cause of action accrues when payor on note comes into breach, not when FDIC, as receiver for failed lender, acquired the right to sue on the note. *FDIC v. Belli*, 981 F.2d 838 (5th Cir. 1993), reh'g denied, 990 F.2d 628 (5th Cir. 1993).

Bank's cause of action against company hired to monitor inventory of steel company, to whom bank made loan, did not accrue until bank discovered inventory shortage, as each time company submitted false inventory report to bank, separate but ongoing breach of agreement occurred. *Merchants & Marine Bank v. Douglas-Guardian Whse. Corp.*, 801 F.2d 742 (5th Cir. 1986).

A cause of action for damages resulting from the closure of a portion of a frontage road by the state highway commission accrued at the time the road was closed and the six-year statute of limitations prescribed by Section 15-1-49 began to run at that time. *Mississippi State Hwy. Comm'n v. Vaughey*, 358 So. 2d 1307 (Miss. 1978).

The rule is well settled in Mississippi that where a debt is payable in installments the statute of limitations begins to

run as to each instalment from the time it becomes due and the creditor can recover only on those installments falling due within the statutory period. *Meridian Prod. Credit Ass'n v. Edwards*, 231 So. 2d 806 (Miss. 1970).

The dismissal by a former sheriff and tax collector of his action against the county for compensation for alleged services did not destroy the right of his assignee, who was to obtain a portion of any recovery, and since the assignee's right was dependent upon the right of his assignor, assignee's action should have been brought within six years from the date of the expiration of the term of office of the former sheriff and tax collector, and, where it was not, the claim was barred. *Smith v. Copiah County*, 232 Miss. 838, 100 So. 2d 614 (1958).

In an action against the union for wrongful suspension and expulsion of member, where this suspension was by a letter mailed in Kansas but received in Mississippi, the cause of action accrued in Mississippi and was subject to the Mississippi statute of limitations. *Lowry v. International Bhd. of Boilermakers, Iron Ship Bldrs. & Helpers*, 220 F.2d 546 (5th Cir. 1955).

Cause of action for suspension of the union accrued on reception of a letter suspending the plaintiff. *Lowry v. International Bhd. of Boilermakers, Iron Ship Bldrs. & Helpers*, 220 F.2d 546 (5th Cir. 1955).

A cause of action for redemption of corporate stock pledged as collateral for indebtedness, and an accounting accrues at the time that the owner of the stock has knowledge of the claim of another to the stock. *Hudson v. Belzoni Equip. Co.*, 203 Miss. 212, 33 So. 2d 796 (1948).

## 29. — —Real property, deeds, etc.

Buyers were without any cause of action until they suffered damages and the record was devoid of any proof that the buyers suffered actual damages prior to the date of closing when they purchased the home; the trial court erred in finding that the statute of limitations accrued prior to the date of closing. *Fletcher v. Lyles*, 999 So. 2d 1271 (Miss. 2009).

An action alleging that the Federal Deposit Insurance Corporation (FDIC) sold,

for its own profit, lands held pursuant to two deeds of trust that the FDIC had previously sold to the plaintiff, was barred by the statute of limitations where the sale occurred more than three years prior to the commencement of the action, notwithstanding the assertion that the plaintiff did not receive actual notice of the sale until more than three years after it occurred, since the recordation of the sale provided the plaintiff with constructive notice of the sale. *Commercial Servs. of Perry, Inc. v. FDIC*, 199 F.3d 778 (5th Cir. 2000).

Landowner's claim that county unconstitutionally took private road for public use through its activity in working on roadway accrued at time county began performing maintenance work on road; maintenance work did or should have put landowner on notice that county was claiming road as public road. *Taylor v. County of Copiah*, 937 F. Supp. 573 (S.D. Miss. 1994), *aff'd*, 51 F.3d 1042 (5th Cir. 1995).

Landowner's claim that county unconstitutionally took fee simple interest in eight feet of land joining public road instead of right of way easement as landowner intended to grant accrued, if at all, when landowner executed warranty deed to county and deed was filed in chancery clerk's office. *Taylor v. County of Copiah*, 937 F. Supp. 573 (S.D. Miss. 1994), *aff'd*, 51 F.3d 1042 (5th Cir. 1995).

Unconstitutional taking of abandoned railroad right of way that landowner believed he owned, allegedly caused by county land surveyor's survey of 1.5 acres, accrued, if at all, when survey was conducted for third parties or when deed to third parties was filed. *Taylor v. County of Copiah*, 937 F. Supp. 573 (S.D. Miss. 1994), *aff'd*, 51 F.3d 1042 (5th Cir. 1995).

An action in subrogation filed by a credit association which had purchased land under a foreclosure sale under its second deed of trust against the successors in title in January, 1967, to recover the amount which it had paid to the beneficiary of the first deed of trust in June of 1961, in payment of a delinquent payment owed to the beneficiary of the first trust deed by the grantor who had executed the deeds of trusts, was barred by the six-year



statute of limitations where the delinquent payment had been due in January of 1961, since the plaintiff credit association acquired no greater rights than those of its subrogor so that when the debt became barred, the plaintiff's right to enforce its remedy in equity on the deed of trust was likewise barred. *Meridian Prod. Credit Ass'n v. Edwards*, 231 So. 2d 806 (Miss. 1970).

Right of mortgagee, furnishing money to heirs, part of which was used to discharge ancestor's trust deeds, to be subrogated to such prior incumbrances as to heirs not signing trust deed, accrued, as regards running of limitations on payment of debt secured by such prior trust deeds. *Burton v. John Hancock Mut. Life Ins. Co.*, 171 Miss. 596, 157 So. 525 (1934), error overruled, 171 Miss. 605, 158 So. 474 (1935).

A purchaser's right of action for deceit based upon false representations as to the acreage or the number of feet in a tract of land sold accrues upon the completion of the sale induced by such false representation, or upon the consummation of the fraud, and will be barred if suit is not filed within six years thereafter, in the absence of concealment of the fraud. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

Where a second deed is made to correct first deed, six-year statute of limitations against action on warranty begins to run from the date of the second deed. *Wade v. Barlow*, 99 Miss. 33, 54 So. 662 (1911).

Where one conveys land owned by the United States and warrants the title, the covenant is broken when made, and the right of action accrues at once. *Pevey v. Jones*, 71 Miss. 647, 16 So. 252, 42 Am. St. R. 486 (1894).

The right of action on his covenant of warranty of a vendee of uncultivated land who acquires and enjoys a mixed possession along with the holder of a paramount title does not accrue until there is an interruption of his enjoyment of such possession. *Watkins v. Gregory*, 69 Miss. 469, 13 So. 696 (1891).

### 30. — — Insurance.

In an action involving ambiguous universal life insurance policies, a genuine issue of material fact existed as to when an alleged fraud was consummated on the

insureds and, therefore, when the statute of limitations, pursuant to Miss. Code Ann. § 15-1-49(2), began to run. *Hicks v. N. Am. Co. for Life & Health Ins.*, 47 So. 3d 181 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 588 (Miss. 2010).

In a case in which a bonding company moved for summary judgment, arguing that an entertainment company's complaint for breach of contract and bad faith denial of its claim was untimely, that argument failed. While both parties agreed the applicable limitation period was the three years provided for in Miss. Code Ann. § 15-1-49, the entertainment company's claim did not accrue until after its claim had been denied, not, as the bonding company argued, when the entertainment company first had notice of the construction defects. *C & I Entm't, LLC v. Fid. & Deposit Co. of Md.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89905 (N.D. Miss. Oct. 28, 2008).

Summary judgment was properly awarded to an insurer in an insured's suit for fraud, breach of contract, and negligent supervision because the insured's action was time-barred; the three-year statute of limitations began to run after the insured read the life insurance policy and expressed concern over its provisions. *Weathers v. Metro. Life Ins. Co.*, 14 So. 3d 732 (Miss. Ct. App. 2008), reversed by, remanded by 14 So. 3d 688, 2009 Miss. LEXIS 305 (Miss. 2009).

In a dispute between an insured and an insurer, a trial court erred in granting summary judgment for the insurer because the statute of limitations had not run; the insured filed suit within two years of discovering his premiums on his policy had increased. *Pate v. Consec Life Ins. Co.*, 971 So. 2d 593 (Miss. 2008).

Complaint by a Mississippi resident against an insurer arising out of uninsured motorist provisions of a policy was properly dismissed as time barred; the original complaint was properly refused by the circuit court clerk because it was signed by a Louisiana attorney who was not licensed to practice in Mississippi, and who had not been admitted pro hac vice. *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679 (Miss. 2007).



Where an insured alleged that an insurance agent misrepresented that a policy's annual premium payments would "vanish" after eight out-of-pocket payments, the insured had been put on notice of a possible misrepresentation in 1993 when the first of several additional payment notices was received, so a cause of action for fraudulent concealment accrued no later than 1993. *Wilbourn v. Equitable Life Assur. Soc'y of the United States*, 998 So. 2d 439 (Miss. Ct. App. 2007), reversed by, remanded by 998 So. 2d 430, 2008 Miss. LEXIS 602 (Miss. 2008).

Since the homeowners' claims against an insurance agent were time-barred pursuant to Miss. Code Ann. § 15-1-49 and the homeowners had not shown that they were not entitled to the benefits of tolling under Miss. Code Ann. § 15-1-67, the insurance agent was fraudulently joined since the homeowners had no possibility of recovery against the agent; the homeowners' motion to remand the case was denied. *Mendrop v. Shelter Mut. Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54783 (N.D. Miss. Aug. 4, 2006), dismissed by 2007 U.S. Dist. LEXIS 86902 (N.D. Miss. Nov. 26, 2007).

In light of a claim for wrongful denial of benefits, the applicable statute of limitations is Mississippi's catch-all statute of limitations found at Miss. Code Ann. § 15-1-49; that statute provides that all actions without a specific period of limitation must be commenced within three years after the cause of action occurred. *Heagy v. Hartford Life Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 43150 (N.D. Miss. June 26, 2006).

Summary judgment was granted to an insurer and an agent in a fraud action relating to the purchase of life insurance because it was time-barred under Miss. Code Ann. § 15-1-49 since the claim should have been filed three years from the completion of the sale; moreover, there was no fraudulent concealment tolling the limitations period since the purchaser was not precluded from discovering her claim in the language of the policy. *Warren v. Horace Mann Life Ins. Co.*, 949 So. 2d 770 (Miss. Ct. App. 2006).

Where Miss. Code Ann. § 15-1-49's three-year statute of limitations applied,

the insurer's motion for summary judgment was granted because the insured's allegation that the insurer failed to disclose pertinent terms of loan transactions and related contracts of insurance was time barred. Additionally, the insured's common defense argument may have been well received at the removal/remand stage of the litigation, but it was inapplicable in the court's summary judgment analysis. *Clark v. Commercial Credit Corp.*, 357 F. Supp. 2d 962 (S.D. Miss. Feb. 7, 2005).

Bank's claims that an insurer acted fraudulently in representing that an insurance policy purchased by the bank for one of its trusts could be paid for with a single premium payment was time-barred under the three-year statute of limitations in Miss. Code Ann. § 15-1-49, where the cause of action accrued in 1995 when the insurer informed the bank that additional payment might be due, as was stated in the policy, and the bank did not file suit until 2004. *Peoples Bank Asset & Trust Mgmt. Dep't v. Great W. Life & Annuity Ins. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16755 (S.D. Miss. Feb. 7, 2005).

Grant of summary judgment against the insureds was proper where their claim against the insurer after the driver insured was injured in an accident was barred by the statute of limitation under Miss. Code Ann. § 15-1-49 because the insurer was added as a defendant to the action more than three years after the extent of the driver insured's injuries was known. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So. 2d 336 (Miss. 2004).

Where plaintiff borrowers raised claims, including a claim that the borrowers were wrongfully charged for credit insurance products provided by defendant insurers, the borrowers' claims were governed by, at most, a three-year statute of limitations, under Miss. Code Ann. § 15-1-49(1), as the borrowers obtained their loans between 7 and 11 years prior to filing suit, their claims were time-barred. *Queen v. Am. Gen. Fin., Inc.*, 289 F. Supp. 2d 782 (S.D. Miss. 2003).

There was no statute of limitations problem in an action arising from the failure of an insurance company to refund an unearned premium on an installment contract, notwithstanding that the action

was not commenced until three years and six days after the installment contract was satisfied, since the insurance company did not have a duty to refund the unearned premium on the date that the contract was satisfied and did not have a duty to refund without notice of satisfaction of the contract. *Mic Life Ins. Co. v. Hicks*, — So. 2d —, 2000 Miss. App. LEXIS 299 (Miss. Ct. App. June 23, 2000), affirmed in part by, reversed in part by, remanded by 2001 Miss. LEXIS 296 (Miss. Oct. 31, 2001).

An insurance company's intervention in an injured worker's third-party tort claim to assert the company's right of subrogation is not subject to a statute of limitations bar so long as the original action was commenced by the injured worker (or his personal representative) within the applicable limitation period. *Mississippi Food & Fuel Workers' Comp. Trust v. Tackett*, 778 So. 2d 136 (Miss. Ct. App. 2000).

An action for the wrongful refusal to pay life insurance benefits accrues at the time of the specific refusal to pay. Thus, the statute of limitations did not begin to run on an action arising from an alleged wrongful refusal to pay life insurance benefits until the insurer notified the beneficiary that it would not pay the benefits. *Young v. Southern Farm Bureau Life Ins. Co.*, 592 So. 2d 103 (Miss. 1991).

This section [Code 1942, § 722] was not abridged by a holding that a cause of action for disability benefits under a group insurance policy did not arise until due proof thereof was made, where the policy required due proof of permanent disability in order to recover benefits. *Metropolitan Life Ins. Co. v. Lindsey*, 184 Miss. 359, 185 So. 573 (1939).

Where disability benefits under an insurance policy were payable at the end of each year, a cause of action accrued for each of them when respectively due, and not before, so that installments which became due more than six years before the commencement of an action for such disability payments, were barred but the remainder were not. *Columbian Mut. Life Ins. Co. v. Craft*, 186 Miss. 234, 185 So. 225 (1938).

Action on life policy brought after insured's death by beneficiary who con-

tended insurer had wrongfully declared policy void during insured's lifetime, held not barred by limitations because brought more than six years after last premium was remitted by insured, since beneficiary had right to treat policy as in force and delay suit until it became payable upon insured's death. *Callender v. Lamar Life Ins. Co.*, 182 Miss. 609, 182 So. 119 (1938).

Cause of action on double indemnity clause of life policy accrued to beneficiary at time of insured's death or within a reasonable time thereafter. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

Cause of action on disability policy held not to have accrued at time insurer disavowed further liability so as to be barred by limitations, since insurer incurred continuing obligation under its contract and insured had no right to recover payments due prior to due date. *Atlantic Life Ins. Co. v. Serio*, 171 Miss. 726, 157 So. 474 (1934).

Jury finding that death occurred on day of disappearance does not render action on life insurance policy barred by six-year statute as proof of death could not be made out until expiration of seven years. *New York Life Ins. Co. v. Brame*, 112 Miss. 828, 73 So. 806 (1917).

### 31. — —Notes and bonds.

Complaint alleging violations of the Mississippi Uniform Commercial Code concerning forced insurance for loans accrued on the dates of plaintiff borrower's disclosure statement, and absent evidence of an affirmative act preventing the borrower from discovering the claims, the three-year Mississippi statute of limitations, Miss. Code Ann. § 15-1-49(1) was not tolled and the claims were time-barred. *Johnson v. Citifinancial, Inc.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22527 (S.D. Miss. Feb. 7, 2003).

Where note secured by deed of trust was extended from time to time, but fact of extensions was not noted on margin of record of deed of trust before remedy to enforce it appeared on face of record to be barred, or within six months thereafter, that no cause of action accrued in favor of indorser of note until he paid debt, held immaterial as affects rights of subsequent purchasers without notice. *Lampton-Reid*



Co. v. Allen, 177 Miss. 698, 171 So. 780 (1937).

Note containing promise to pay "on demand after date" held due and payable on day following date thereof, as regards limitation. S.S. Finger Mercantile Co. v. Adair, 159 Miss. 303, 131 So. 875 (1931).

Six-year statute did not begin to run against note payable on demand until actual demand was made. Spiro v. Shapleigh Hdwe. Co., 153 Miss. 81, 118 So. 429 (1928), motion denied, 153 Miss. 195, 119 So. 206 (1928).

When demand for interest due on corporate bonds was refused and the principal thereof became at once due and payable in accordance with the provisions of the bonds, the owner's right to collect then and there accrued and the running of limitations must be computed from that date. Central Trust Co. v. Meridian L. & Ry., 106 Miss. 431, 63 So. 575 (1913), error overruled, 64 So. 216 (Miss. 1914).

### 32. — —Banking.

Facts that individuals claimed a bank employee failed to disclose could have been discovered by the individuals through reasonable diligence more than three years before they filed suit; there was no reasonable possibility that the individuals could establish a claim against the resident defendant and the discovery rule under Miss. Code Ann. § 15-1-49(2) did not toll the statute of limitation. Stacher v. Am. Gen. Fin., Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 18713 (S.D. Miss. Mar. 7, 2003).

Where in 1943 a bank by mistake credited a deposit to an account of a brother of depositor and both accounts remained inactive until January 1949, when the brother withdrew his account and the bank did not discover the mistake until March 1951 when the active depositor presented his pass book, the cause of action for restitution of the funds did not arise until January 1949 and neither the three- nor the six-year statute of limitation barred suit thereon brought on June 1951. Van Zandt v. First Nat'l Bank, 220 Miss. 127, 70 So. 2d 327 (1954).

Where a bank paid a check to a person other than the drawer, under the belief that the indorsement was genuine, the six-year statute started to run from the

date that the bank rendered drawer a statement showing the check to be charged against it. Masonic Benefit Ass'n of Stringer Grand Lodge v. First State Bank, 99 Miss. 610, 55 So. 408 (1911).

### 33. — —Contracts.

In a case in which a buyer sued a software seller for contract claims based on a services agreement, the transaction was governed by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, and the trial court did not err in dismissing as barred by the statute of limitations the buyer's service contract claims. Peavey Elecs. Corp. v. Baan U.S.A., Inc., 10 So. 3d 945 (Miss. Ct. App. 2009).

Where borrowers signed a loan agreement in 1995 and brought suit against the lender in 2001, claims such as fraud and breach of covenant of good faith and fair dealing, which were governed by the 3-year statute of limitations, were time-barred because the claims arose at the time of the execution of the loan as opposed to at the time that the borrowers were first made aware that better terms existed. Since the borrowers signed and received a copy of the loan containing all the payment terms, they were on notice of the terms complained of as of the time of the execution of the loan agreement in 1995, and the statute of limitations began to run at that time. CitiFinancial Mortg. Co. v. Washington, 967 So. 2d 16 (Miss. 2007).

Statute of limitations did not run against an attorney and a real estate specialist in the mother and son's action for breach of contract because a Florida property was never sold; because a component of the contract remained to be fulfilled, the statute of limitations had not yet begun to run. Bailey v. Estate of Kemp, 955 So. 2d 777 (Miss. 2007).

Insurer was awarded summary judgment in a debtor's action alleging that the insurer illegally bundled insurance products with loans that the debtor obtained from a creditor because the debtor's claims were barred by the three-year statute of limitations in Miss. Code Ann. § 15-1-49(1); the debtor's claims "accrued" on the dates that he entered into the loans.



Donald v. Pioneer Credit Co., 374 F. Supp. 2d 495 (S.D. Miss. June 21, 2005).

Trial court did not err in denying motions to dismiss the borrower's claim because the borrower never received reasonable notice of the accounting method used by the lender and the statute of limitation never began to run until, presumably, documents were produced during discovery; however the other borrower did receive reasonable notice of the lender's activities and the statute of limitation began to run earlier and did bar his action against the lender. *American Bankers' Ins. Co. v. Oliver*, 819 So. 2d 1196 (Miss. 2001).

An immediate action based upon an anticipatory breach is a different cause of action from that based on the nonperformance at the contract time, and limitation period does not begin to run upon nonperformance of contractual duty until the cause of action accrues and the duty of performance continues in spite of repudiation. *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 52 So. 2d 650 (1951), suggestion of error overruled, opinion modified, 212 Miss. 67, 54 So. 2d 170 (1951).

Acceptance of counter proposal altering original contract constitutes new contract from which running of 6-year statute will be computed. *Edward Thompson Co. v. Foy*, 115 Miss. 848, 76 So. 685 (1917).

### 34. — Negligence cases.

Relying on a directive from the Mississippi Supreme Court in the Edwards decision, the United States Court of Appeals for the Fifth Circuit found that, under Miss. Code Ann. § 15-1-49, a daughter's cause of action for wrongful death accrued when the mother was diagnosed with breast cancer, not when knowledge of the injury and its cause were known. *Barnes ex rel. Barnes v. Koppers Inc.*, 534 F.3d 357 (5th Cir. 2008).

Discovery rule of Miss. Code Ann. § 15-1-49(2) barred as untimely plaintiff's action against a manufacturer for an allegedly defective implantable cardioverter defibrillator (ICD) because reasonable diligence would have put plaintiff on notice that the death of the decedent could have been caused by the ICD and that some negligent conduct occurred. *Greer v. Medtronic, Inc.*, — F. Supp. 2d —, 2008

U.S. Dist. LEXIS 34376 (N.D. Miss. Apr. 25, 2008).

Where borrowers signed a loan agreement in 1995 and brought suit against the lender in 2001, negligence claim governed by the 3-year statute of limitations was time-barred because it arose at the time of the execution of the loan, when plaintiffs signed and received a copy of the terms of the contract, as opposed to at the time that the borrowers were first made aware that better terms existed. *CitiFinancial Mortg. Co. v. Washington*, 967 So. 2d 16 (Miss. 2007).

Insurance agent's cause of action against the insurer did not accrue or occur pursuant to Miss. Code Ann. § 15-1-49(1) until the insureds filed suit against him in 2000; the agent did not have a cause of action when the policy was sold in 1990, nor was he or should have been aware of the fraud allegedly committed by the insurer upon him and the insureds. *Bullard v. Guardian Life Ins. Co. of Am.*, 941 So. 2d 812 (Miss. 2006).

Discharged Chapter 7 debtor's legal malpractice claim against his bankruptcy attorney for alleged negligence in handling case arose prepetition, and thus was estate property, despite debtor's claim that he was not injured until indicted, post-discharge, for bankruptcy fraud; debtor and attorney had prepetition relationship required to treat claim as arising when alleged misconduct occurred, and debtor should have discovered any discrepancies between actual assets and those listed on petition when he signed petition, as required for claim to accrue under Mississippi law. *Wheeler v. Magdovitz*, 137 F.3d 299 (5th Cir. 1998).

In a negligence action against a tobacco company arising out of lung cancer allegedly sustained by the plaintiff as a result of cigarette smoking, the statute of limitations under § 15-1-49 commenced to run upon discovery of the lung cancer. *Schiro v. American Tobacco Co.*, 611 So. 2d 962 (Miss. 1992).

A discovery rule would be adopted in conjunction with § 15-1-49 in the case of a negligence or products liability cause of action involving latent disease; the discovery rule adopted is identical to the rule provided in § 15-1-49(2). The cause of

action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease. *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704 (Miss. 1990).

Medical malpractice action was not barred by statute of limitations where alleged negligent act occurred on June 28, 1974, foreign object was discovered in lining of patient's heart on June 21, 1982, and action was filed on June 14, 1984, because enactment of specific statute of limitations, § 15-1-36, dealing with malpractice tort claims, controlled over general statute, § 15-1-49; specific statute defined date of accrual of action as being date of alleged act, omission, or neglect, or date injury would or with reasonable diligence might have been first known or discovered, and provided that it applied to claims which accrued on or after July 1, 1976; fact that different definition of accrual may have been accepted with respect to general 6-year statute of limitations was beside point, because that definition had been superseded by specific statute of limitations. *Kilgore v. Barnes*, 508 So. 2d 1042 (Miss. 1987).

### 35. — Heirship.

Suit to establish heirship was well within 6 year limitation period from event triggering running of statute, which was receipt of notice of heir's potential interest in property, because statute does not begin to run until heir knows his status has been questioned and is not required to bring suit to establish rights unless and until there is question concerning his status as heir. *Matter of Heirship of McLeod* (Miss. 1987) 506 So. 2d 289 *In re Heirship of McLeod*, 506 So. 2d 289 (Miss. 1987).

An illegitimate daughter's petition to determine heirship was not a paternity action, and therefore was not barred by § 15-1-49 when she failed to file suit within six years of reaching majority, since under § 91-1-15, the determination of heirship could not be made prior to the decedent's death, and, until then, her cause of action did not accrue. *Webber v. Kidd*, 435 So. 2d 632 (Miss. 1983).

### 36. — Joint causes of action.

A joint right of action for waste which accrues to remaindermen while they are

infants is not barred by limitation as to any of them until the lapse of the statutory period after the youngest has attained his majority; but a joint right of action therefor which accrues to them after the eldest has attained his majority is barred as to all of them after the lapse of the statutory period. *Learned v. Ogden*, 80 Miss. 769, 32 So. 278 (1902).

The six years' limitation applies to claims of adult heirs for rent of land procured from their mother by duress, and is not suspended as to them by the minority of other heirs, the claims not being necessarily joint. *Allen v. Leflore County*, 80 Miss. 298, 31 So. 815 (1902).

Where at the accrual of a joint cause of action one of the parties is not under disability the statute will run against all and when one is barred all are. *Stauffer v. British & Am. Mtg. Co.*, 77 Miss. 127, 25 So. 299 (1899).

### 37. — Computation of limitation period.

Where defendant has not been in the state at all, as well as where he resided here when the cause of action accrued and subsequently removed, in computing the six years the time of his absence is not to be counted. *Robinson v. Moore*, 76 Miss. 89, 23 So. 631 (1898).

If a judgment by default, valid on its face, is vacated at a subsequent term on motion of defendant, and he pleads the statute of limitations, the time elapsed since the declaration was filed cannot be computed. *Kelly v. Harrison*, 69 Miss. 856, 12 So. 261 (1892).

### 38. — Tolling of statute.

Although the filing of a personal injury lawsuit tolled the three-year statute of limitations under Miss. Code Ann. § 15-1-49 four days before its expiration, the limitations period resumed running at the end of the service of process period under Miss. R. Civ. P. 4(h) and, thus, dismissal with prejudice was proper where process was not served until six days after the expiration of the 120-day service period. *Stutts v. Miller*, 37 So. 3d 1 (Miss. 2010).

In a case in which five car buyers brought their state law claims against an auto financier more than six years after their financing transactions, those claims



were untimely. The claims were subject to the three-year limitations period in Miss. Code Ann. § 15-1-49(1), and the buyers could not toll the limitations period by using Miss. Code Ann. § 15-1-67 because they simply failed to allege a subsequent act of concealment separate from the alleged fraud underlying the cause of action. *Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506 (5th Cir. 2008).

In a wrongful death case, a daughter's claim was barred by the statute of limitations in Miss. Code Ann. § 15-1-49. She raised her 42 U.S.C.S. § 9658 claim as an afterthought, and she overbroadly construed its preemptive scope; the daughter's plea for the tolling of Miss. Code Ann. § 15-1-49 by means of 42 U.S.C.S. § 9658 was rejected. *Barnes ex rel. Barnes v. Koppers Inc.*, 534 F.3d 357 (5th Cir. 2008).

Excess insurer's fraud and other tort claims against parties involved in settling medical malpractice claims against two doctors were barred under the limitations periods in Miss. Code Ann. §§ 15-1-35, 15-1-49, which were not tolled under Miss. Code Ann. § 15-1-67 because a letter from counsel for one of the doctors, which letter was written one year before the insurer filed suit, invited the excess insurer to discuss the withdrawal of the doctor's consent to settle, which the excess insurer alleged led to its payment obligations on behalf of another doctor whose primary coverage was exhausted, and counsel's letter did not attempt to conceal anything from the excess insurer. *Nat'l Union Fire Ins. Co. v. Blasio*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 42669 (N.D. Miss. May 23, 2008).

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were improperly dismissed, he was denied his right to a jury trial as set forth in Miss.

Const. Art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764 (Miss. 2007).

Insureds' claims against financial services companies were barred by a three-year limitations period of Miss. Code Ann. § 15-1-49(1) and there was no basis for tolling due to fraudulent concealment in that the insureds were bound by the contents of the contracts they signed that contained the purchase of insurance with the loan, whether or not they read them, and there was no evidence of subsequent affirmative acts of concealment. *Clay v. First Family Fin. Servs.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 58385 (N.D. Miss. Aug. 18, 2006).

Plaintiff's personal injury claims against the manufacturers of products that allegedly contained asbestos were time-barred under the three-year statute of limitations in Miss. Code Ann. § 15-1-49; although plaintiff properly filed his complaint within three years of his asbestosis diagnosis and the statute of limitations was tolled during the 120-day period in which plaintiff had to effect service of process, where plaintiff failed to effect service within 120 days, the statute of limitations resumed running and expired before plaintiff could refile his complaint. *Riley v. Ga. Pac. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Where borrowers claimed that they were misled into believing that they needed to obtain credit life and disability insurance in order to obtain loans, the court found that the borrowers' claims, which accrued more than three years before the lawsuit was filed, were time-barred pursuant to Miss. Code Ann. § 15-1-49; tolling pursuant to Miss. Code Ann. § 15-1-67 was inapplicable because of affirmative disclosures made in the borrowers' loan applications and the Federal Disclosure Statements. *Benson v. Am. Heritage Life Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 49851 (S.D. Miss. July 14, 2006).

Because a nationwide class action brought against defendant lenders in state court was filed more than three



years after plaintiff borrowers' loan transactions, the class action did not toll the limitations period and could not revive the borrower's claims which were already barred under Miss. Code Ann. § 15-1-49. *Smith v. First Family Fin. Servs.*, 436 F. Supp. 2d 836 (S.D. Miss. 2006).

Summary judgment for bank was affirmed pursuant to statute of limitations in Miss. Code Ann. § 15-1-49 as the bank customer's possession of bank documents with clear statements presented on their face negated the bank customer's argument that the statutory period should be extended beyond the three year period due to fraudulent concealment by the bank. *Morgan v. Citizens Bank*, 912 So. 2d 1133 (Miss. Ct. App. 2005).

Consumers' civil antitrust action, which was filed against a distributor, was subject to the period of limitations for latent injuries, under Miss. Code Ann. § 15-1-49(2), because the undertaking of a criminal conspiracy was seldom if ever, announced to the public, and the efforts of the distributor to engage in price fixing was just such a conspiracy. *Carder v. BASF Corp.*, 919 So. 2d 258 (Miss. Ct. App. 2005).

Insureds' fraud and misrepresentation claims arising out of the purchase of life insurance were dismissed pursuant to Fed. R. Civ. P. 12 (b)(6) because the action was barred by the statute of limitations, Miss. Code Ann. § 15-1-49, since the insureds did not allege that defendants engaged in any affirmative act or conduct that prevented the insureds from discovering their claims, which would have invoked the tolling provisions of the fraudulent concealment statute, Miss. Code Ann. § 15-1-67. *O'Bannon v. Guardian Life Ins. Co. of Am.*, 331 F. Supp. 2d 476 (S.D. Miss. Aug. 4, 2004).

Plaintiff who filed a complaint against a defendant but did not serve the complaint on the defendant within a 120-day period had to either re-file a complaint before the statute of limitation ran or show good cause for failing to serve process on the defendant within that 120-day period, otherwise, dismissal was proper; although tolled for the 120 days after the complaint was filed, the statute of limitations, Miss. Code Ann. § 15-1-49, expired before the

December 3 summons was issued, and the statute of limitations expired long before the victim filed his amended complaint in February 2003. *Williams v. Fornett*, 906 So. 2d 810 (Miss. Ct. App. 2004).

Where investors alleged that investment companies were aware of their agent's conversion of the investors' funds before the criminal activity was publicly disclosed, neither fraudulent concealment nor equitable estoppel applied to toll the limitations periods; after the agent's misconduct was discovered, the investors delayed filing their complaints against the companies until well after the limitations periods expired and there was no conduct of the companies that caused the investors' undue delay. *Joe v. Minn. Life Ins. Co.*, 337 F. Supp. 2d 821 (S.D. Miss. 2004).

Summary judgment was granted to corporations' on fraudulent misrepresentation claims because the tolling provisions of Miss. Code Ann. § 15-1-67 were inapplicable, and thus individuals' claims were barred by the three year statute of limitation in Miss. Code Ann. § 15-1-49, where there was no evidence that the corporations engaged in affirmative acts of concealment that prevented the individuals from discovering their claims in a timely manner, in that the individuals' allegations instead focused on the corporations' alleged conduct prior to, and contemporaneous with, the purchase of the insurance policies. *Bland v. Fleet Fin., Inc.*, 318 F. Supp. 2d 392 (N.D. Miss. 2004).

Claims arising from loans that were used to buy insurance were time-barred because the insureds failed to prove an affirmative act of fraudulent concealment after completion of the insurance sales in order to toll the statute of limitations. *Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003), cert. denied, — U.S. —, 126 S. Ct. 335, 163 L. Ed. 2d 48 (2005).

Borrower's misrepresentation and negligence claims against a credit insurer's employee were time-barred and the statute was not tolled under Miss. Code Ann. § 15-1-67 because the borrower received, but did not read, copies of all pertinent documents, which clearly stated that credit insurance was optional. *Bell v. Am. Gen. Fin., Inc.*, 267 F. Supp. 2d 582 (S.D. Miss. 2003).

Purchasers alleged facts sufficient to invoke the fraudulent inducement exception to the parole evidence rule because their allegations arose almost entirely out of false representations made by the agents to induce them to enter into contracts; therefore, given Mississippi precedent supporting a claim for fraud where the plaintiff did not read the contract but instead relied on the agent's misrepresentations, the purchasers stated an arguably reasonable basis that they could establish a claim for fraudulent concealment, that the three-year statute of limitations under Miss. Code Ann. § 15-1-49 had been tolled by fraudulent concealment, and that their claims were not time-barred. *Anderson v. Equitable Life Assur. Soc'y of the United States*, 248 F. Supp. 2d 584 (S.D. Miss. 2003).

The rule of concealed fraud did not toll the statute of limitations in an action by a judgment creditor alleging a fraudulent conveyance of real property by the judgment debtor as the rule of concealed fraud cannot apply to matters of public record. *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869 (Miss. 2001).

The defendant was not equitably estopped from asserting the limitations period in an action to enforce a promissory note, notwithstanding that he continued to make 74 monthly payments after the balloon payment on the note became due, as there was no evidence that the plaintiff relied on the defendant or that he sought to induce the plaintiff's reliance. *EB, Inc. v. Smith*, 757 So. 2d 1017 (Miss. Ct. App. 2000).

The limitations period for the enforcement of a promissory note was not tolled by the fact that the defendant continued to make 74 monthly payments after the balloon payment on the note became due since such payments did not unequivocally acknowledge when the balance was due, to whom the balance was due, and for what the balance was due, and, moreover, such payments did not contain a specification of the debt referred to and a promise to pay a fixed amount. *EB, Inc. v. Smith*, 757 So. 2d 1017 (Miss. Ct. App. 2000).

The discovery rule applied in an action seeking damages to property caused by

the disposal of oil field waste buried in pits upon the property, where the waste included radioactive material produced by oil and gas exploration, and where the presence of the radioactive waste was detectable only through the use of a survey meter. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161 (Miss. 1999).

The discovery rule is inapplicable in actions involving conversion of negotiable instruments unless the defendant asserting the statute of limitations is involved in the fraudulent concealment. *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144 (Miss. 1998).

The statute of limitations in a legal malpractice action was not tolled through fraudulent concealment even if the defendant attorney did fraudulently conceal his negligence since the plaintiffs, through the exercise of reasonable diligence, should have been able to discover the attorney's negligence more than 6 years prior to the date on which the complaint was filed where there was very little that the plaintiffs alleged in their complaint that they did not know 9 years before the malpractice suit was filed. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

Products liability action against manufacturer of drug stelazine was barred by 6-year statute of limitations in § 15-1-49, where last incidence of prescription of drug and onset of symptoms of side-effect condition occurred more than 6 years prior to commencement of suit; statute of limitations was not tolled because there was no evidence of fraudulent concealment of the plaintiff's condition. *Lindley v. Hamilton*, 883 F.2d 360 (5th Cir. 1989), reh'g denied, 892 F.2d 78 (5th Cir. 1989).

In an action for wrongful death filed by the surviving spouse and children after the statutory limitation period had passed, § 15-1-59, the savings statute, did not toll the limitations period in favor of the children, since the surviving spouse was a person in esse who had the right to file suit for wrongful death during the six-year limitation period after decedent's death, and thus the action was barred. *Arender v. Smith County Hosp.*, 431 So. 2d 491 (Miss. 1983).

Even though partial payment on a note executed and delivered in Alabama might



operate in substance as a new promise under the Alabama law, the Mississippi statute relating to the remedy would be applicable in case of an attempt to enforce the obligation in Mississippi, and therefore such payments in Alabama would not toll the running of the limitation period, in view of a statutory provision that in actions founded upon contracts the case would not be taken out of the operation of the limitation statute, unless an acknowledgment or promise of the indebtedness should be made in writing signed by the party chargeable therewith. *Montgomery v. Yarbrough*, 192 Miss. 667, 6 So. 2d 925 (1942).

In absence of proof of concealed fraud on part of insurer with respect to cause of insured's death which would toll statute of limitations until discovery of true facts, action for double indemnity benefits held barred by six-year statute. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

The filing of declaration on November 14, 1936, with request to circuit clerk to issue summons at once in action on note which was due November 15, 1930, constituted the beginning of a suit which stopped running of six-year statute of limitation, notwithstanding clerk delayed issuance of summons until November 18, 1936, and summons was not served until December 3, 1936. *Wood v. Peerey*, 179 Miss. 727, 176 So. 721\* (1937).

Statement in trust deed that former trust deeds by grantors or grantor and wife remained in full force was promise to pay tolling limitation statute. *Herron v. Land*, 151 Miss. 893, 119 So. 823 (1929).

Where wife signed homestead trust deed husband's acknowledgment in writing of debt before bar of limitation statute bound wife. *Herron v. Land*, 151 Miss. 893, 119 So. 823 (1929).

### 39. Particular cases; miscellaneous.

Court of appeals erred in reversing an order granting an employer's motion for summary judgment in a widow's action alleging bad faith for failing to timely pay workers' compensation benefits because the Mississippi Workers' Compensation Commission's final judgment affirming an administrative law judge's order awarding the widow benefits marked the end of

its involvement in the case, and since the widow's suit was filed more than three years later, it was time-barred under the general three-year statute of limitations, Miss. Code Ann. § 15-1-49; the plain language of Miss. Code Ann. § 71-3-51 provided that "the final award of the Commission shall be conclusive and binding unless either party shall appeal," and since no party appealed the Commission's decision, the "unless" qualifier was irrelevant, and according to the statute's very specific, unambiguous language, the Commission's award was "final" and "conclusive and binding." *Harper v. Cal-Maine Foods, Inc.*, 43 So. 3d 401 (Miss. 2010).

Plaintiff's claim for breach of contract against an asbestos manufacturer was unsuccessful because plaintiffs did not timely submit their settlement documents to the manufacturer, as required by the settlement agreement, and the action was time-barred by Miss. Code Ann. § 15-1-49(1). *Everitt v. Pneumo Abex, LLC*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 115837 (S.D. Miss. Dec. 10, 2009), reversed by, remanded by 411 Fed. Appx. 726, 2011 U.S. App. LEXIS 2944 (5th Cir. Miss. 2011).

Whether lender's claims were founded upon unwritten contracts, making them subject to the three-year limitations of Miss. Code Ann. § 15-1-29, or whether they fell within the general three-year limitations of Miss. Code Ann. § 15-1-49, the result was the same where (i) the last payment made upon the loans was in March 2001, (ii) the action to collect on the delinquent loans was filed in January 2005, (iii) the action to collect on the delinquent loans was filed approximately three years and ten months from the date of default, and (iv) the fact that the lender was fully aware that no payments were being made on these delinquent loans between March 2001 and January 2005 was beyond debate; thus, the claims were time-barred. *Morgan v. Stevens*, 989 So. 2d 482 (Miss. Ct. App. 2008).

After a guardianship account was drained, the twenty-four-year-old ward sued the bank for breaching its duty by allowing the funds on deposit to be converted without a court order. The claim was barred by the three-year statute of



limitations set forth in Miss. Code Ann. § 15-1-49, because it was not filed within three years of the ward turning twenty-one. *Williams v. Duckett* (In re *Duckett*), 991 So. 2d 1165 (Miss. 2008).

Beneficiaries' action was not purely and exclusively equitable and they sought no equitable relief and did not seek to impose a constructive trust; the beneficiaries sought purely legal relief, namely compensatory and punitive money damages, such that the cause of action and the remedy of the case were not purely and exclusively equitable and the chancellor did not err in applying the general six-year statute of limitations of Miss. Code Ann. § 15-1-49. *Winters v. AmSouth Bank*, 964 So. 2d 595 (Miss. Ct. App. 2007).

Since accrued royalties were personal property and not an interest in land, Miss. Code Ann. § 15-1-7 was inapplicable; there being no specific statute of limitations for actions seeking recovery of accrued royalties, the general, three-year statute of Miss. Code Ann. § 15-1-49(1) required the trustee to bring the action against the oil companies within three years next after the cause of such action accrued. *Nygaard v. Getty Oil Co.*, 918 So. 2d 1237 (Miss. 2005).

Customers' claims that they were fraudulently induced by insurance company employees to purchase credit insurance policies in connection with consumer loans were barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49 because all claims accrued at the time the loan agreements were executed because the customers were charged with notice where it was undisputed that each loan agreement contained an insurance disclosure which informed the borrower that credit insurance was not required and that the decision to make the loan would not be affected by the borrower's decision. The customers failed to establish or allege any fraudulent concealment, therefore the customers could not avail themselves of the tolling mechanism provided under Miss. Code Ann. § 15-1-67. *Andrus v. Ellis*, 887 So. 2d 175 (Miss. 2004).

Three statutes of limitation in Miss. Code Ann. § 15-1-49(1) applied to bar

landowners' claim against the city for failing to enforce a contract with a railroad to maintain a city bridge. *Hobson v. City of Vicksburg*, 874 So. 2d 1026 (Miss. Ct. App. 2004).

In an action by Mississippi borrowers against an out-of-state lender and four Mississippi employees of the lender, the borrowers' myriad claims against the employees were barred by the three-year limitation period of Miss. Code Ann. § 15-1-49(1) and the employees had to be dismissed from the action, where the borrowers alleged that defendants wrongfully induced the borrowers to buy credit insurance when the borrowers obtained their loans, and where Miss. Code Ann. § 15-1-67 did not toll the limitation period because the loan documents clearly showed that credit insurance was being purchased. *Frye v. Am. Gen. Fin., Inc.*, 304 F. Supp. 2d 876 (S.D. Miss. 2004).

In borrowers' suit against lenders, insurers, and individuals, arising from loan transactions, removal was appropriate based upon diversity of citizenship because the individuals were fraudulently joined; the claims against the individuals were time-barred and the borrowers failed to show fraudulent concealment for tolling of the statute of limitations. *Owens v. First Family Fin. Servs.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25345 (S.D. Miss. May 29, 2003).

Though a 29-year-old alleged son filed a paternity action not to enforce his alleged father's child support obligations, but for the sole purpose of knowing his ancestry, the trial court properly dismissed the case as time-barred; whether Miss. Code Ann. §§ 93-9-9 or 15-1-49 was the applicable statute of limitations was immaterial, as under the former, his suit was time-barred when he turned 21, and under the latter, when he turned 24 (i.e., three years after he turned 21). *Autrey v. Parson*, 864 So. 2d 294 (Miss. Ct. App. 2003), cert. denied, — U.S. —, 125 S. Ct. 216, 160 L. Ed. 2d 49 (2004), cert. denied, 864 So. 2d 282 (Miss. 2004).

The three-year limitation provided for in the statute applied to an action by a judgment creditor in which it was alleged that the judgment debtor had fraudulently conveyed real property to his son.

O'Neal Steel, Inc. v. Millette, 797 So. 2d 869 (Miss. 2001).

An action by an inmate regarding whether the forfeiture of his money and gold coins was legally had was barred by the statute of limitations where the inmate received notice of the forfeiture proceeds in 1989 but did not commence his action until seven years later. *Sheriff v. Morris*, 767 So. 2d 1062 (Miss. Ct. App. 2000).

An action against a bank arising from its attempt to collect a balance on a credit card which was stolen from the plaintiff was barred by the statute of limitations since the plaintiff failed to assert any acts of negligence by the bank after December 13, 1991, when \$49.00 was erroneously charged to his account. Later actions by the bank in referring the account to several collection agencies did not constitute additional negligent activities for purposes of the statute of limitations. *Hazzard v. Chase Manhattan Corp.*, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 10812 (N.D. Miss. July 21, 2000), affirmed by 275 F.3d 1078, 2001 U.S. App. LEXIS 25707 (5th Cir. Miss. 2001).

A suit against state of Mississippi education officials for alleged violation of educational rights assured under Art 4 of the Mississippi Constitution of 1868-1869 was time barred under § 15-1-49, as the plaintiffs could not demonstrate that they were not aware of the harm inflicted by the Mississippi Constitution more than 3 years prior to the bringing of the suit. *A-1 By D-2 v. Molpus*, 906 F. Supp. 375 (S.D. Miss. 1995).

The limitation of action period provided in § 15-1-49 applies to claims for deprivation of property brought pursuant to 42 USC § 1983. *Bankston v. Pass Rd. Tire Ctr., Inc.*, 611 So. 2d 998 (Miss. 1992).

Where plaintiff, recipient of certain scholarship funds as financial assistance for medical school costs and tuition, was required to fulfill 4 year service obligation at approved health care facility, and signed private practice assignment agreement with health care facility, with such agreement stating that it would be "negotiable at the end of one year", and accepted employment there, but was terminated 10 months later with the

termination being memorialized as a non-renewal of employment agreement, § 15-1-35 was not applicable to portion of complaint alleging termination of his employment, rather appropriate provision was "catch all" statute of limitations § 15-1-49. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

Mississippi's general statute of limitations is considered procedural and therefore applies to actions in Mississippi arising under laws of another jurisdiction. *Bastoe v. Sterling Drug, Inc.*, 683 F. Supp. 586 (S.D. Miss. 1988).

The 10-year limitation of § 15-1-39 is applicable to both express and implied trusts. However, the application of § 15-1-39 is limited in that the cause of action and the remedy of the case must be purely and exclusively equitable or the general 6-year statute of limitations will be applied. *Wholey v. Cal-Maine Foods, Inc.*, 530 So. 2d 136 (Miss. 1988).

Once *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938, was decided, public was fairly on notice that in Mississippi one-year limitations period might well be chosen over 6-year limitations period as more appropriate period for actions under 42 USCS § 1983. *Hanner v. Mississippi*, 833 F.2d 55 (5th Cir. 1987).

Even if § 15-1-49 was applicable to disciplinary proceedings against an attorney, it would not be a bar to an action against the attorney by the State Bar, where the Bar had no way of knowing of attorney's failure to establish a guardianship account. *Pitts v. Mississippi State Bar Ass'n*, 462 So. 2d 340 (Miss. 1985).

A party who pled the ten-year statute of limitations in § 15-1-7 could not thereafter on appeal claim that she had sufficiently raised the general limitation statute of six years set forth in § 15-1-49. *Watson v. Miller*, 409 So. 2d 715 (Miss. 1982).

A suit on a credit memorandum issued to plaintiff in 1958 was barred by the 6 year statute of limitations where the period for demand was not indefinite, where plaintiff made no attempt to use the credit between 1958 and 1972, and where it did not communicate with defendant at all



concerning the credit between 1963 and 1972; nor was the statute of limitations tolled until defendant's successor corporation first qualified to do business in Mississippi where such contention was raised for the first time on appeal and there was no showing that consideration of such issue was necessary to prevent a miscarriage of justice. *Valley Cement Indus., Inc. v. Midco Equip. Co.*, 570 F.2d 1241 (5th Cir. 1978), reh'g denied 573 F.2d 308 (5th Cir. 1978).

Mississippi's general statute of limitations is considered procedural and therefore applies to actions in Mississippi arising under laws of another jurisdiction. *Bastoe v. Sterling Drug, Inc.*, 683 F. Supp. 586 (S.D. Miss. 1988).

This section governed the tort aspect of an action alleging that a television set malfunctioned, causing a fire that destroyed most of plaintiffs' home, but was inapplicable to their breach of implied warranties claim; plaintiffs' negligence and strict liability in tort claims were not time-barred under this section, even though the television set had been manufactured and sold more than six years before the action was commenced, where there was no showing that plaintiffs knew or should have known of the alleged defect prior to the fire and the statute of limitations thus did not begin to run until the date of the fire. *Maly v. Magnavox Co.*, 460 F. Supp. 47 (N.D. Miss. 1978).

Although plaintiff's action for abuse of process and malicious prosecution was primarily based on his 1964 arrest and 1966 conviction for criminal contempt, where the prosecution against him was not finally dismissed until August, 1968, his cause of action accrued within six years prior to commencement of suit in September, 1969. *Hyde Constr. Co. v. Koehring Co.*, 387 F. Supp. 702 (S.D. Miss. 1974), rev'd on other grounds sub nom. *Dunn v. Koehring*, 546 F.2d 1193 (5th Cir. 1977), decision clarified on reh'g, 551 F.2d 73 (5th Cir. 1977).

A counterclaim for replevin of goods sold under a written conditional sales contract is governed by the 6-year statute of limitations. *Paul O'Leary Lumber Corp. v. Mill Equip., Inc.*, 332 F. Supp. 1144 (S.D. Miss. 1970), aff'd, 448 F.2d 536 (5th Cir. 1971).

Stockholder's action for redemption of corporate stock, which had been pledged as collateral to secure an indebtedness, and for an accounting would have been barred in six years after knowledge of the action of the corporation in claiming legal title thereto and retiring the stock. *Hudson v. Belzoni Equip. Co.*, 203 Miss. 212, 33 So. 2d 796 (1948).

#### 40. — Insurance.

Insureds' claim for negligent misrepresentation, which alleged that their insurer's agent stated that the insureds did not need to purchase flood insurance, was time barred under the three-year limitations period in Miss. Code Ann. § 15-1-49 where the agent's alleged misstatements were uttered six years before the insureds filed suit. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), writ of certiorari denied by 552 U.S. 1310, 128 S. Ct. 1873, 170 L. Ed. 2d 745, 2008 U.S. LEXIS 3106, 76 U.S.L.W. 3554 (2008).

In a tort action against an insurer based on an agent's alleged oral misrepresentation as to payment terms, the limitations period of Miss. Code Ann. § 15-1-49 was not tolled because the insured had the written policy in hand and thus could not demonstrate that some affirmative act was done to prevent discovery of the actual terms. *Wilbourn v. Equitable Life Assur. Soc'y of the United States*, 998 So. 2d 439 (Miss. Ct. App. 2007), reversed by, remanded by 998 So. 2d 430, 2008 Miss. LEXIS 602 (Miss. 2008).

Insurer's right to subrogation under Miss. Code Ann. § 83-11-107 does not transform into a right to "equitable indemnification" merely because the limitations period in Miss. Code Ann. § 15-1-49 has run on its subrogation right, even where the limitations period expires owing to no fault of the insurer. *Miss. Farm Bureau Cas. Ins. Co. v. Orme*, 422 F. Supp. 2d 685 (S.D. Miss. 2006).

Where the debtors filed suit against mortgage and insurance companies for breach of fiduciary duties and negligent misrepresentation more than four years after receiving their mortgage loans, the case was barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49. *Carter v. Citigroup, Inc.*, 938 So. 2d 809 (Miss. 2006).



Insurer of a passenger and an insured could not proceed on a claim for "equitable indemnification" against the insured to recover a sum paid to the passenger under an underinsured/uninsured motorist policy after he was struck by the insured's car; the insurer could proceed only on a claim of subrogation under Miss. Code Ann. § 83-11-107, but because the claim was barred by the statute of limitations in Miss. Code Ann. § 15-1-49, the insurer had no viable claim against the insured. *Miss. Farm Bureau Cas. Ins. Co. v. Orme*, 422 F. Supp. 2d 685 (S.D. Miss. 2006).

Statute of limitations on an insured's claim for uninsured motorist benefits expired on August 8, 2003, where the insured admitted that she knew the alleged tortfeasor was uninsured on August 8, 2000, the date of the accident. As the insured never filed a claim against the insurer during that period, the insured's claim was now barred by the three-year statute of limitations. *Fid. & Guar. Ins. Underwriters v. Sullivan*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 2527 (N.D. Miss. Jan. 11, 2006).

Plaintiffs' claim for fraud was barred by the statute of limitations in Miss Code Ann. § 15-1-49 because the policies plaintiffs bought from an insurance company explained the terms, and thus nothing prevented plaintiffs from discovering the terms of the policy pursuant to Miss. Code Ann. § 15-1-67 even if they were different from what the company and its agent represented. *Parker v. Horace Mann Life Ins. Co.*, 949 So. 2d 57 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 108 (Miss. 2007).

Consumers' fraud action against lenders in their sale of credit insurance with consumer loans was barred by the three-year limitations period of Miss. Code Ann. § 15-1-49, and consumers failed to show evidence of an affirmative act of fraudulent concealment after the initial insurance sale, as required under Miss. Code Ann. § 15-1-67, in order to toll the limitations period. *Liddell v. First Family Fin. Servs.*, — F.3d —, 2005 U.S. App. LEXIS 18411 (5th Cir. Aug. 25, 2005).

Claims brought by a number of borrowers against nondiverse employees of a lender arising from sales of credit insur-

ance were time barred, as (1) the limitations period was not tolled under Miss. Code Ann. § 15-1-67 due to fraudulent concealment absent a fiduciary relationship between the employees and the borrowers and (2) the borrowers did not act with due diligence as required under § 15-1-67 or for application of the discovery rule under Miss. Code Ann. § 15-1-49(2), as the borrowers' loan documents disclosed all of the information concerning credit insurance that allegedly was misrepresented or concealed. *Anderson v. City Fin. Co.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25226 (S.D. Miss. July 11, 2003).

Insureds' claim against an individual insurance agent for fraudulent misrepresentation was barred by the three-year statute of limitations, and the statute of limitations was not tolled because the insureds presented no evidence of any affirmative acts of concealment by the agent; moreover, if the insureds had read the policies, they would have known that the agents were not authorized to change the terms of the contract, and that the policies stated nothing about receiving retirement benefits at age 65. *Smith v. Union Nat'l Life Ins. Co.*, 286 F. Supp. 2d 782 (S.D. Miss. 2003).

Insured's claims related to an alleged one-time act or omission relating to the sale of the insurance policy in question and did not assert that the insurer was involved in continual unlawful acts, thus, the statute of limitations was not tolled, and the insured's suite was barred. *Lady v. Jefferson Pilot Life Ins. Co.*, 241 F. Supp. 2d 655 (S.D. Miss. 2001).

The six-year statute of limitations codified at 28 U.S.C.S. § 2415(a), rather than the three-year statute of limitations contained in this section, applied to an action by an insurance company to recover damages caused by the appellants' intentional act of arson that damaged property insured by it since the mortgagee was a federal agency and the insurance company sued as the subrogee of the federal agency. *Durr v. American Nat'l Property & Cas. Co.*, 796 So. 2d 215 (Miss. 2000).

The statute of limitations barred causes of action for breach of contract, fraud, breach of duties of good faith and fair dealing and conspiracy asserted against

an insurance company based upon the manner in which a series of health insurance policies were allegedly developed, advertised, marketed. *Greco v. Torchmark Corp.*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 17894 (N.D. Miss. Oct. 29, 1999).

An insurer was notified of a claim, which arose from an automobile accident between an insured and an uninsured motorist, well within the applicable 6-year statute of limitations set forth in § 15-1-49, even though the insurer was first notified of the accident approximately 6 ½ years after the date of the accident, where the insured was 17 years old when she was injured in the accident, and therefore, pursuant to § 15-1-59, the statute of limitations did not begin to run against her until she reached her 21st birthday. The policy and purpose behind the Uninsured Motorist Act is to provide the same protection to one injured by an uninsured motorist as that individual would have if injured by a financially responsible driver. Thus, since the insured's cause of action against the uninsured motorist was not barred, her claim against the insurer was viable; since uninsured motorist coverage was purchased, the insurer had an obligation to protect the insured as long as the claim against the uninsured motorist was permitted. *Lawler v. GEICO*, 569 So. 2d 1151 (Miss. 1990).

Where owners of a television set sent it to be repaired, where, after it was repaired, it caught fire and damaged the owner's house, and where the owners executed a release and subrogation receipt to the insurance company, which later filed a complaint against the repair shop, suit against the repair shop was barred by § 15-1-49 on the basis that the statute of limitations began running against the owners on the claim on the day of the fire; moreover, the fact that the insurance company later became subrogated to the rights of the owners did not operate to extend the period within which the suit could be brought simply because the insurance company was substituted in the place of the owners and succeeded to their rights and remedies in their claim against the repair shop. *Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So. 2d 750 (Miss. 1984).

#### 41. —Real property, deeds, etc.

Mortgagor's wrongful foreclosure claim was time-barred under Miss. Code Ann. § 15-1-49 as it was filed 10 years after the foreclosure; Miss. Code Ann. § 15-1-7 applied to actions to recover land, not to actions for wrongful foreclosure. *Tenn. Props. Inc. v. Gillentine*, 66 So. 3d 695 (Miss. Ct. App. 2011).

Summary judgment was properly granted to a trustee in a prior owner's action to set aside a warranty deed transfer and a trust six years later because the three-year statute of limitations in Miss. Code Ann. § 15-1-49 applied, rather than the ten-year period in Miss. Code Ann. § 15-1-7. Concealed fraud did not toll the limitations period since the instrument here was recorded as a matter of public record. *McWilliams v. McWilliams*, 970 So. 2d 200 (Miss. Ct. App. 2007).

Statute of limitations for Mississippi landowner's claims asserting due process taking violations, equal protection violations, and discrimination on account of race was Mississippi's 3-year residual statute of limitations. *Taylor v. County of Copiah*, 937 F. Supp. 573 (S.D. Miss. 1994), *aff'd*, 51 F.3d 1042 (5th Cir. 1995).

Ten-year limitation period of Code 1942, § 709, applies to a bill to set aside a deed and to hold grantee as trustee of the land for benefit of complainants, neither the three-year limitation period of Code 1942, § 729, nor the six-year period of this section [Code 1942, § 722] being applicable when accounting feature contained in bill is merely incidental. *Burton v. Gibbes*, 204 Miss. 248, 37 So. 2d 285 (1948).

#### 42. —Family relationships, heirships, estates.

Though a 29-year-old alleged son filed a paternity action not to enforce his alleged father's child support obligations, but for the sole purpose of knowing his ancestry, the trial court properly dismissed the case as time-barred; whether Miss. Code Ann. §§ 93-9-9 or 15-1-49 was the applicable statute of limitations was immaterial, as under the former, his suit was time-barred when he turned 21, and under the latter, when he turned 24 (i.e., three years after he turned 21). *Autrey v. Parson*, 864 So. 2d 294 (Miss. Ct. App. 2003), *cert. denied*, — U.S. —, 125 S. Ct. 216, 160 L. Ed. 2d 49



(2004), cert. denied, 864 So. 2d 282 (Miss. 2004).

Limitations period regarding a foreign conservator's action against a guardian alleging the unauthorized expenditure of an estate's funds did not begin running until the guardian filed his final accounting. *United States Fid. & Guar. Co. v. Melson*, 809 So. 2d 647 (Miss. 2002).

Section 15-1-25, which specifically states that a suit against an executor or administrator must be filed within 4 years of the qualification of the executor or administrator, is an example of the legislature carving out a specific statute of limitations period in order to preempt the general 6-year limitations, and therefore the specific statute of § 15-1-25 preempts the general statute of § 15-1-49. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

The six-year statute of limitations is inapplicable to suits brought by illegitimates under § 91-1-15 whose cause of action accrued prior to July 1, 1981. *Paschall v. Smiley*, 530 So. 2d 18 (Miss. 1988).

General six-year statute of limitation applies to heirship proceedings where no specific statute of limitations was applicable. In *re Heirship of McLeod*, 506 So. 2d 289 (Miss. 1987).

Action by illegitimate to be adjudicated son of deceased and to be allowed to share in estate which is brought within 3 years of July 1, 1981, date enactment of amendment of § 91-1-15 is timely, notwithstanding fact that suit is brought 14 years after death of deceased, so long as death occurred prior to July 1, 1981. *Berry v. Berry*, 463 So. 2d 1031 (Miss. 1984), cert. denied, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 73 (1985).

The motion of an illegitimate daughter of decedent seeking a declaration that she was his heir-at-law was not barred by the six-year statute of limitations set forth in § 15-1-49, even though it was filed more than six years after she had reached majority. *Stevenson v. Daniels*, 446 So. 2d 597 (Miss. 1984).

In an action by an illegitimate child demanding that she be declared the heir of her natural father, capable of inheriting from him under the Mississippi laws of

descent and distribution, the order entered in favor of the illegitimate daughter would be reversed and the suit dismissed where the time for bringing the action was six years from the date of the daughter's majority (§ 15-1-49) but the action was not commenced until 18 years after that date. *Knight v. Moore*, 396 So. 2d 31 (Miss. 1981), cert. denied, 454 U.S. 817, 102 S. Ct. 95, 70 L. Ed. 2d 86 (1981).

#### 43. —Employment.

Discriminatory discharge action under federal civil rights law (42 USCS § 1981) is not barred by one year statute of limitations for enumerated intentional torts, but is governed by residual statute of limitations which provides 6-year limitation period. *Kozam v. Emerson Elec. Co.*, 711 F. Supp. 313 (N.D. Miss. 1989).

Section 15-1-49 was applicable to an employment discrimination action brought under 42 USCS §§ 1981, 1983. *Walls v. Mississippi State Dep't of Pub. Welfare*, 542 F. Supp. 281 (N.D. Miss. 1982) but see *Walls v. Mississippi State Dep't of Pub. Welfare*, 730 F.2d 306 (5th Cir. 1984).

Job discrimination case initiated under the civil rights statute was governed by Mississippi's catch-all statute providing a six-year limitation period. *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520 (5th Cir. 1980), reh'g denied, 618 F.2d 781 (5th Cir. 1980).

The 6-year statute of limitations would be applied in an employment discrimination action brought under 42 USCS § 1981. *Heath v. D.H. Baldwin Co.*, 447 F. Supp. 495 (N.D. Miss. 1977).

In an employment discrimination action pursuant to 42 USC § 1981, the general six-year statute of limitations provided by § 15-1-49 rather than the contractual three-year statute of limitations provided by § 15-1-29 would be applicable even though a mere claim for back pay would ordinarily be governed by the three-year statute. *Walton v. Utility Prods., Inc.*, 424 F. Supp. 1145 (N.D. Miss. 1976).

#### 44. —Civil rights.

In an employment termination case alleging tort claims and claims under 42 U.S.C.S. § 1983 in which a former teacher's aide argued on appeal that Miss. Code



Ann. § 15-1-49 should be tolled because in the first case, his appeal from the school board's decision to terminate his employment, the circuit court failed to rule on certain Miss. R. Civ. P. 60 motions, that could not toll the statutes of limitations for his claims. *Davis v. Biloxi Pub. Sch. Dist.*, 43 So. 3d 1135 (Miss. Ct. App. 2009), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 487 (Miss. 2010).

Eighth Amendment claims for equitable relief made under 42 U.S.C.S. § 1983 by death-sentenced inmates challenging their method of execution were barred by the three-year statute of limitations of Miss. Code Ann. § 15-1-49 in that the claims accrued after completion of direct review or the date when the lethal injection statute of Miss. Code Ann. § 99-19-51 became effective and the limitations period was not tolled by Miss. Code Ann. § 15-1-67 or by equitable estoppel. *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008), writ of certiorari denied by 130 S. Ct. 57, 175 L. Ed. 2d 45, 2009 U.S. LEXIS 5526, 78 U.S.L.W. 3171 (U.S. 2009).

Federal civil rights action under 42 U.S.C.S. § 1983 was governed by the three-year statute of limitations under Mississippi's residual statute of limitations for personal injury actions, Miss. Code Ann. § 15-1-49; a plaintiff was required to file his complaint within three years of the date his action accrued or when he had a complete and present cause of action. *Giles v. Stokes*, 988 So. 2d 926 (Miss. Ct. App. 2008).

Federal civil rights action under 42 USCS § 1983 is governed by 3-year statute of limitations under § 15-1-49. *James v. Sadler*, 909 F.2d 834 (5th Cir. 1990).

For actions in Mississippi brought under 42 USCS § 1983 accruing before *Wilson v. Garcia* (1985) 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938, appropriate limitations period shall be either (1) longer pre-Wilson period, commencing at time action accrued, or (2) post-Wilson one-year period, commencing with date of Wilson decision, whichever expires first.

*Hanner v. Mississippi*, 833 F.2d 55 (5th Cir. 1987).

The Mississippi six-year catch-all statute (Code § 15-1-49) controlled an action pursuant to 42 USCS § 1983 against a city, its police department and various policemen asserting deprivation of constitutional right to freedom from physical abuse and intimidation which action allegedly occurred when in the course of arresting and jailing the plaintiff two policemen hurled him head first into the concrete floor and wall of a cell. *Morrell v. City of Picayune*, 690 F.2d 469 (5th Cir. 1982).

Six-year limitation period contained in § 15-1-49 applies to actions brought under 42 USCS § 1981. *Jones v. Birdsong*, 530 F. Supp. 221 (N.D. Miss. 1980), aff'd, 679 F.2d 24 (5th Cir. 1982), reh'g denied, 683 F.2d 417 (5th Cir. 1982), cert. denied, 459 U.S. 1202, 103 S. Ct. 1186, 75 L. Ed. 2d 433 (1983).

The applicable statute of limitations for an action for the denial, under color of state law, of rights secured by the constitution and laws of the United States, where the wrongs complained of were an alleged abuse of the Mississippi statutory deannexation procedure, was Mississippi's catch-all statute providing a six-year limitation. *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971).

#### 45. Corporations.

Where a shareholder allegedly entered into a settlement agreement based on fraud, the shareholder's claims against a corporate officer, a securities company, and others were time-barred because, inter alia, (1) the shareholder admitted that the shareholder became suspicious about the corporation's environmental liability as far back as 1993, and (2) an alleged "firm commitment letter" was not a guarantee that the securities company would underwrite the corporation's public offering upon which the shareholder could have relied. *Pope v. Sorrentino*, 992 So. 2d 1194 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 531 (Miss. 2008).

## ATTORNEY GENERAL OPINIONS

A cause of action which accrued prior to July 1, 1989, would be controlled by six year statute of limitations. Gibson, Sept. 24, 1990, A.G. Op. #90-0681.

A refund of erroneously paid taxes may be made for taxes that were paid within three years prior to the date the petition seeking such refunds was filed with the board of supervisors. See Sections 27-73-3 and 15-1-49. Fortier, February 23, 1996, A.G. Op. # 96-0087.

Since there is no specific statute that prescribes the time within which a claim for a refund of erroneously paid taxes must be made, the three year period of limitation provided for in Section 15-1-49 applies. Reynolds, October 4, 1996, A.G. Op. #96-0689.

Backpay, to which a municipal employee is legally entitled pursuant to the

personnel policies and procedures adopted by the mayor and commissioners of a city, can be paid at any time prior to the running of the applicable statute of limitations set out in Section 15-1-49. If the statute has run the city may not disregard such statute of limitations and may not compensate the employee with backpay. Twiford, November 1, 1996, A.G. Op. #96-0636.

If otherwise exempt property becomes subject to taxation by way of a lease or other arrangement with a private party, then the three- year limitation would be applicable to refunds relating to the overpayment of such taxes. Stark, Apr. 15, 2005, A.G. Op. 05-0116.

## RESEARCH REFERENCES

**ALR.** What constitutes a contract in writing within statute of limitations. 3 A.L.R.2d 809.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction. 5 A.L.R.2d 302.

Running of statute of limitations against claim for services rendered over extended period under indefinite employment not fixing time of payment. 7 A.L.R.2d 198.

Change in party after statute of limitations has run. 8 A.L.R.2d 6.

Failure to comply with statute requiring one involved in automobile accident to stop or report as affecting question as to suspension or tolling statute of limitations. 10 A.L.R.2d 564.

When limitation period begins to run against cause of action or claim for contracting of disease. 11 A.L.R.2d 277.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Claim of government against taxpayer (or one in privity with him) which is barred by lapse of time as available to defeat or diminish claim of taxpayer against government, or vice versa. 12 A.L.R.2d 815.

Limitation of actions for annulment of marriage. 52 A.L.R.2d 1163.

When statute of limitations begins to run against note payable on demand. 71 A.L.R.2d 284.

What statute of limitation covers action for indemnity. 57 A.L.R.3d 833.

What statute of limitations governs action for interference with contract or other economic relations. 58 A.L.R.3d 1027.

Statute of limitations in illegitimacy or bastardy proceedings. 59 A.L.R.3d 685.

Choice of law as to applicable statute of limitations in contract actions. 78 A.L.R.3d 639.

Products liability: what statute of limitation governs actions based on strict liability in tort. 91 A.L.R.3d 455.

When does statute of limitation begin to run upon an action by subrogated insurer against third-party tortfeasor. 91 A.L.R.3d 844.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease. 91 A.L.R.3d 991.

When statute of limitations begins to run as to cause of action for development



of latent industrial or occupational disease. 1 A.L.R.4th 117.

What statute of limitations governs damage action against attorney for malpractice. 2 A.L.R.4th 284.

What statute of limitations governs action arising out of transaction consummated by use of credit card. 2 A.L.R.4th 677.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution. 19 A.L.R.4th 456.

When statute of limitations begins to run upon action against attorney for malpractice. 32 A.L.R.4th 260.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats. 41 A.L.R.4th 1078.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 A.L.R.4th 216.

Time of discovery as affecting running of statute of limitations in wrongful death action. 49 A.L.R.4th 972.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death. 54 A.L.R.4th 362.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice. 70 A.L.R.4th 535.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product. 30 A.L.R.5th 1.

Attorney Malpractice — Tolling or Other Exceptions to Running of Statute of Limitations. 87 A.L.R.5th 473.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of occurrence of negligent act or omission. 11 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of

occurrence of sustaining damage or injury and other theories. 12 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Statement of rule and application of rule to providing client with allegedly negligent advice or failing to advise. 13 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to conduct of litigation and delay or inaction in conducting client's affairs. 14 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to property, estate, corporate, and document cases. 15 A.L.R.6th 427.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions § 107.

**CJS.** 54 C.J.S., Limitations of Actions § 51.

**Law Reviews.** 1979 Mississippi Supreme Court Review: Insurance. 50 Miss. L. J. 813, December 1979.

The DES Dilemma: An Analysis of Recent Decisions. 52 Miss. L. J. 199, March 1982.

1982 Mississippi Supreme Court Review: Miscellaneous. 53 Miss. L. J. 179, March 1983.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L. J. 49, March, 1985.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi — Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

Jackson, Legislative reform of statutes of limitations in Mississippi: proposed interpretations, possible problems. 9 Miss College LR 231, Spring 1989.

Litigation in Mississippi Today: A Symposium: Class Actions & Joinder in Mississippi, 71 Miss. L.J. 447, Winter, 2002.



Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

## § 15-1-51. Limitations of suits by and against the state, counties and municipal corporations.

Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof, except that any judgment or decree rendered in favor of the state, or any subdivision or municipal corporation thereof, shall not be a lien on the property of the defendant therein for a longer period than seven (7) years from the date of filing notice of the lien, unless an action is brought before the expiration of such time or unless the state or such subdivision or municipal corporation refiles notice of the lien. There shall be no limit upon the number of times that the state, or any subdivision or municipal corporation thereof, may refile such notices of lien.

The statutes of limitation shall run in favor of the state, the counties, and municipal corporations beginning at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon. The provisions of this section shall apply to all pending and subsequently filed notices of liens.

**SOURCES:** Codes, 1892, § 2736; 1906, § 3096; Hemingway's 1917, § 2460; 1930, § 2291; 1942, § 721; Laws, 1991, ch. 503, § 1, eff from and after passage (approved April 3, 1991).

**Cross References** — Prohibition against revival of remedy barred by lapse of time or statute of limitation, see Miss. Const. Art. 4, § 97.

Statutes of limitation running against the state or any subdivision thereof, see Miss. Const. Art. 4, § 104.

When state may be sued, see § 11-45-1.

Suits by and against county, generally, see § 11-45-17.

Suits by and against municipality, generally, see § 11-45-25.

Immunity of state and its political subdivisions from liability and suit for torts and torts of employees, see §§ 11-46-1 et seq.

General powers of municipal corporation, see § 21-17-1.

Limitation of actions by State Tax Commission, see § 27-3-41.

## JUDICIAL DECISIONS

1. In general.
2. Subdivisions within purview of statute.
3. Suits by State and its subdivisions.
4. —Suits between subdivisions.
5. Suits against State and its subdivisions.
6. Running of limitation period.

### 1. In general.

The statutes of limitation concerning adverse possession do not run against the state. Mississippi State Hwy. Comm'n v.

New Albany Gas Sys., 534 So. 2d 204 (Miss. 1988).

Mere mistake, accident or ignorance of one not under disability is not sufficient to suspend the statute of limitations. Mitchell v. Town of Magee, 51 So. 2d 198 (Miss. 1951).

Where bonds were purchased by a testator in 1916 and were to become due in 1936 and they were later bequeathed by the testator who died in 1939, without specific designation to his wife, and the wife died in 1948, leaving all her property

to legatee, and neither the wife nor the legatee were aware of the existence of the bonds, an action by the legatee in 1949 was barred by the six-year statute of limitations. *Mitchell v. Town of Magee*, 51 So. 2d 198 (Miss. 1951).

This section [Code 1942, § 721] is inapplicable to appeal, since the right of appeal exists only by virtue of the statutes which confer it. *Town of Tutwiler v. Gibson*, 117 Miss. 879, 78 So. 926 (1918).

Adverse occupancy does not bar municipalities from right to remove obstructions from street. *City of Lexington v. Hoskins*, 96 Miss. 163, 50 So. 561 (1909).

Exceptions in favor of sovereignty in matters of property on the application of the statute of limitations must be construed strictly against the sovereignty. *Warren County v. Lamkin*, 93 Miss. 123, 46 So. 497 (1908).

Section 104, Const. 1890, suspended the running of the statute of limitations against counties or pending contracts, where the bar was not complete, as well as on future contracts. *Board of Supvrs. v. Helton*, 79 Miss. 122, 29 So. 820 (1901).

## 2. Subdivisions within purview of statute.

In a case in which a husband and wife argued that an open-account claim by a collection agency for collection in the justice court was barred by a three-year statute of limitations, that argument failed. A circuit court correctly found that their unpaid bills were owed to a governmental entity, a general hospital, the hospital's accounts were assigned to the collection agency for collection purposes only, and the collection agency's claim was not time-barred pursuant to Miss. Code Ann. § 15-1-51. *Laffitte v. Southern Fin. Sys.*, 30 So. 3d 1236 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

Hospital was a subdivision of state for purposes of its suit against doctor for unpaid rent, and was thus not subject to one-year statute of limitations; county board of supervisors and city board of aldermen passed resolutions authorizing purchase and lease of office by hospital for express purpose of recruiting doctors to county and city, and office was purchased and leased pursuant to local and private

legislation. *Murphree v. Aberdeen-Monroe County Hosp.*, 671 So. 2d 1300 (Miss. 1996).

A hospital which was jointly owned by a city and a hospital district, and was governed by a board of trustees jointly appointed by the city council and the county board of supervisors, was a "subdivision [of the state] or municipal corporation thereof" within the meaning and contemplation of Art 4, § 104 of the Mississippi Constitution and § 15-1-51. Thus, the 7-year period of limitations governing judgment liens set forth in § 15-1-47 was inoperative against the hospital. *Enroth v. Memorial Hosp.*, 566 So. 2d 202 (Miss. 1990).

The Yazoo-Mississippi delta levee district is within the statute [Code 1942, § 721] and § 104, Const. 1890. *Adams v. Illinois C.R. Co.*, 71 Miss. 752, 15 So. 640 (1894).

## 3. Suits by State and its subdivisions.

Pursuant to § 15-1-51 and Miss. Const. Art. 4, § 104, the statute of limitations in civil cases does not run against the state, its political subdivisions, or municipal corporations thereof. *Parish v. Frazier*, 195 F.3d 761 (5th Cir. 1999).

Where an underlying debt was owed to a community hospital, existing under §§ 41-13-10 et seq., the hospital was a subdivision of the state and the statute of limitations was inoperative against it. *Parish v. Frazier*, 195 F.3d 761 (5th Cir. 1999).

Unless the city is barred by laches or estoppel, it has a right to have a building removed from its present location in the street. *Brown v. City of Gulfport*, 213 Miss. 457, 57 So. 2d 290 (1952).

Laches cannot be set up as defense to suit by State revenue agent to collect penalties under anti-trust laws. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 94 So. 7 (1922), modified on suggestion of error, 131 Miss. 345, 95 So. 137 (1923), error dismissed, 263 U.S. 673, 44 S. Ct. 5, 68 L. Ed. 500 (1923), cert. denied, 263 U.S. 698, 44 S. Ct. 5, 68 L. Ed. 512 (1923), reh'g denied, 263 U.S. 678, 44 S. Ct. 132, 68 L. Ed. 502 (1923).

This section [Code 1942, § 721] applies to actions by the state for recovery of penalty under antitrust laws, and no stat-



ute of limitations runs against the state in such actions. *Grenada Lumber Co. v. State*, 98 Miss. 536, 54 So. 8 (1911).

Ten-year statute will bar action of ejectment by county against lessee in possession of county land not devoted to public use, under void lease, for term of lease. *Warren County v. Lamkin*, 93 Miss. 123, 46 So. 497 (1908).

Notwithstanding that the statute of limitations could not be invoked against counties, a lessee of sixteenth section school lands, in an action by the county denying the validity of the lease and seeking to oust him, in defense of his term and as against the county's claim to immediate possession, could show that the county had no title to convey him, having previously conveyed the term to another, and could set up the outstanding term of such other, which by reason of his adverse possession for ten years he had acquired at a time when counties were subject to statutes of limitations. *Jones v. Madison County*, 72 Miss. 777, 18 So. 87 (1895).

#### 4. —Suits between subdivisions.

Const. 1890 § 104 applies to suit by town against county to recover one-half of road tax collected on property within the town limits. *Town of Crenshaw v. Panola County*, 115 Miss. 891, 76 So. 741 (1917).

#### 5. Suits against State and its subdivisions.

Constitutional amendment prohibiting state from making payment on certain precivil war bonds did not toll statute of limitations for bringing claim on bonds, as enactment did not prohibit bondholder from bringing suit. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Although state procured passage of constitutional amendment prohibiting payment of certain precivil war bonds, state was not equitably estopped from asserting that bondholders' action to recover on bonds was barred by statute of limitations, as amendment did not prohibit bondholders from bringing claim on bonds and, therefore, state did not induce bondholders to abstain from filing suit to protect their rights and collect duly owed debts. *Grant v. State*, 686 So. 2d 1078

(Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Statute of limitations for filing suit to collect on precivil war bonds began to run in favor of state when bondholders first had right to make demand on officer authorized by state to allow or disallow claims, even though constitutional amendment precluded payment on bonds, and, therefore, there was no state officer who could authorize claims. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Since bondholders' action against state to recover on precivil war bonds was barred by statute of limitations, chancellor did not need to rule on constitutionality of constitutional amendment prohibiting payment on bonds, and chancellor's ruling that amendment was unconstitutional was impermissible advisory opinion. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

On state's motion for summary judgment in bondholders' action to recover on precivil war bonds, based on running of statute of limitations, chancellor could look beyond parties' pleadings to constitutional amendment prohibiting payment on bonds before making determination as to whether action was time barred. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

The six-year statute of limitations was applicable to the right of a teacher in an agricultural high school to demand payment of salary from the proceeds of bonds to be issued by the county and to compel issuance of such bonds by mandamus upon failure of the board of supervisors (which was not shown to have ever been advised of the existence of the obligation until suit was filed) otherwise to do so. *Fuqua v. Board of Supvrs.*, 192 Miss. 6, 4 So. 2d 350 (1941).

The failure of a statute, making it mandatory that a county having legal and undisputed outstanding warrants or other obligations and insufficient funds in the treasury to pay them, should at once prepare for and take up such warrants or other obligations from the proceeds of se-



rial bonds issued for such purpose, to make reference therein to any statute of limitations did not have the effect of waiving, as to all obligations of a county incurred after its enactment, the provisions of this section [Code 1942, § 721] to the effect that statutes of limitations should begin to run in favor of the state, counties and municipal corporations at the time when the plaintiff first had the right to demand payment. *Fuqua v. Board of Supvrs.*, 192 Miss. 6, 4 So. 2d 350 (1941).

Orders on its treasurer in payment of work done on levees by the board of levee inspectors of Issaquena county, under the laws cited, are in their nature essentially county debts and not subject to the statute of limitations. *Anderson v. Issaquena County*, 75 Miss. 873, 23 So. 310 (1898).

There is no statute to bar proceedings to enforce payment of claims against a county which have been allowed by the judgment of its authorities. *Taylor v. Board of Supvrs.*, 70 Miss. 87, 12 So. 210 (1892); *Klein v. Smith County Supvrs.*, 54 Miss. 254 (1876).

## 6. Running of limitation period.

Constitutional amendment prohibiting state from making payment on certain precivil war bonds did not toll statute of limitations for bringing claim on bonds, as enactment did not prohibit bondholder from bringing suit. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Although state procured passage of constitutional amendment prohibiting payment of certain precivil war bonds, state was not equitably estopped from asserting that bondholders' action to recover on bonds was barred by statute of limitations, as amendment did not prohibit bondholders from bringing claim on bonds and, therefore, state did not induce bondholders to abstain from filing suit to protect their rights and collect duly owed debts. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Statute of limitations for filing suit to collect on precivil war bonds began to run in favor of state when bondholders first had right to make demand on officer authorized by state to allow or disallow

claims, even though constitutional amendment precluded payment on bonds, and, therefore, there was no state officer who could authorize claims. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

On state's motion for summary judgment in bondholders' action to recover on precivil war bonds, based on running of statute of limitations, chancellor could look beyond parties' pleadings to constitutional amendment prohibiting payment on bonds before making determination as to whether action was time barred. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

A cause of action for damages resulting from the closure of a portion of a frontage road by the state highway commission accrued at the time the road was closed and the six-year statute of limitations prescribed by section 15-1-49 began to run at that time. *Mississippi State Hwy. Comm'n v. Vaughney*, 358 So. 2d 1307 (Miss. 1978).

The dismissal by a former sheriff and tax collector of his action against the county for compensation for alleged services did not destroy the right of his assignee, who was to obtain a portion of any recovery, and since the assignee's right was dependent upon the right of his assignor, assignee's action should have been brought within six years from the date of the expiration of the term of office of the former sheriff and tax collector, and, where it was not, the claim was barred. *Smith v. Copiah County*, 232 Miss. 838, 100 So. 2d 614 (1958).

Action against county by heirs of tax collector for commissions on collections brought within six years after filing and rejection of claim with board of supervisors, but more than six years after right to file claim accrued, held barred by limitations, in absence of evidence that heirs had been legally restrained from pursuing remedy within statutory period. *Grenada County v. Nason*, 174 Miss. 725, 165 So. 811 (1936).

Patentee not entitled to refund until land commissioner cancels patent and presents it to auditor, and limitations do

not begin to run until that time. *Wilson v. Naylor*, 116 Miss. 573, 77 So. 606 (1918).

Judgment declaring tax title void, in suit to confirm, was final adjudication justifying presentation to auditor of claim

for purchase-money, and only after auditor's refusal to issue a warrant in payment of the claim thus presented could suit be instituted against the state. *Brown v. Ford*, 112 Miss. 678, 73 So. 722 (1917).

### ATTORNEY GENERAL OPINIONS

As long as debt is owed to community hospital and is to be paid to community hospital, statute of limitations does not run and debt remains due and payable indefinitely but this favorable treatment cannot be used for benefit of private individual or firm and regular statute of limitations would apply once debt is assigned and statute begins to run from date debt was originally owed, not date of assignment of debt to private entity. *Baker*, June 24, 1993, A.G. Op. #93-0398.

It is not possible for an individual to acquire any rights through prescription or adverse possession nor can the county acquire a roadway easement against 16th

section land by way of prescription. *Wallace*, Feb. 4, 2000, A.G. Op. #2000-0038.

Any attempt to require contract terms seeking to limit the liability of a private vendor or specifying a limitation period different than the general limitations period prescribed for contractual claims would be unenforceable. *Thomas*, Dec. 2, 2003, A.G. Op. 03-0629.

If a county board of supervisors determines that a demand made is barred by the applicable statute of limitations, it must assert that defense and is not authorized to pay the claim. *Ross*, Nov. 3, 2006, A.G. Op. 06-0562.

### RESEARCH REFERENCES

**ALR.** Limitation period as affected by requirement of notice or presentation of claim against governmental body. 3 A.L.R.2d 711.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 13, 14, 146, 392, 407.

4 Am. Jur. Trials, Statutes of Limitation § 14.

**CJS.** 54 C.J.S., Limitations of Actions §§ 24-26.

## § 15-1-53. Effect of running of statute of limitations against executor, administrator, guardian, or other trustee, as against beneficiary.

When the legal title to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability and within the saving of any statute of limitations; and may be availed of in any suit or actions by such person.

**SOURCES:** Codes, 1880, § 2694; 1892, § 2761; 1906, § 3123; *Hemingway's* 1917, § 2487; 1930, § 2297; 1942, § 727.

**Cross References** — Limitations applicable to action by ward against guardian, see § 15-1-27.

Executor's or administrator's duty to make title to land, see § 91-7-221.

Deeds of conveyance by executors and administrators, see § 91-7-223.

What actions survive to executors and administrators, see § 91-7-233.

## JUDICIAL DECISIONS

1. In general.
2. Persons affected.

### 1. In general.

A ward's disability did not toll the statute of limitations in an action commenced by his guardian where the guardian was appointed some years before the cause of action arose. *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788 (Miss. 1998).

Section 15-1-53 does not apply to action alleging that deed of trust executed by mortgagor and its foreclosure are invalid because mortgagor was mentally incompetent, because by its terms, statute applies only where legal title to property or right in action is in conservator as opposed to ward, and right of action was at all times in mortgagor rather than conservator. *Talbert v. Henderson*, 688 F. Supp. 250 (S.D. Miss. 1987).

Provisions of Miss. Code Annotated § 15-1-53 are not applicable where conservator was empowered merely to manage incompetent's property and affairs, and right of action to challenge execution of deed of trust and foreclosure pursuant to it remained at all times in incompetent. *Talbert v. Henderson*, 688 F. Supp. 250 (S.D. Miss. 1987).

The statute [Code 1942, § 727] only applies where the legal title or right of action at law or in equity is in the guardian or trustee, and a mere equitable right

in the beneficiary. *Weir v. Monahan*, 67 Miss. 434, 7 So. 291 (1890).

### 2. Persons affected.

This statute [Code 1942, § 727] has no application to the rights of remaindermen under a devise or grant in trust to take effect only after the termination of a particular estate until the rights of the remaindermen fall into possession. *Reynolds v. Wilkinson*, 119 Miss. 590, 81 So. 278 (1919).

Remaindermen are not barred from securing cancellation of deed to the land under wrongful sale during life of life tenant. *Clark v. Foster*, 110 Miss. 543, 70 So. 583 (1916).

The statute [Code 1942, § 727] begins to run against one to whom land is conveyed in trust for others from the time adverse possession is taken under claim of ownership, and when he is barred the beneficiaries he represents are barred. *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487 (1895).

This provision does not apply to ordinary cases where the right is that of minors, to be asserted by the guardian in their names. *Weir v. Monahan*, 67 Miss. 434, 7 So. 291 (1890).

Where a husband lends his wife's money as his own, the borrower not knowing it was hers until the debt was barred as to him, it is also barred as to her. *Perry v. Ellis*, 62 Miss. 711 (1885).

## RESEARCH REFERENCES

**ALR.** Time of existence of mental incompetency which will prevent or suspend running of statute of limitations. 41 A.L.R.2d 726.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 A.L.R.3d 630.

When statute of limitations commences to run on right of partnership accounting. 44 A.L.R.4th 678.

Medical malpractice statutes of limitation minority provisions. 71 A.L.R.5th 307.

Effect of appointment of legal representative for person under mental disability on running of state statute of limitations against such person. 111 A.L.R.5th 159.

**Am Jur.** 31 Am. Jur. 2d, Executors and Administrators §§ 667 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 28-30.



## § 15-1-55. Effect of death of party before bar is complete.

If a person entitled to bring any of the personal actions herein mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person.

**SOURCES:** Codes, 1857, ch. 57, art. 18; 1871, § 2162; 1880, § 2683; 1892, § 2753; 1906, § 3113; Hemingway's 1917, § 2477; 1930, § 2298; 1942, § 728.

**Cross References** — Actions for injuries producing death, see § 11-7-13.

Time allowed to commence malpractice action on behalf of deceased person who died under disability, see § 15-1-36.

Effect of death of party to suit, see §§ 91-7-237 et seq.

## JUDICIAL DECISIONS

### 1. In general.

Miss. Code Annotated § 15-1-59 does not place maximum durational limit on savings provision of § 15-1-7, as had Mississippi Legislature intended for savings clause in § 15-1-7 to have maximum duration it would have included such limit in § 15-1-7, as Legislature has in other statutes of limitations provisions, and further, § 15-1-59 is not statute of limitations. *Talbert v. Henderson*, 688 F. Supp. 250 (S.D. Miss. 1987).

When a decedent dies in the last year in which a suit may be brought for his injury this provision adds a year after his death within which suit may be brought by his personal representatives. *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963).

Where debtor dies before debt is barred this section [Code 1942, § 728] controls. *Duffy v. Kilroe*, 116 Miss. 7, 76 So. 681 (1917).

The statute [Code 1942, § 728] allows suit to be brought within one year of the death of the party liable, and not within one year from the date of letters testamentary or of administration, as did § 2612

Code of 1871. *Klaus v. Moore*, 77 Miss. 701, 27 So. 612 (1900); *Hughston v. Nail*, 73 Miss. 284, 18 So. 920 (1895).

Death of the debtor does not interrupt the running of the statute of limitations, but since the personal representative cannot be sued for six months after grant of letters, this time should not be counted against the creditor. *Allen v. Hillman*, 69 Miss. 225, 13 So. 871 (1891).

The personal representative of the deceased person must sue or be sued within one year after his death. *Weir v. Monahan*, 67 Miss. 434, 7 So. 291 (1890).

As applying former enactment of this section [Code 1942, § 728] as contained in Code of 1871 wherein the limitation period did not begin to run until issuance of letters testamentary or of administration, see *Hambrick v. Jones*, 64 Miss. 240, 8 So. 176 (1886); *Cook v. Reynolds*, 58 Miss. 243 (1880); *Sledge v. Jacobs*, 58 Miss. 194 (1880); *Clayton v. Merrett*, 52 Miss. 353 (1876).

The statute [Code 1942, § 728] only applies to cases in which the death of the person occurred within the last year of the time limited. *Hambrick v. Jones*, 64 Miss. 240, 8 So. 176 (1886).

## RESEARCH REFERENCES

**ALR.** Time from which statute of limitations begins to run against cause of

action for wrongful death. 97 A.L.R.2d 1151.

Statute of limitations: Effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued. 28 A.L.R.3d 1141.

Defamation action as surviving plaintiff's death, under statute not specifically covering action. 42 A.L.R.4th 272.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice. 70 A.L.R.4th 535.

**Am Jur.** 4 Am. Jur. Trials, Statutes of Limitation §§ 25, 26.

**CJS.** 54 C.J.S., Limitations of Actions § 286.

## § 15-1-57. Statute of limitations not to run when person prohibited to sue.

When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

**SOURCES:** Codes, 1857, ch. 57, art. 26; 1871, § 2170; 1880, § 2691; 1892, § 2758a; 1906, § 3120; Hemingway's 1917, § 2484; 1930, § 2307; 1942, § 737.

## JUDICIAL DECISIONS

### 1. In general.

Summary judgment was granted to an electric company in a property damage case because the statute of limitations was not tolled under Miss. Code Ann. § 15-1-57 since, from the date of an alleged incident until the expiration of the three-year statute of limitations, other parties were free to file their own claim or to join in the claim erroneously filed on behalf of a dissolved corporation. Miss. R. Civ. P. 15(c) did not allow for a reprieve from the limitations period because no amended complaint was filed; instead, an entirely new action with new parties was initiated. *Funderburg v. Pontotoc Elec. Power Ass'n*, 6 So. 3d 439 (Miss. Ct. App. 2009).

Second complaint filed by a patient in a medical malpractice action was not untimely because pursuant to Miss. Code Ann. §§ 15-1-36(15) and 15-1-57 the two-year statute of limitations was tolled for the 60 day period during which the patient was required to give notice of his claim to a doctor and medical center. *Caldwell v. Warren*, 2 So. 3d 751 (Miss. Ct. App. 2009).

Patient's medical malpractice claim was untimely filed, Miss. Code Ann. §§ 15-1-36(15) and 15-1-57 because the sixty-day

notice period during which the patient was barred from filing suit extended the two-year statute of limitations by only sixty days, and the patient's complaint was filed after the sixty days had expired. *Blessitt v. King's Daughters Hosp.*, 18 So. 3d 878 (Miss. Ct. App. 2009).

Circuit court erred in dismissing the doctor as a defendant from the beneficiaries' wrongful death claim where the time allowed by the medical malpractice statute of limitations had not yet expired when the doctor was served with the amended complaint. *Long v. Mem'l Hosp. at Gulfport*, 969 So. 2d 35 (Miss. 2007).

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note and never filed collection on the note; further, the savings clause, Miss. Code Ann. § 15-1-57, did not apply because that section applied only when a person was restrained or prohibited from bringing suit. *Chimento v. Fuller*, 965 So. 2d 668 (Miss. 2007).

Because the two-year statute of limitations in Miss. Code Ann. § 15-1-36(15) was extended 60 days pursuant to Miss. Code Ann. § 15-1-57, the individual's claim for malpractice against a medical

center was timely when it was filed two years and 30 days after the date of injury. *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274 (Miss. 2006), remanded by 23 So. 3d 1080, 2009 Miss. LEXIS 474 (Miss. 2009).

In an appeal of dismissal of a medical malpractice case due to limitations, the judgment was reversed because it was timely filed within the statute of limitations; the most reasonable interpretation of Miss. Code Ann. § 15-1-36(15) and § 15-1-57 tolled the two-year statute of limitations for 60 days. *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005).

Constitutional amendment prohibiting state from making payment on certain precivil war bonds did not toll statute of limitations for bringing claim on bonds, as enactment did not prohibit bondholder from bringing suit. *Grant v. State*, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

In a wrongful death action against the administrator of an estate arising from an automobile accident, the 4-year limitations period set forth in § 15-1-25 was not tolled pursuant to § 15-1-57 during the time that another suit stemming from the same accident was on direct appeal to the Supreme Court from an order granting a directed verdict where the plaintiff in the wrongful death action was not a party to the second suit, and did not have any involvement with it except that the plain-

tiff's decedent had been riding in the same automobile as the plaintiff's decedent in the second lawsuit; the order granting the directed verdict in the second case in no way prevented the plaintiff from filing his wrongful death cause of action. *Townsend v. Estate of Gilbert*, 616 So. 2d 333 (Miss. 1993).

Action for wrongful death brought by statutory heirs of decedent, alleging that decedent came into contact with toxic substances during his employment with defendant, resulting in his death, was time-barred where approximately 8½ years elapsed between decedent's death and filing of present action; negligence actions being governed by § 15-1-49 (6 years), actions based on intentional infliction of emotional distress being controlled by § 15-1-35 (one year), and breach of warranty actions governed by § 75-2-725 (6 years), whether defendants' acts were characterized as intentional or negligent, longest possible limitations period under Mississippi law would be 6 years. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

Action by heirs of tax collector for commissions, brought within six years after filing and rejection of claim by supervisors, but more than six years after right to file claim accrued, held barred by limitations, in absence of showing that heirs had been legally restrained. *Grenada County v. Nason*, 174 Miss. 725, 165 So. 811 (1936).

## RESEARCH REFERENCES

**ALR.** Delay caused by other litigation as estopping reliance on statute of limitations. 45 A.L.R.3d 703.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 195 et seq.

4 Am. Jur. Trials, Statutes of Limitation §§ 24 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 124 et seq.

## § 15-1-59. Saving in favor of persons under disabilities.

If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.



**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 1 (7); 1857, ch. 57, art. 12; 1871, § 2156; 1880, § 2677; 1892, § 2746; 1906, § 3106; Hemingway's 1917, § 2470; 1930, § 2308; 1942, § 738; Laws, 1983, ch. 482, § 2, eff from and after July 1, 1983.

**Cross References** — Ratification of contracts made during infancy, see § 15-3-11. Collateral attack by minor upon decree establishing title to property, see § 91-1-31.

## JUDICIAL DECISIONS

1. In general.
2. Actions under Tort Claims Act.
3. Actions for child support.
4. Actions for wrongful death.

### 1. In general.

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were improperly dismissed, he was denied his right to a jury trial as set forth in Miss. Const. art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764 (Miss. 2007).

Where the mother entered into the relationship with the father when the mother was 14 years old and moved in with the father before the mother was 16 years old, the mother was not entitled to protection from the courts, as the mother's action for an equitable distribution of the property was not brought during the mother's minority or within three years thereafter pursuant to the savings clause for minors under Miss. Code Ann. § 15-1-59. *Nichols v. Funderburk*, 881 So. 2d 266 (Miss. Ct. App. 2003), *aff'd*, 883 So. 2d 554 (Miss. 2004).

Where plaintiff presented sufficient evidence on the issue of her unsoundness of mind to shift the burden of proof to defendant and a review of the testimony indicated that plaintiff was not in effective control of the day-to-day affairs of her

family, the court could not rely on this evidence to support a finding that the tolling provisions of Miss. Code Ann. § 15-1-59 were inapplicable. *Hampton v. Gannett Co.*, 296 F. Supp. 2d 716 (S.D. Miss. 2003).

Trial court erred in ruling that the minor's savings statute, Miss. Code Ann. § 15-1-59, did not toll the statute of limitations on a wrongful death action; however, once a wrongful death suit was filed in her behalf, the minor no longer enjoyed the protection of § 15-1-59; since there could be but one cause of action under Miss. Code Ann. § 11-7-13, the minor was governed by the same statute of limitations as the decedent's administratrix. *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Where a father entered into a stipulation to dismiss a driver from a negligence case with prejudice, his minor son was unable to assert the same cause of action against the driver when he reached the age of majority, under the doctrine of *res judicata*. *Taylor v. Taylor*, 835 So. 2d 60 (Miss. 2003).

Provisions of the minor's savings statute, Miss. Code Ann. § 15-1-59, and the wrongful death statute, Miss. Code Ann. § 11-7-13, conflict where there exists a person qualified under § 11-7-13 to bring suit, as § 11-7-13 requires that one suit be brought for damages from wrongful death. Thus, the statute of limitations runs against both the personal representative of the deceased and the deceased's children. *Curry v. Turner*, 832 So. 2d 508 (Miss. 2002).

In a child support matter, more than seven years had passed since the eldest child had become 21; therefore, his claim was barred by the statute of limitations, but the claim of his sister was still viable, and the father did not waive the defense

by failing to raise it as an affirmative defense in the pleadings when no pleading was required. *Brown v. Brown*, 822 So. 2d 1119 (Miss. Ct. App. 2002).

The minor savings clause applies to a wrongful death action. *Thiroux v. Austin*, 749 So. 2d 1040 (Miss. 1999).

The statute of limitations was not tolled for unsoundness of mind, notwithstanding evidence that the plaintiff received social security disability for schizophrenia, where the trial judge found that the plaintiff was capable of managing his own affairs, managed his own money, hired an attorney to file three lawsuits, and testified very coherently and competently at his discovery depositions. *Brumfield v. Lowe*, 744 So. 2d 383 (Miss. Ct. App. 1999).

The Mississippi Tort Claims Act's one year statute of limitations expressed in § 11-46-11 is not tolled by the "minor savings clause" of this section until the minor achieves majority. *Marcum v. Hancock County Sch. Dist.*, 741 So. 2d 234 (Miss. 1999).

The statute applies to a proceeding to recover child support, whether the proceeding is commenced by the child, after emancipation, or by the custodial parent. *Glass v. Glass*, 726 So. 2d 1281 (Ct. App. 1998).

Unadjudicated unsoundness of mind can be sufficient to trigger the savings statute; a legal adjudication of incompetency is not necessary to toll the statute of limitations if sufficient evidence exists to show that the victim was mentally incompetent at the time the cause of action accrued. *Rockwell v. Preferred Risk Mut. Ins. Co.*, 710 So. 2d 388 (Miss. 1998).

Statute of limitations on mother's action to enforce foreign judgment against father for child support arrearage was tolled by minority of children, even though mother was not under disability of minority. *Vice v. Department of Human Servs.*, 702 So. 2d 397 (Miss. 1997).

The limitation period provided by § 99-39-5(2) is not subject to the savings clause in § 15-1-59; the savings clause in § 15-1-59 applies only to actions mentioned in Chapter 1, Title 15 of the Mississippi Code of 1972. *Cole v. State*, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

An insurer was notified of a claim, which arose from an automobile accident between an insured and an uninsured motorist, well within the applicable 6-year statute of limitations set forth in § 15-1-49, even though the insurer was first notified of the accident approximately 6 ½ years after the date of the accident, where the insured was 17 years old when she was injured in the accident, and therefore, pursuant to § 15-1-59, the statute of limitations did not begin to run against her until she reached her 21st birthday. *Lawler v. GEICO*, 569 So. 2d 1151 (Miss. 1990).

Statute of limitations, applicable to contempt action brought by divorced parent to enforce past due child support, is savings clause in favor of persons under disabilities (§ 15-1-59), not 7 year statute of limitations (§ 15-1-43), so long as child is minor. *Wilson v. Wilson*, 464 So. 2d 496 (Miss. 1985).

In an action for wrongful death filed by the surviving spouse and children after the statutory limitation period had passed, § 15-1-59, the savings statute, did not toll the limitations period in favor of the children, since the surviving spouse was a person in esse who had the right to file suit for wrongful death during the six-year limitation period after decedent's death, and thus the action was barred. *Arender v. Smith County Hosp.*, 431 So. 2d 491 (Miss. 1983).

The general savings statute in favor of those under disabilities insofar as limitations of actions are concerned does not apply to the statute giving a widow the right to renounce her husband's will under certain circumstances. *Wolcott v. Wolcott*, 184 So. 2d 381 (Miss. 1966).

Suit to set aside conveyance made during minority is barred where statutory period has run since grantor's majority. *Floyd v. Floyd*, 239 Miss. 69, 121 So. 2d 133 (1960).

If unsoundness of mind of one suing for damages for assault and battery began before expiration of day of injury, limitations did not begin until removal of disability. *Pannell v. Glidewell*, 146 Miss. 565, 111 So. 571 (1927).

Bill barred on its face by limitation is demurrable, although complainants sue



by next friend where it is not alleged that complainants were minors. *Thames v. Mangum*, 87 Miss. 575, 40 So. 327 (1906).

The statute [Code 1942, § 738] applies only to the actions mentioned in this chapter. *Foster v. Yazoo & Miss. V.R. Co.*, 72 Miss. 886, 18 So. 380 (1895).

Where a party is under two or more disabilities when a cause of action accrues, the statute will not begin to run until all be removed. *North v. James*, 61 Miss. 761 (1884).

## **2. Actions under Tort Claims Act.**

The one (1) year statute of limitations of the Mississippi Tort Claims Act set forth in § 11-46-11 is not tolled by the minors' savings clause in this section. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144 (Miss. 1999).

This section's minor savings clause only applies to periods of limitation within this chapter and not to the Mississippi Torts Claims Act; thus, plaintiff failed to file her claim under the MTCA within the prescribed limitations period. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144 (Miss. 1999).

## **3. Actions for child support.**

Registration of a child support order was timely because the three-year statute of limitations applicable to the father under Mississippi law was tolled while the child remained a minor. The tolling applied to the mother and the State, though neither was under such a disability, and the child was twelve years old in January, 1999. *Shelnut v. Dep't of Human Servs.*, 9 So. 3d 359 (Miss. 2009).

Chancery court did not err in granting a wife an interest in a husband's retirement account to secure child support; thus, the statute of limitations on the wife's action based on a domestic judgment under Miss. Code Ann. § 15-1-43 was tolled by the child support exception of Miss. Code Ann. § 15-1-59 because the retirement funds, though put in the wife's name, were child

support payments. *Carlson v. Matthews*, 966 So. 2d 1258 (Miss. Ct. App. 2007).

Limitations period under Miss. Code Ann. § 15-1-43 did not bar a contempt action to recover child support payments 12 years after a divorce decree was entered because the youngest child had until 2008 to bring the action under the savings clause of Miss. Code Ann. § 15-1-59. *Strack v. Sticklin*, 959 So. 2d 1 (Miss. Ct. App. 2006), writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Son was still a minor when the mother initiated the contempt action; thus, pursuant to Miss. Code Ann. § 15-1-59, the statute of limitations had not run on the father's child support obligations. It therefore followed that even if the father had obtained a ruling on his affirmative defense of laches, it would have availed him naught. *Durr v. Durr*, 912 So. 2d 1033 (Miss. Ct. App. 2005).

In a contempt proceeding for the husband's failure to pay child support, the affirmative defense of statute of limitations was not waived because, although the husband filed an answer, no such pleading was required under Miss. R. Civ. P. 12(b) and 81(d)(2), (4); thus, the husband had the right to raise the defense at any stage and the statute of limitations would bar any claims filed seven years after the youngest child reached the age of 21 pursuant to Miss. Code Ann. § 15-1-59. *Miss. Dep't of Human Servs. v. Guidry*, 830 So. 2d 628 (Miss. 2002).

## **4. Actions for wrongful death.**

Personal representatives' amended complaint against a convenience store in a wrongful death action was dismissed because the minor's savings statute, Miss. Code Ann. § 15-1-59, did not toll the general statute of limitations, Miss. Code Ann. § 15-1-49, which otherwise barred the wrongful death claim against the convenience store. *Anderson v. R & D Foods, Inc.*, 913 So. 2d 394 (Miss. Ct. App. 2005).



## RESEARCH REFERENCES

**ALR.** Proof of unadjudged incompetency which prevents running of statute of limitations. 9 A.L.R.2d 964.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward. 86 A.L.R.2d 965.

Effect of infant's marriage after cause of action accrues on running of limitations as against him or her. 91 A.L.R.2d 1272.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 A.L.R.4th 216.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations. 11 A.L.R.5th 588.

Medical malpractice statutes of limitation minority provisions. 71 A.L.R.5th 307.

When Is Person, Other than One Claiming Posttraumatic Stress Syndrome or Memory Repression, Within Coverage of Statutory Provision Tolling Running of Limitations Period on Basis of Mental Disability. 23 A.L.R. 6th 697.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 202 et seq.

4 Am. Jur. Trials, Statutes of Limitation § 24.

**CJS.** 54 C.J.S., Limitations of Actions §§ 131 et seq.

**Law Reviews.** 1983 Mississippi Supreme Court Review: Inapplicability of savings statute to wrongful death actions. 54 Miss. L. J. 169, March, 1984.

## § 15-1-61. Repealed.

Repealed by Laws of 1975, ch. 402, eff from and after July 1, 1975.

[Codes, 1892, § 2747; 1906, § 3107; Hemingway's 1917, § 2471; 1930, § 2309; 1942, § 739; Laws, 1888, p. 93.]

**Editor's Note** — Former § 15-1-61 related to actions brought for assault, assault and battery, or maiming for persons in custody within one year after release.

## § 15-1-63. Effect of absence from the state.

If, after any cause of action has accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after he shall return.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (11); 1857, ch. 57, art. 13; 1871, § 2157; 1880, § 2678; 1892, § 2748; 1906, § 3108; Hemingway's 1917, § 2472; 1930, § 2310; 1942, § 740.

**Cross References** — Limitations of prosecutions generally, see § 99-1-5.  
Trial in absentia in criminal cases, see § 99-17-9.

## JUDICIAL DECISIONS

1. In general.
2. Absence from state.
3. —Subsequent visits, effect of.
4. —Property within the state during absence.
5. Nonresidence.

6. Pleading.

## 1. In general.

A plaintiff seeking to benefit from § 15-1-63 must have been unable to effect service on the defendant during the period

for which it is claimed the statute is tolled-i.e., the defendant must have left the state and not be amenable to service under a long-arm statute or other means because, for example, his or her whereabouts are unknown; the statute of limitations is not tolled where the plaintiff knew or should have known of the defendant's whereabouts. *Sullivan v. Trustmark Nat'l Bank*, 653 So. 2d 930 (Miss. 1995).

Under § 15-1-63, the burden of proving that the defendant was absent and not amenable to service is on the plaintiff. *Sullivan v. Trustmark Nat'l Bank*, 653 So. 2d 930 (Miss. 1995).

If a plaintiff can obtain process on a non-resident defendant, in a suit filed under the long arm statute, he will not be excused for his failure to sue and will not be entitled to claim that the statute of limitations is tolled during the absence of the defendant from the state; if a plaintiff makes such a claim, the burden is on him to show the duration of the defendant's absence from the state and to show that defendant cannot be served with process under any of the ways provided by the long arm statute. *Gulf Nat'l Bank v. King*, 362 So. 2d 1253 (Miss. 1978).

A suit on a credit memorandum issued to plaintiff in 1958 was barred by the 6 year statute of limitations where the period for demand was not indefinite, where plaintiff made no attempt to use the credit between 1958 and 1972, and where it did not communicate with defendant at all concerning the credit between 1963 and 1972; nor was the statute of limitations tolled until defendant's successor corporation first qualified to do business in Mississippi where such contention was raised for the first time on appeal and there was no showing that consideration of such issue was necessary to prevent a miscarriage of justice. *Valley Cement Indus., Inc. v. Midco Equip. Co.*, 570 F.2d 1241 (5th Cir. 1978), reh'g denied 573 F.2d 308 (5th Cir. 1978).

This section [Code 1942, § 740] applies only to actions in personam and does not apply to actions in rem. *King v. Childress*, 232 Miss. 766, 100 So. 2d 578 (1958).

This section [Code 1942, § 740] is not applicable to suit at law or equity for

recovery of land. *Beresford v. Marble*, 95 Miss. 461, 50 So. 68 (1909).

The statute embraces all persons; there is no saving. *Hodges v. Darden Bros.*, 51 Miss. 199 (1875).

The reason of the exception is that during such absence the plaintiff cannot sue. If the right to sue be unimpaired, notwithstanding the absence, the case is not within this section [Code 1942, § 740]. *French v. Davis*, 38 Miss. 218 (1859).

## 2. Absence from state.

Where an action on a promissory note was instituted in Mississippi and the note had been executed in Alabama, this statute [Code 1942, § 740] tolling the statute of limitations where there is an absence from the state was not applicable, for the absence relied on was from Alabama and not from Mississippi. *Guthrie v. Merchants Nat'l Bank*, 254 Miss. 532, 180 So. 2d 309 (1965).

This statute [Code 1942, § 740] applies only where the cause of action accrues within the state of Mississippi and the person against whom it accrued thereafter absents himself, and does not apply where the cause of action accrued in another state and defendant thereafter moved to Mississippi. *Le Mieux Bros. Corp. v. Armstrong*, 91 F.2d 445 (5th Cir. 1937).

Seven-year limitation for issuance of execution on judgment, not extended by absence of execution defendant from state, issuance of execution not being commencement of action. *McGraw v. Mitchell*, 142 Miss. 357, 107 So. 423 (1926).

Phrase "be absent from and reside out of the state" applies to unmarried woman who went to California to work as domestic servant intending to return to the state after earning enough to pay off indebtedness on property. *Hendricks v. Kellogg*, 116 Miss. 22, 76 So. 746 (1917).

A cause of action accrues in this state whenever one has a right of action in this state, and if the person against whom it has accrued be absent from and resides out of this state, the time of his absence is not counted in his favor in the suit here. *Hunt v. Belknap*, 78 Miss. 76, 28 So. 751 (1900).

The statute [Code 1942, § 740] applies where defendant has not been in the state at all, as well as where the defendant



resided here at the time the cause of action accrued and subsequently removed. *Robinson v. Moore*, 76 Miss. 89, 23 So. 631 (1898); *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

It is only where a right of action accrues in this state and the persons go from and reside out of it that the statute prevents the period of their absence from being counted. *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

If he have no such residence here, and be absent, the section [Code 1942, § 740] applies, even though it be shown that the debtor had not acquired a domicil or fixed residence abroad. *State v. Furlong*, 60 Miss. 839 (1883).

If the debtor have a home in this state, so that service of process can be had on him under our laws, by leaving with a member of his family or posting a copy, his absence on a trip abroad will not be within this section [Code 1942, § 740]. *Dent v. Jones & Pintard*, 50 Miss. 265 (1874).

### 3. —Subsequent visits, effect of.

Where the defendant contracts a debt and removes to another state, and afterwards visits this state as a traveling salesman, going from place to place and staying only a day or two at each place, though while thus occupied he remained in the state continuously for several months, he is absent within the meaning of the statute. *Weille v. Levy*, 74 Miss. 34, 20 So. 3, 60 Am. St. R. 500 (1896).

A person who, after a cause of action accrues against him, removes and resides out of the state, is entitled to the benefit of the time spent here on subsequent visits which are open, notorious, and long enough for suit; but such person cannot claim that because of such visits his subsequent absences are to be disregarded. *Pindell v. Harris*, 57 Miss. 739 (1880); *Withers v. Bullock*, 53 Miss. 539 (1876).

### 4. —Property within the state during absence.

The fact that the debtor has property liable to attachment is immaterial; "the statute follows the person and not the property of the debtor." *Fisher v. Fisher*, 43 Miss. 212 (1870).

### 5. Nonresidence.

Where a cause of action for labor and materials furnished to improve the defendant's property located in Mississippi accrued in this state and the defendant was a nonresident of Mississippi at the time of such accrual and remained a nonresident thereafter, the three-year statute of limitations did not run to bar the claim. *Gross v. Thomas*, 187 So. 2d 307 (Miss. 1966).

This section [Code 1942, § 740] is inapplicable where the cause of action accrued outside the state. *C & L Rural Elec. Coop. Corp. v. Kincade*, 175 F. Supp. 223 (N.D. Miss. 1959), *aff'd*, 276 F.2d 929 (5th Cir. 1960).

Where the construction required by a contract was to be performed in Arkansas and any breach thereof occurred at the construction site, this section [Code 1942, § 740] did not toll the limitation period. *C & L Rural Elec. Coop. Corp. v. Kincade*, 175 F. Supp. 223 (N.D. Miss. 1959), *aff'd*, 276 F.2d 929 (5th Cir. 1960).

Where the landowner had actual knowledge for ten years prior to the commencement of a suit, or by the use of reasonable prudence would have known, that the instrument she executed was a mineral deed rather than a royalty deed, and she could have brought action at any time within the ten-year period and obtained process upon the nonresident defendant by publication, the landowner's action was barred by the ten-year statute of limitations provided in § 709, Code of 1942. *King v. Childress*, 232 Miss. 766, 100 So. 2d 578 (1958).

Where a judgment was rendered in Alabama against a nonresident of Mississippi on a cause of action which did not accrue in Mississippi, and the defendant thereafter became a resident of Mississippi, the statute of limitations ran from the date of the judgment rather than from the time the defendant became a resident of Mississippi. *United States Fid. & Guar. Co. v. Ransom*, 192 Miss. 286, 5 So. 2d 238 (1941).

Limitation does not run in favor of nonresident maker of note and deed of trust on property in state. *Mason v. Stroud*, 155 Miss. 829, 125 So. 408 (1930).

This section [Code 1942, § 740] applies only where person against whom cause of



action accrues in the state removes and resides out of state; not applicable where nonresident alien corporation claimed adverse possession of land through tenants. *Scottish Am. Mtg. Co. v. Butler*, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C,1236 (1911).

This statute [Code 1942, § 740] does not save the bar of a note made in another state where the limit is ten years, although both maker and payee resided there at the time and the maker did not become a resident of this state until nearly six years after maturity. *Wright v.*

*Mordaunt*, 77 Miss. 537, 27 So. 640, 78 Am. St. R. 536 (1900).

The statute of limitations does not run during a debtor's absence from the state as a nonresident, and this rule is applicable, though the plaintiff be nonresident. *Bower v. G. Henshaw & Sons*, 56 Miss. 619 (1879).

## 6. Pleading.

One relying on this statute must invoke it and plead the facts which make it applicable. *Tinsley v. Mills*, 36 F. Supp. 621 (E.D. La. 1940).

## RESEARCH REFERENCES

**ALR.** Provision of statute of limitations excluding period of defendant's absence from the state as applicable to a local cause of action against individual who was a nonresident when the same arose. 17 A.L.R.2d 502.

Tolling of statute of limitations during absence from state as affected by fact that

party claiming benefit of limitations remained subject to service during absence or nonresidence. 55 A.L.R.3d 1158.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 169 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 242, 243 et seq.

## § 15-1-65. Action barred in another jurisdiction barred here.

When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

**SOURCES:** Codes, 1880, § 2684; 1892, § 2754; 1906, § 3114; *Hemingway's* 1917, § 2478; 1930, § 2311; 1942, § 741; Laws, 1989, ch. 311, § 4, eff from and after July 1, 1989.

**Editor's Note** — Laws, 1989, ch. 311, § 7, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

**Cross References** — Effect of completion of limitations, see § 15-1-3.

Actions on foreign judgments, see § 15-1-45.

## JUDICIAL DECISIONS

1. In general.
2. Particular applications.

### 1. In general.

The doctrine of *forum non conveniens*

will never be applied to dismiss a case if it is barred elsewhere by a statute of limitations, unless or until the defendant is willing to stipulate that he or she will waive the statute of limitations defense.

Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557 (Miss. 1988).

Section 15-1-65, which makes provision for nonresidents bringing suit on causes of action accruing in another state, applies only to a nonresident who moves to Mississippi after the statute has run on the cause in the other state. *Shewbrooks v. A.C. & S., Inc.*, 529 So. 2d 557 (Miss. 1988).

In action brought in District Court in Mississippi, fact that statute of limitations of another state, which state has most significant relationship to occurrence and parties, is deemed procedural does not preclude application of Mississippi's "following statute", so as to make other state's one year limitations period applicable to products liability in negligence claims against seller of cash register. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

This statute [Code 1942, § 741] applies to a cause of action against a corporation as well as to individuals. *Stavang v. American Potash & Chem. Corp.*, 227 F. Supp. 786 (S.D. Miss. 1964), *aff'd*, 344 F.2d 117 (5th Cir. 1965).

This provision applies only in favor of a nonresident who has moved into Mississippi after a cause of action against him is barred in his former state of residence; and when his removal was before it had become barred, the Mississippi statute of limitations applies. *Sheets v. Burman*, 322 F.2d 277 (5th Cir. 1963).

Statute of Mississippi applies to right of action arising in another state and sued on in Mississippi. *Fisher v. Burk*, 123 Miss. 781, 86 So. 300 (1920).

The sole purpose and effect of the statute are to give one suing in this state the benefit of a bar complete elsewhere. *Wright v. Mordaunt*, 77 Miss. 537, 27 So. 640, 78 Am. St. R. 536 (1900).

The statute [Code 1942, § 741] does not apply if the defendant has never resided in this state. History of the statute given. *Robinson v. Moore*, 76 Miss. 89, 23 So. 631 (1898).

Query, whether both parties must have resided in the state where the cause of action accrued until the bar of that state had attached. *Robinson v. Moore*, 76 Miss. 89, 23 So. 631 (1898).

The statute [Code 1942, § 741] applies only where a nonresident in whose favor the statute had accrued afterwards removes into this state. *Louisiana & Miss. R. Transf. Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930); *Louisville & N.R. Co. v. Pool*, 72 Miss. 487, 16 So. 753 (1895).

## 2. Particular applications.

Summary judgment granted against two corporations licensed to do business in the State of Mississippi on the grounds that the State's three-year statute of limitations did not apply to an incident that occurred in the State because the corporations were foreign corporations was reversed because the two corporations should have been considered residents for purposes of invocation of the State statute of limitations, in much the same way as the corporations would be able to invoke the use of the Mississippi long arm statute, Miss. Code Ann. § 13-3-57. *St. Paul Fire & Marine Ins. Co. v. Paw Paw's Camper City, Inc.*, 346 F.3d 153 (5th Cir. 2003).

Mississippi statute of limitations would apply in action brought by Pennsylvania resident against manufacturer of farm combine, purchased in Pennsylvania, for injuries sustained in Pennsylvania while cleaning combine, since action was brought in District Court in Mississippi on grounds that manufacturer of combine was qualified to do business in Mississippi at time action accrued, and even though case was subsequently transferred to Pennsylvania. *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990), on remand, 914 F.2d 242 (3d Cir. Pa. 1990), but see *Varnado v. Danek Medical, Inc.*, (E.D. La. Aug. 19, 1998).

In action brought in District Court in Mississippi, fact that statute of limitations of another state, which state has most significant relationship to occurrence and parties, is deemed procedural does not preclude application of Mississippi's "following statute", so as to make other state's one year limitations period applicable to products liability in negligence claims against seller of cash register. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

Mississippi Code § 15-1-65 was inapplicable to Mississippi residents' common law action brought in Mississippi seeking to recover damages for injuries incurred in Louisiana while employed by an individual defendant and a corporate defendant which were subject to suit in Mississippi at the time of alleged accident causing the injuries. *White v. Malone Properties, Inc.*, 494 So. 2d 576 (Miss. 1986).

Where a cause of action arising in Kansas which would have been barred by the Kansas statute of limitations had the action been brought in Kansas was timely filed in Mississippi under Mississippi's statute of limitations against a defendant who was a nonresident of Mississippi, the Mississippi statute of limitations was appropriate where the Kansas statute of limitations was considered procedural rather than substantive by Kansas courts. *Steele v. G.D. Searle & Co.*, 422 F. Supp. 560 (S.D. Miss. 1976), motion denied, 428 F. Supp. 646 (S.D. Miss. 1977).

This statute did not apply in favor of persons who were residents of Mississippi at the time the cause of action accrued, even though the accrual took place in another state. *Cummings v. Cowan*, 390 F. Supp. 1251 (N.D. Miss. 1975).

This section did not apply to an action arising out of an automobile accident which occurred in Mississippi, even though all of the parties and witnesses were residents of Alabama. *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975).

Cause of action arising from breach of contract in another state is governed by Mississippi statute of limitations in which action thereon was brought where defendant had never resided in Mississippi. *Fisher v. Burk*, 123 Miss. 781, 86 So. 300 (1920).

Mississippi statute of limitations controls in action in this state on note made in Ontario, Canada. *Philp v. Hicks*, 112 Miss. 581, 73 So. 610 (1917).

This section [Code 1942, § 741] inapplicable to action against domestic railroad companies for personal injury inflicted in foreign state. *New Orleans Great N.R. Co. v. Fortinberry*, 107 Miss. 79, 64 So. 966 (1914).

A railroad company operating a road in this state, and therefore suable as a resident here, cannot plead the statute against an action for stock killed in another state where the statute of limitations, if suit were there brought, would be a bar. *Louisville & N.R. Co. v. Pool*, 72 Miss. 487, 16 So. 753 (1895).

## RESEARCH REFERENCES

**CJS.** 54 C.J.S., Limitations of Actions § 43.

**Law Reviews.** 1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi — Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

Jackson, Legislative reform of statutes of limitations in Mississippi: proposed interpretations, possible problems. 9 Miss. College LR 231, Spring 1989.

Litigation in Mississippi Today: A Symposium: Class Actions & Joinder in Mississippi, 71 Miss. L.J. 447, Winter, 2002.

## § 15-1-67. Effect of fraudulent concealment of cause of action.

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.



**SOURCES:** Codes, 1857, ch. 57, art. 14; 1871, § 2158; 1880, § 2679; 1892, § 2749; 1906, § 3109; Hemingway's 1917, § 2473; 1930, § 2312; 1942, § 742.

**Cross References** — Effect of fraud on right to bring action in equity, see § 15-1-9. Fraud in the probate of a will, see § 91-7-23.

## JUDICIAL DECISIONS

1. In general.
2. What constitutes concealed fraud, generally.
3. — Particular cases.
4. Notice or knowledge.
5. Reasonable diligence.
6. Persons affected.
7. Evidence.
8. Pleading.

### 1. In general.

Where lenders made a sufficient showing of affirmative acts by a borrower to conceal a fraud in the inducement claim, it was a matter for the jury to consider whether the claim was fraudulently concealed from the lenders until discovered. *Whitaker v. Limeco Corp.*, 32 So. 3d 429 (Miss. 2010).

Trial court erred in granting summary judgment to a manufacturer of poultry houses and a general contractor, in a suit brought by farmers, because, under either an equitable-estoppel theory or the fraudulent-concealment exception of Miss. Code Ann. § 15-1-67, "the application of Miss. Code Ann. § 15-1-41 could be barred. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608 (Miss. 2008).

Clients' claim of fraudulent concealment was hollow where they presented no evidence to satisfy the test for fraudulent concealment; they offered no evidence to back up their bare assertion that the attorneys fraudulently concealed their alleged negligence, and the clients made no offering of any affirmative act designed to conceal a cause of action. *Channel v. Loyacono*, 954 So. 2d 415 (Miss. 2007).

Six-year limitation of Miss. Code Ann. § 15-1-41 is not affected by the date of accrual, and by extension not tolled by Miss. Code Ann. § 15-1-67; therefore, summary judgment was properly granted to a builder and a manufacturer in a property damage case arising from leaky roofs on chicken houses where a lawsuit

was not filed until 2004, despite the fact that the leaks began shortly after completion in 1995 or 1996. *Windham v. Latco of Miss., Inc.*, 972 So. 2d 652 (Miss. Ct. App. 2007), reversed by, remanded by, overruled in part by 972 So. 2d 608, 2008 Miss. LEXIS 44 (Miss. 2008).

Concealment statute does not affect the statute of repose as the statute of repose operates independently of causes of action and by its nature bars hidden claims and accruals of causes of action are irrelevant to its operation. *Estes v. Bradley*, 954 So. 2d 455 (Miss. Ct. App. 2006).

Trustee alleged no specific affirmative act by the company to conceal the true amount of royalties owed the trust; thus, his claim of fraudulent concealment had no merit, and the statute of limitations was not tolled. *Nygaard v. Getty Oil Co.*, 918 So. 2d 1237 (Miss. 2005).

Insureds simply made vaguely referenced misrepresentations and concealment attributable to the insurer without specifying any factual basis for those assertions. Therefore, the fraudulent concealment doctrine did not apply to the their fraud claims and summary judgment for the insurer was proper. *Robinson v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 516 (Miss. Ct. App. 2005).

To toll the limitation period, a plaintiff must prove that the defendant engaged in affirmative acts of concealment, that the plaintiff acted with due diligence in attempting to discover the claim, and that the plaintiff was unable to do so. *Frye v. Am. Gen. Fin., Inc.*, 304 F. Supp. 2d 876 (S.D. Miss. 2004).

To avail themselves of the doctrine of fraudulent concealment to toll the running of the limitations period, plaintiffs have a twofold obligation to demonstrate that (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on their part to discover it. *Ander-*

son v. City Fin. Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25226 (S.D. Miss. July 11, 2003).

Action by plaintiff against former employer for slander was time-barred where publication took place more than one year prior to institution of action, despite fact that plaintiff did not discover defamatory statements until more than one year after they were made. *EEOC v. Southern Pub. Co.*, 732 F. Supp. 682 (S.D. Miss. 1988).

A cause of action for malpractice does not accrue, so as to set the statute of limitations to running while the doctor concealed the facts from the patient. *Sheets v. Burman*, 322 F.2d 277 (5th Cir. 1963).

The liability of an attorney for breach of duty attaches immediately upon the breach, and the statute of limitations begins to run then, unless there is fraudulent concealment of the cause of action, in which case it begins to run from its discovery, or from the time when reasonable diligence would have led to its discovery. *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885 (1896).

## **2. What constitutes concealed fraud, generally.**

Death row inmates were not entitled to have the three-year statute of limitations for personal injury actions in Miss. Code Ann. § 15-1-49 tolled based upon fraudulent concealment under Miss. Code Ann. § 15-1-67 because there was no evidence that the State affirmatively concealed its protocol governing the manner in which it carried out executions or that the inmates were unaware that a 42 U.S.C.S. § 1983 action was the proper method for challenging the State's lethal injection protocol. *Walker v. Epps*, 587 F. Supp. 2d 763 (N.D. Miss. 2008), affirmed by 550 F.3d 407, 2008 U.S. App. LEXIS 25327 (5th Cir. Miss. 2008).

Affirmative act of fraudulent concealment must occur post-completion of the fraudulent act in order to toll the statute of limitations under Miss. Code Ann. § 15-1-67. *Nat'l Union Fire Ins. Co. v. Blasio*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 42669 (N.D. Miss. May 23, 2008).

Growers failed to demonstrate any affirmative act on the part of the farm to conceal any information and did not pro-

vide any details of how the farm concealed its alleged fraudulent actions; merely alleging that the other side had complete control of the data would not suffice; the growers did not demonstrate any action by them to obtain any of the allegedly concealed information. *Sanderson Farms, Inc. (Prod. Div.) v. Ballard*, 917 So. 2d 783 (Miss. 2005).

Borrower's misrepresentation and negligence claims against a credit insurer's employee were time-barred under Miss. Code Ann. § 15-1-49 and the statute was not tolled because the borrower received, but did not read, copies of all pertinent documents, which clearly stated that credit insurance was optional. *Bell v. Am. Gen. Fin., Inc.*, 267 F. Supp. 2d 582 (S.D. Miss. 2003).

Any reliance plaintiffs may have placed on the oral statements of the loan agents regarding credit life insurance that were contradicted by the express language of the loan agreements was per se unreasonable, and such oral statements could not constitute fraudulent concealment. *Agnew v. Wash. Mut. Fin. Group, LLC*, 244 F. Supp. 2d 672 (N.D. Miss. 2003).

To establish a claim of fraudulent concealment under Miss. Code Ann. § 15-1-67, plaintiffs must (1) show some act of an affirmative nature designed to prevent and which does prevent discovery of the claim, and (2) prove that even though they acted with due diligence in attempting to discover the claim, they were unable to do so. *Ross v. Citifinancial, Inc.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26733 (S.D. Miss. Mar. 18, 2002), amended by 2002 U.S. Dist. LEXIS 26740 (S.D. Miss. May 8, 2002), affirmed by, remanded by 344 F.3d 458, 2003 U.S. App. LEXIS 18068 (5th Cir. Miss. 2003).

In order for a particular misrepresentation to constitute fraud which would toll the statute of limitations, it must be made under such circumstances, and be of such nature, that a reasonably prudent person would act thereon. *Wilson v. Retail Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971), aff'd, 457 F.2d 1406 (5th Cir. 1972).

Acts of fraud resulting in concealment of cause of action, to postpone its accrual until fraud shall be or might have been discovered, must be committed by defen-



dants or someone in privity with them. *Burton v. John Hancock Mut. Life Ins. Co.*, 171 Miss. 596, 157 So. 525 (1934), error overruled, 171 Miss. 605, 158 So. 474 (1935).

Where false representation as to acreage of tract is not fraudulently concealed by vendor after sale, purchaser's right of action for deceit accrues upon completion of sale induced by false representation. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

Cause of action of mortgagee against parties cashing check for award in condemnation proceeding was not concealed, and therefore extended, where mortgagee was served in proceeding but did not appear. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Vendor's continuing false representations as to acreage after sale held fraudulent concealment tolling limitations. *Lundy v. Hazlett*, 147 Miss. 808, 112 So. 591 (1927).

Fraudulent concealment of cause of action cannot be predicated upon open and public acts of defendant. *Thornton v. City of Natchez*, 88 Miss. 1, 41 So. 498 (1906).

Concealment of the cause of action for a libel contained in a letter sent by mail cannot be predicated upon any act of the writer at the place where the letter was mailed. *McCarlie v. Atkinson*, 77 Miss. 594, 27 So. 641, 78 Am. St. R. 540 (1900).

The sending of a libelous letter by mail does not alone constitute a concealment of its contents or publication. *McCarlie v. Atkinson*, 77 Miss. 594, 27 So. 641, 78 Am. St. R. 540 (1900).

Where the fraud itself is the basis of the right of action, unless a relation of trust and confidence exists between the parties, the defendant must have been guilty of some positive act of fraudulent representation or concealment directly towards the party injured. *State v. Furlong*, 60 Miss. 839 (1883); *Edwards v. Gibbs*, 39 Miss. 166 (1860); *Buckner v. Calcote*, 28 Miss. 432 (1855), error dismissed, 59 U.S. (18 How.) 243, 15 L. Ed. 348 (1856).

Where the matter is of record, and the party complaining has the means of finding out the character of the transaction, the statute does not apply. *Fleming v. Grafton*, 54 Miss. 79 (1876).

### 3. — Particular cases.

Insurance policies were ambiguous where, in part, the definition of maturity date in the policies failed to explain that the payment of the planned premium would not be sufficient to keep the policy in effect to the maturity date; an issue of fact remained as to when the alleged fraud was consummated upon the insureds and whether the limitations period was tolled pursuant to Miss. Code Ann. § 15-1-67. *Hicks v. N. Am. Co. for Life & Health Ins.*, 47 So. 3d 181 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 588 (Miss. 2010).

Although a buyer alleged that a software seller tried to conceal integration problems by blaming the buyer for customizing the software, and by trying to convince the buyer to upgrade to a newer version of the software, the buyer failed to demonstrate how the seller's alleged conduct could and did prevent the buyer from discovering its claim. Buyer could not reasonably rely on the representations it cited, and the record was simply absent of any evidence that it did. *Peavey Elecs. Corp. v. Baan U.S.A., Inc.*, 10 So. 3d 945 (Miss. Ct. App. 2009).

Excess insurer's fraud and other tort claims against parties involved in settling medical malpractice claims against two doctors were barred under the limitations periods in Miss. Code Ann. §§ 15-1-35, 15-1-49, which were not tolled under Miss. Code Ann. § 15-1-67 because a letter from counsel for one of the doctors, which letter was written one year before the insurer filed suit, invited the excess insurer to discuss the withdrawal of the doctor's consent to settle, which the excess insurer alleged led to its payment obligations on behalf of another doctor whose primary coverage was exhausted, and counsel's letter did not attempt to conceal anything from the excess insurer. *Nat'l Union Fire Ins. Co. v. Blasio*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 42669 (N.D. Miss. May 23, 2008).

Where a shareholder allegedly entered into a settlement agreement based on fraud, the shareholder's claims against a corporate officer, a securities company, and others were time-barred because, in-



ter alia, (1) the shareholder admitted that the shareholder became suspicious about the corporation's environmental liability as far back as 1993, and (2) an alleged "firm commitment letter" was not a guarantee that the securities company would underwrite the corporation's public offering upon which the shareholder could have relied. *Pope v. Sorrentino*, 992 So. 2d 1194 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 531 (Miss. 2008).

Chancery court properly dismissed a wife's motion for contempt and modification of a property settlement in a divorce proceeding where the wife's claim for modification of the property settlement was time-barred under the statute of limitations; because there was no evidence of any fraudulent concealment on the part of the husband regarding his 401(k) plan, the statute of limitations ran from the entry of the judgment of divorce. *Shaw v. Shaw*, 985 So. 2d 346 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 135 (Miss. 2008).

Where plaintiff borrowers alleged fraudulent and negligent inducement into purchasing credit insurance in connection with loans, but alleged no post-sale act concealing that arrangement subsequent to the loans, they were not entitled to tolling under Mississippi's fraudulent concealment statute, Miss. Code Ann. § 15-1-67, on the claims against defendant insurers, and all of the claims were time-barred under Miss. Code Ann. § 15-1-49(1) because the last loan was dated September 15, 1999, and the action was not filed until December 28, 2002. *Jones v. Life of the S. Ins. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1414 (S.D. Miss. Jan. 4, 2006).

Where the debtors filed suit against mortgage and insurance companies for breach of fiduciary duties and negligent misrepresentation more than four years after receiving their mortgage loans, the case was barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49; fraudulent concealment did not toll the statute of limitations, and defendants did not take any affirmative actions which were designed to prevent discovery

of the claims. *Carter v. Citigroup, Inc.*, 938 So. 2d 809 (Miss. 2006).

Summary judgment was granted to an insurer and an agent in a fraud action relating to the purchase of life insurance because it was time-barred under Miss. Code Ann. § 15-1-49 since the claim should have been filed three years from the completion of the sale; moreover, there was no fraudulent concealment tolling the limitations period since the purchaser was not precluded from discovering her claim in the language of the policy. *Warren v. Horace Mann Life Ins. Co.*, 949 So. 2d 770 (Miss. Ct. App. 2006).

Bank's claims against an insurer, including fraudulent inducement in the purchase of a policy, were dismissed as time-barred under Miss. Code § 15-1-49, because even if the bank had not examined the policy when it was purchased, or if its terms were not clear, the bank was put on notice that the single premium payment may not have been sufficient to keep the policy in force; neither the oral representations from the insurer's agent that a single payment would maintain the policy, the express assurances that payments were not due, nor the zero balance statements over six years constituted concealment to save the case pursuant to Miss. Code § 15-1-67. *Peoples Bank Asset & Trust Mgmt. Dep't v. Great W. Life & Annuity Ins. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16752 (S.D. Miss. Feb. 7, 2005).

Summary judgment was granted to corporations' on fraudulent misrepresentation claims because the tolling provisions of Miss. Code Ann. § 15-1-67 were inapplicable, and thus individuals' claims were barred by the three year statute of limitation in Miss. Code Ann. § 15-1-49, where there was no evidence that the corporations engaged in affirmative acts of concealment that prevented the individuals from discovering their claims in a timely manner, in that the individuals' allegations instead focused on the corporations' alleged conduct prior to, and contemporaneous with, the purchase of the insurance policies. *Bland v. Fleet Fin., Inc.*, 318 F. Supp. 2d 392 (N.D. Miss. 2004).

Loans that were the subject of the individuals' complaint were all made in or

before 1994, and yet the individuals filed suit on February 2, 2002, well over three years after the date of the last loan to any of the individuals, in violation of Miss. Code Ann. § 15-1-3. The individuals' causes of action did not survive because the individuals failed to identify fraudulent concealment by a bank employee which, had it occurred and been proven, could have defeated the time bar, pursuant to Miss. Code Ann. § 15-1-67. *Stacher v. Am. Gen. Fin., Inc.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 18713 (S.D. Miss. Mar. 7, 2003).

Insureds' claim against an individual insurance agent for fraudulent misrepresentation was barred by the three-year statute of limitations, and the statute of limitations was not tolled because the insureds presented no evidence of any affirmative acts of concealment by the agent; moreover, if the insureds had read the policies, they would have known that the agents were not authorized to change the terms of the contract, and that the policies stated nothing about receiving retirement benefits at age 65. *Smith v. Union Nat'l Life Ins. Co.*, 286 F. Supp. 2d 782 (S.D. Miss. 2003).

Borrower's misrepresentation and negligence claims against a credit insurer's employee were time-barred under Miss. Code Ann. § 15-1-49 and the statute was not tolled because the borrower received, but did not read, copies of all pertinent documents, which clearly stated that credit insurance was optional. *Bell v. Am. Gen. Fin., Inc.*, 267 F. Supp. 2d 582 (S.D. Miss. 2003).

In a suit arising out of the purchase of two insurance policies, an insured's claims against three insurance agents for fraud, suppression/omission, negligence, and negligent suppression were barred by the statute of limitations because the insured failed to prove an affirmative act of fraudulent concealment after completion of the insurance sales or that she acted with due diligence in attempting to discover her claims. *Williams v. Union Nat'l Life Ins. Co.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26332 (S.D. Miss. Sept. 25, 2003), vacated by, remanded by 2004 U.S. Dist. LEXIS 27494 (S.D. Miss. Sept. 17, 2004).

Trial court did not err in dismissing a fraud and misrepresentation case against

an insurer with prejudice because the claim was barred by the six-year statute of limitations in Miss. Code Ann. § 722 (1972); the cause of action was not tolled by Miss. Code Ann. § 15-1-67 because the insurer did nothing to prevent two insureds from discovering their cause of action. *Stephens v. Equitable Life Assur. Soc'y of the United States*, 850 So. 2d 78 (Miss. 2003).

In borrowers' suit arising from allegedly fraudulent loan transactions, agents were fraudulently joined and remand was not necessary, because the borrowers could not establish a cause of action against the agents in state court since the viable claims against the agents were time-barred and the statute of limitations was not tolled under the doctrine of fraudulent concealment. *Ross v. First Family Fin. Servs., Inc.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 23212 (N.D. Miss. Aug. 26, 2002).

The statute of limitations was not tolled with regard to the defendant's claim pertaining to an adjustment of retirement account funds that were in the plaintiff's name, where the defendant never alleged that the plaintiff fraudulently concealed any misdeeds and the record indicated that the defendant knew of each payment of retirement account funds on behalf of the plaintiff. *Hall v. Dillard*, 739 So. 2d 383 (Miss. Ct. App. 1999).

In order to toll the statute of limitations, the plaintiffs were required to prove that their son, who defrauded them while acting as their investment advisor, was in privity with the defendant financial services company or acting as an agent of that company. *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144 (Miss. 1998).

In a construction defect action, the plaintiff's allegation that the defendant fraudulently concealed construction deficiencies because "parts of the metal supports were covered by 2 X 8 wooden boards" and the "top concealed some of the faulty welds as well as insulation which covered other welding joints" did not constitute fraudulent concealment of a cause of action within the meaning of § 15-1-67. *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988).



The rules and regulations of a retail credit company and its agreements with its customers to keep its reports confidential did not amount to a fraud or the concealment of a fraud within the purview of this section [Code 1942, § 742], nor did the company have any duty or obligation to reveal the contents of its confidential reports to the person who was the subject of such report (but see 15 USC, § 1681q), and the period of limitation of any cause of action for libel based on such report would commence running at the time the report was received by the company's customer. *Wilson v. Retail Credit Co.*, 438 F.2d 1043 (5th Cir. 1971).

In a libel suit based on the contents of a credit report, the court was of the opinion that due to the qualified privilege of confidential credit reports made in good faith in the every day course of business, the fact that the contents of the report were not earlier revealed to plaintiff did not amount to a concealed fraud within the meaning of this section [Code 1942, § 742]. *Wilson v. Retail Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972).

Where one of the parties to an agreement for the exchange of land failed to execute a deed to the property he exchanged, but the other party and her son moved thereon, the son continuing to occupy the land thereafter for many years and until the heirs of the first mentioned party brought an action in ejectment, the statute postponing the running of limitations until after the actual or constructive knowledge of concealed fraud was inapplicable, and would be inconsistent with the ten-year statute establishing title by adverse possession, since under the latter statute knowledge of an open, notorious and adverse possession may be presumed. *Leggett v. Norman*, 192 Miss. 494, 6 So. 2d 578 (1942).

This section [Code 1942, § 742] did not apply to permit recovery for disability payments due more than six years before the commencement of an action therefor, where the insurer's refusal to pay them was based upon reasonable grounds for a difference of opinion and there was no fraudulent concealment or wilful misrepresentation. *Columbian Mut. Life Ins. Co. v. Craft*, 186 Miss. 234, 185 So. 225 (1938).

Statement of agent for insurer who was not present at death of insured that insured died of heart disease, and beneficiary entitled to only indemnity for natural death, was statement of opinion and not misrepresentation on which could be predicated charge of fraud. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

Mere silence of insurer as to contents of proof of death which was submitted by beneficiary's physician who attended insured, did not constitute fraud which would toll running of statute of limitations, where beneficiary accepted amount payable for natural death and failed to make inquiry for approximately six years as to true facts of insured's death. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

No concealed fraud existed where a bank paid check to person other than drawer, believing forged endorsement to be genuine, and delivered cancelled check to drawer; limitations commenced running when bank rendered drawer statement showing check charged against it. *Masonic Benefit Ass'n of Stringer Grand Lodge v. First State Bank*, 99 Miss. 610, 55 So. 408 (1911).

#### 4. Notice or knowledge.

County was not entitled to dismissal of a civil rights claim alleging that the county through its former sheriff and deputy aided a campaign of violence of a white supremacist group by refusing to investigate and by covering up the commission of the murder of plaintiffs' relatives because the complaint sufficiently alleged a basis under Miss. Code Ann. § 15-1-67 for finding that plaintiffs' cause of action accrued within the three year limitations period when a federal investigation revealed the involvement of the sheriff and deputy and not when the bodies were discovered. *Moore v. Franklin County*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55349 (S.D. Miss. June 30, 2009).

Eighth Amendment claims for equitable relief made under 42 U.S.C.S. § 1983 by death-sentenced inmates challenging their method of execution were barred by the three-year statute of limitations of Miss. Code. Ann. § 15-1-49 in that the claims accrued after completion of direct



review or the date when the lethal injection statute of Miss. Code Ann. § 99-19-51 became effective and the limitations period was not tolled by Miss. Code Ann. § 15-1-67 or by equitable estoppel. *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008), writ of certiorari denied by 130 S. Ct. 57, 175 L. Ed. 2d 45, 2009 U.S. LEXIS 5526, 78 U.S.L.W. 3171 (U.S. 2009).

Where borrowers claimed that they were misled into believing that they needed to obtain credit life and disability insurance in order to obtain loans, the court found that the borrowers' claims, which accrued more than three years before the lawsuit was filed, were time-barred pursuant to Miss. Code Ann. § 15-1-49; tolling pursuant to Miss. Code Ann. § 15-1-67 was inapplicable because of affirmative disclosures made in the borrowers' loan applications and the Federal Disclosure Statements. *Benson v. Am. Heritage Life Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 49851 (S.D. Miss. July 14, 2006).

Alleged sexual abuse victim failed to satisfy either prong of the fraudulent concealment test where she did not present any evidence showing that any party committed any act or conduct of an affirmative nature designed to prevent, and which did prevent, discovery of a claim; because the victim failed to satisfy either prong of the fraudulent concealment test, and because she was aware of the abuse, the statute of limitations was not tolled. *Doe v. Roman Catholic Diocese*, 947 So. 2d 983 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 90 (Miss. Jan. 25, 2007).

In bank's suit alleging that an insurer acted fraudulently in representing that an insurance policy purchased by the bank for one of its trusts could be paid for with a single premium payment, the three-year statute of limitations in Miss. Code Ann. § 15-1-49 was not tolled by Miss. Code Ann. § 15-1-67, as the insurer did not do anything to prevent the bank from discovering that additional premium payments might be due, as was stated in the policy itself. *Peoples Bank Asset & Trust Mgmt. Dep't v. Great W. Life & Annuity Ins. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16755 (S.D. Miss. Feb. 7, 2005).

Customers' claims that they were fraudulently induced by insurance company employees to purchase credit insurance policies in connection with consumer loans were barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49 because all claims accrued at the time the loan agreements were executed because the customers were charged with notice where it was undisputed that each loan agreement contained an insurance disclosure which informed the borrower that credit insurance was not required and that the decision to make the loan would not be affected by the borrower's decision. The customers failed to establish or allege any fraudulent concealment, therefore the customers could not avail themselves of the tolling mechanism provided under Miss. Code Ann. § 15-1-67. *Andrus v. Ellis*, 887 So. 2d 175 (Miss. 2004).

In an action by Mississippi borrowers against an out-of-state lender and four Mississippi employees of the lender, the borrowers' myriad claims against the employees were barred by the three-year limitation period of Miss. Code Ann. § 15-1-49(1) and the employees had to be dismissed from the action, where the borrowers alleged that defendants had wrongfully induced the borrowers to buy credit insurance when the borrowers obtained their loans, and where Miss. Code Ann. § 15-1-67 did not toll the limitation period because the loan documents clearly showed that credit insurance was being purchased. *Frye v. Am. Gen. Fin., Inc.*, 304 F. Supp. 2d 876 (S.D. Miss. 2004).

Where plaintiff borrowers raised claims, including a claim that the borrowers were wrongfully charged for credit insurance products provided by defendant insurers, the borrowers' claims were time-barred, as filed more than three years after the borrowers obtained their loans, and the statute was not tolled based on fraudulent concealment of the borrowers' claims under Miss. Code Ann. § 15-1-67, as the borrowers failed to plead or offer any proof of an affirmative act of fraudulent concealment post completion of the loan, nor did they plead or offer any proof that they acted with due diligence in attempting to discover their claims, further,

with reasonable diligence, the borrowers would have discovered the alleged fraud on the date they obtained their loans, and the loan and credit insurance documents alone placed them on notice of the terms of their agreements, including the fact that credit insurance was not required. *Queen v. Am. Gen. Fin., Inc.*, 289 F. Supp. 2d 782 (S.D. Miss. 2003).

Contracting party was under a legal obligation to read a contract before signing it, and knowledge of the contents of a contract were imputed to a contract party even if he did not read the contract before signing it; therefore, the statute of limitations on a debtor's time-barred fraud and negligent misrepresentation claims against a lender's resident agents was not tolled by any reliance on the agents' alleged misrepresentations of the contract terms. *Brumfield v. Pioneer Credit Co.*, 291 F. Supp. 2d 462 (S.D. Miss. 2003).

Court reversed itself on a motion to remand because it had erred in concluding that the issue was whether subsequent fraudulent acts had occurred to toll the statute of limitations, when the issue was whether plaintiffs knew or should have known of the fraud, and because plaintiffs did know of the fraud by virtue of documents in their possession, the statute of limitations under Miss. Code Ann. § 15-1-76 was not tolled, and there was "no possibility" of recovery against the resident defendants. *Rainwater v. Lamar Life Ins. Co.*, 246 F. Supp. 2d 546 (S.D. Miss. 2003), appeal dismissed, remanded, 391 F.3d 636 (5th Cir. 2004).

Under Miss. Code Ann. § 15-1-67, the statute of limitations on the fraudulent concealment claim was tolled where plaintiffs demonstrated reasonable diligence in failing to find the alleged fraud. *Rainwater v. Lamar Life Ins. Co.*, 207 F. Supp. 2d 561 (S.D. Miss. 2002).

Where, there being no administration of a decedent's estate, the decedent's brother collected payment on a mortgage, owned by the decedent, and paid the amount received to the decedent's widow and son, the limitation statute applicable to cases of concealed fraud was not available in an action by the daughters of the decedent to recover from the brother's estate their share of the amount paid over by him to

the wife and son, since there was no proof of any fraud and concealment, the mortgage had been recorded on the day of its execution, which was sufficient to put the daughters on notice of its existence, and everything that was thereafter done about it was at all times easily ascertainable by the daughters upon the exercise of any reasonable diligence. *Rimmer v. Austin*, 191 Miss. 664, 4 So. 2d 224 (1941).

Notice to buyer of corporate bonds of default of corporation on coupons and of resulting organization of bondholders' protective committee held sufficient notice of falsity of seller's representations that bonds were safe investment to start running of three-year limitation under this section [Code 1942, § 742]. *First Nat'l Bank v. Johnson*, 177 Miss. 634, 171 So. 11 (1936).

Statute [Code 1942, § 742] does not run against remainderman unless he knew purchaser from life tenant was claiming full fee. *Belt v. Adams*, 125 Miss. 387, 87 So. 666 (1921).

The mere filing of a bill to cancel a deed, before service of summons on or publication for a defendant who has no actual notice thereof, is not such constructive notice of the fraud charged as will put in operation against him the statute in cases of concealed frauds. *North Am. Trust Co. v. Lanier*, 78 Miss. 418, 28 So. 804, 84 Am. St. R. 635 (1900).

### 5. Reasonable diligence.

Where plaintiff borrowers' action against defendant lenders, alleging wrongs committed in connection with loan transactions, was barred by Miss. Code Ann. § 15-1-49, because the loan documents disclosed all the information the borrowers contended was concealed, and yet they had never even read the documents, due diligence for tolling due to concealment under Miss. Code Ann. § 15-1-67 could not be found. *Smith v. First Family Fin. Servs.*, 436 F. Supp. 2d 836 (S.D. Miss. 2006).

Under Miss. Code Ann. § 15-1-67, plaintiff is not entitled to the benefits of tolling unless he proves that defendant engaged in affirmative acts of concealment and that even though he acted with due diligence in attempting to discover his cause of action, he was unable to do so.



*Mendrop v. Shelter Mut. Ins. Co.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54783 (N.D. Miss. Aug. 4, 2006), dismissed by 2007 U.S. Dist. LEXIS 86902 (N.D. Miss. Nov. 26, 2007).

Plaintiffs' claim for fraud was barred by the statute of limitations in Miss Code Ann. § 15-1-49 because the policies plaintiffs bought from an insurance company explained the terms, and thus nothing prevented plaintiffs from discovering the terms of the policy pursuant to Miss. Code Ann. § 15-1-67 even if they were different from what the company and its agent represented. *Parker v. Horace Mann Life Ins. Co.*, 949 So. 2d 57 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 108 (Miss. 2007).

Where investors alleged that investment companies were aware of their agent's conversion of the investors' funds before the criminal activity was publicly disclosed, fraudulent concealment did not apply to toll the statutes of limitation; after the agent's misconduct was discovered, the investors delayed filing their complaints against the companies until well after the limitations periods expired and there was no conduct of the companies that caused the investors' undue delay. *Joe v. Minn. Life Ins. Co.*, 337 F. Supp. 2d 821 (S.D. Miss. 2004).

Where state residents failed to plead or offer any proof of an "affirmative act of fraudulent concealment post completion of the loan, and it was clear that with reasonable diligence the residents would have discovered the alleged fraud on the date they obtained their loans, the statute of limitations in Miss. Code Ann. § 15-1-67 was not tolled by fraudulent concealment. *Frye v. Am. Gen. Fin., Inc.*, 307 F. Supp. 2d 836 (S.D. Miss. 2004).

In an action arising from a fatal motor vehicle accident which was allegedly caused by the defendant chasing the decedents and causing them to crash into a truck, the defendant was not entitled to summary judgment on the ground that the statute of limitations expired prior to the commencement of the action. The plaintiffs alleged fraudulent concealment by the defendant and it was for the jury to decide whether the plaintiffs acted with due diligence in investigating the acci-

dent. *Robinson v. Cobb*, 763 So. 2d 883 (Miss. 2000).

Under Mississippi law, statute of limitations on insured's claims against life insurer arising out of alleged "churning" was not tolled by fraudulent concealment where insured had ample information at time he purchased second policy, and certainly by time he received his annual statement on original policy, that premiums on new policy were being paid by use of paid up value of old policy. *Cunningham v. Massachusetts Mut. Life Ins. Co.*, 972 F. Supp. 1053 (N.D. Miss. 1997).

The statute of limitations in a legal malpractice action was not tolled through fraudulent concealment even if the defendant attorney did fraudulently conceal his negligence since the plaintiffs, through the exercise of reasonable diligence, should have been able to discover the attorney's negligence more than 6 years prior to the date on which the complaint was filed where there was very little that the plaintiffs alleged in their complaint that they did not know 9 years before the malpractice suit was filed. *Stevens v. Lake*, 615 So. 2d 1177 (Miss. 1993).

A person claiming fraud as an excuse for nonaction within the statutory period must exercise reasonable diligence to discover the fraud sooner, or show that he could not with reasonable diligence have so discovered it. *Wilson v. Retail Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972).

Where a cotenant who held a power of attorney from other cotenants sold timber on land of cotenancy and did not disclose the sale and deposited proceeds in his own bank account, the claim of other cotenants for accounting was not barred by the statute of limitations in view of this section [Code 1942, § 742] providing that a cause accrues when fraud is, or with reasonable diligence might have been discovered. *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956).

Where agent of insurer under life policy containing double indemnity provision tendered check for benefit payable for natural death of insured and stated to beneficiary who was ignorant of circumstances of insured's death that such amount was all insurer owed beneficiary, the beneficia-



ry's acceptance of such amount and delivery of policy to insurer and failure for six years to make inquiry as to circumstances of insured's death, did not constitute "reasonable diligence" to determine cause of insured's death so as to toll limitations until discovery of true facts. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

To extend period of limitation from date of discovery of fraud by which cause of action was concealed, plaintiff must exercise reasonable diligence to discover facts sooner, or show that he could not have done so. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

Statute [Code 1942, § 742] does not run against complainant exercising reasonable diligence until his discovery of fraud. *J.K. Orr Shoe Co. v. Edwards*, 111 Miss. 542, 71 So. 816 (1916).

#### 6. Persons affected.

Where trust deed to farm was executed by all of heirs except children of deceased daughter, and part of money advanced was used to discharge ancestor's trust deeds, right of assignee of trust deed to subrogation to trust deeds as to grandchildren's undivided interest was barred by six-year limitation, notwithstanding mortgagors' alleged fraudulent representation that grandchildren were not heirs, where grandchildren did not participate in fraud, and not being joint tenants, but tenants in common with mortgagors, were not their "privies;" term "privies" meaning those who stand in mutual or successive relationship to same rights of property. *Burton v. John Hancock Mut. Life Ins. Co.*, 171 Miss. 596, 157 So. 525 (1934), error overruled, 171 Miss. 605, 158 So. 474 (1935).

#### 7. Evidence.

Since the homeowners' claims against an insurance agent were time-barred pursuant to Miss. Code Ann. § 15-1-49 and the homeowners had not shown that they were not entitled to the benefits of tolling under Miss. Code Ann. § 15-1-67, the insurance agent was fraudulently joined since the homeowners had no possibility of recovery against the agent; the homeowners' motion to remand the case was denied. *Mendrop v. Shelter Mut. Ins. Co.*,

— F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54783 (N.D. Miss. Aug. 4, 2006), dismissed by 2007 U.S. Dist. LEXIS 86902 (N.D. Miss. Nov. 26, 2007).

Consumers' fraud action against lenders in their sale of credit insurance with consumer loans was barred by the three-year limitations period of Miss. Code Ann. § 15-1-49, and consumers failed to show evidence of an affirmative act of fraudulent concealment after the initial insurance sale, as required under Miss. Code Ann. § 15-1-67, in order to toll the limitations period. *Liddell v. First Family Fin. Servs.*, — F.3d —, 2005 U.S. App. LEXIS 18411 (5th Cir. Aug. 25, 2005).

In borrowers' suit against lenders, insurers, and individuals, arising from loan transactions, removal was appropriate based upon diversity of citizenship because the individuals were fraudulently joined; the claims against the individuals were time-barred and the borrowers presented no evidence of affirmative acts of concealment by defendants for tolling the statute of limitations. *Owens v. First Family Fin. Servs.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25345 (S.D. Miss. May 29, 2003).

The statute of limitation was tolled with regard to an action arising from an oral agreement in a multimillion dollar oil and gas transaction since the defendant fraudulently concealed the truth regarding the agreement by making numerous false representations and swearing to them under oath. *Allred v. Fairchild*, 785 So. 2d 1064 (Miss. 2001).

Evidence, in action for double indemnity commenced more than eleven years after payment of benefit for natural death, held insufficient to justify judgment against insurer on ground of concealed fraud. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

In absence of proof of concealed fraud on part of insurer which would toll statute of limitations until discovery of true facts, action held barred by six-year statute. *New York Life Ins. Co. v. Gill*, 182 Miss. 815, 182 So. 109 (1938).

In suit by purchaser for false representations as to acreage of tract sold, evidence failed to establish that vendor fraudulently concealed false representa-

tions after sale, and hence suit begun more than seven years after sale was barred. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934).

Evidence held to show that factor charging principal brokerage charges on lumber sold, but not showing them on statements rendered, except in one instance, when it was explained as “demurrage,” which means delay, concealed cause of action for overcharges until shortly before bill was filed. *D.S. Pate Lumber Co. v. Weathers*, 167 Miss. 228, 146 So. 433 (1933).

## 8. Pleading.

In a case in which five car buyers brought their state law claims against an auto financier more than six years after their financing transactions, those claims were untimely. The claims were subject to the three-year limitations period in Miss. Code Ann. § 15-1-49(1), and the buyers could not toll the limitations period by using Miss. Code Ann. § 15-1-67 because they simply failed to allege a subsequent act of concealment separate from the alleged fraud underlying the cause of action. *Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506 (5th Cir. 2008).

In a discriminatory lending suit filed by African American loan recipients against an auto financing corporation, the loan recipients’ state law deceptive trade practices and common law claims were barred by the three-year statute of limitations in Miss. Code Ann. § 15-1-49(1), which was not tolled by the fraudulent concealment rule codified in Miss. Code Ann. § 15-1-67 because the loan recipients admitted that they knew the interest rates were high at the time they signed the loan documents, which clearly displayed the rates being charged. *Archer v. Nissan Motor Acceptance Corp.*, 633 F. Supp. 2d 259 (S.D. Miss. 2007), affirmed by 550 F.3d 506, 2008 U.S. App. LEXIS 25292 (5th Cir. Miss. 2008).

Child was killed by a water heater’s explosion; while minimal, the mother’s and sister’s pleadings in a wrongful death action were factually particular enough to allege fraudulent concealment and to satisfy Miss. R. Civ. P. 9(b), and the circuit court’s decision to deny a motion to dismiss was not an abuse of discretion. *State*

*Indus. v. Hodges*, 919 So. 2d 943 (Miss. 2006).

Homeowners’ predatory lending practices claims were time barred under Miss. Code Ann. § 15-1-49(1) because their respective transactions occurred well over the three years before the suit was brought and the homeowners failed to show any affirmative act of fraudulent concealment under Miss. Code Ann. § 15-1-67 to toll the statute of limitations. *Carson v. McNeal*, 375 F. Supp. 2d 509 (S.D. Miss. 2005).

Insureds’ fraud and misrepresentation claims arising out of the purchase of life insurance were dismissed pursuant to Fed. R. Civ. P. 12 (b)(6) because the action was barred by the statute of limitations, Miss. Code Ann. § 15-1-49, since the insureds did not allege that defendants engaged in any affirmative act or conduct that prevented the insureds from discovering their claims, which would have invoked the tolling provisions of the fraudulent concealment statute, Miss. Code Ann. § 15-1-67. *O’Bannon v. Guardian Life Ins. Co. of Am.*, 331 F. Supp. 2d 476 (S.D. Miss. Aug. 4, 2004).

Federal district court refused to remand a suit alleging fraud in connection with sales of credit insurance, finding that claims brought by a number of borrowers against nondiverse employees of a lender were time barred, as (1) the limitations period was not tolled under Miss. Code Ann. § 15-1-67 due to fraudulent concealment absent a fiduciary relationship between the employees and the borrowers and (2) the borrowers did not act with due diligence as required under § 15-1-67, as the borrowers’ loan documents disclosed all of the information concerning credit insurance that allegedly was misrepresented or concealed. *Anderson v. City Fin. Co.*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25226 (S.D. Miss. July 11, 2003).

Insurance purchasers sufficiently alleged in their complaint that an insurance agent engaged in affirmative acts of concealment that prevented the purchasers from discovering their cause of action until the limitations had expired; however, the purchasers alleged specific facts that, if proven, made it reasonably possible for a state court to toll the statute of limita-



tions period. *Reed v. Am. Gen. Life & Accident Ins. Co.*, 192 F. Supp. 2d 641 (N.D. Miss. 2002).

Party averring concealed fraud must prove facts justifying his claim. *Gordon v. Anderson*, 90 Miss. 677, 44 So. 67 (1907).

## RESEARCH REFERENCES

**ALR.** Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 A.L.R.2d 500.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors. 100 A.L.R.2d 1094.

Fraud, misrepresentation, or deception as estopping reliance on statute of limitations. 43 A.L.R.3d 429.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 A.L.R.3d 630.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts. 18 A.L.R.4th 1340.

Fraud as extending statutory limitations period for contesting will or its probate. 48 A.L.R.4th 1094.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations. 88 A.L.R.4th 851.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts. 33 A.L.R.5th 1.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Attorney Malpractice — Tolling or Other Exceptions to Running of Statute of Limitations. 87 A.L.R.5th 473.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 158 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 240, 241.

## § 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

**SOURCES:** Codes, *Hutchinson's* 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 19; 1871, § 2163; 1880, § 2686; 1892, § 2756; 1906, § 3116; *Hemingway's* 1917, § 2480; 1930, § 2314; 1942, § 744.

**Cross References** — Other actions having one year statute of limitations, see §§ 15-1-33, 15-1-35.



## JUDICIAL DECISIONS

1. In general.
2. Applicability.
3. Defeat of action in general.
4. —Matter of form.
5. —Reversal of judgment.
6. Action improperly dismissed.
7. Standing.

**1. In general.**

In a medical malpractice case in which the first action filed by the survivors and heirs of the deceased was clearly filed within the two-year statute of limitations found in Miss. Code Ann. § 15-1-36(2), but was dismissed pursuant to Miss. Code Ann. § 15-1-36(15) because they had not provided the required notice to the hospital and the healthcare provider prior to filing and the hospital and the healthcare provider filed a motion for summary judgment to dismiss the second medical malpractice suit as untimely, the Saving Statute, Miss. Code Ann. § 15-1-69, applied to the second filing, and it was not untimely. The first case had been duly commenced. *Herrington v. Promise Specialty Hosp.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 90509 (S.D. Miss. Sept. 30, 2009).

Savings statute, Miss. Code Ann. § 15-1-69, is designed as remedial legislation intended to protect the good-faith efforts of plaintiffs who make a simple mistake; the statute is not designed to penalize plaintiffs and bar the continuation of an ongoing suit because the drafters of the law surely did not intend that a suit automatically abate or be dismissed upon the death of a party. *Harris v. Darby*, 17 So. 3d 1076 (Miss. 2009).

Trial court erred in granting a doctor and a medical practice summary judgment in an executrix's medical malpractice action on the ground that the executrix's motion to substitute parties pursuant to Miss. R. Civ. P. 25 was barred by Miss. Code Ann. § 15-1-69 because § 15-1-69 was inapplicable when the action was never abated or dismissed in any manner; had the trial court dismissed the case without prejudice, the savings statute would have applied, and the executrix would have had a full year from that dismissal to re-file the suit, but since the

trial court granted summary judgment, it did not trigger the statute. *Harris v. Darby*, 17 So. 3d 1076 (Miss. 2009).

Where a plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute of limitations shall not prevent him from doing so, provided he follows it promptly, by suit within a year; Mississippi's savings statute is highly remedial, and it ought to be liberally construed. However, the plaintiff must have exercised good faith in filing the first action in the wrong court. *Estate of Boles v. Nat'l Heritage Realty, Inc.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55825 (N.D. Miss. June 23, 2009).

Although an appellate court rendered void ab initio a wrongful death action because the administratrix lacked standing to file a wrongful death action as a result of the chancery court's lack of subject matter jurisdiction over the estate, regardless of whether the estate's first complaint tolled the statute of limitations, the savings statute applied to save the cause of action, and Tolliver did not address the application of the savings statute. The savings statute saved the otherwise time-barred cause of action. *Estate of Boles v. Nat'l Heritage Realty, Inc.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55825 (N.D. Miss. June 23, 2009).

Pursuant to Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, and Miss. Code Ann. § 15-1-1, Miss. Code Ann. § 15-1-69 did not apply to the MTCA, and it is worth noting that non-tort claims act cases are not controlling as to the applicability of § 15-1-69, and because the MTCA has a one-year statute of limitation that is significantly shorter than the catchall three-year statute of limitation, the one-year statute of limitation found in Miss. Code Ann. § 11-46-11 is controlling; thus, the court rejected the parents' claim that Miss. Code Ann. § 15-1-69 applied to the MTCA to toll the statute of limitation under Miss. Code Ann. § 11-46-11. *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2003).

This section did not apply to an action originally filed in federal court since the plaintiff did not erroneously file the action in good faith where he had moved to another state in an attempt to establish diversity jurisdiction and without a good faith intent to establish residence. *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So. 2d 841 (Miss. Ct. App. 2000).

This section does not extend to suits filed within the permitted one-year grace period after the same cause of action has been dismissed in a court of another state. *S & H Grocery, Inc. v. Gilbert Constr. Co.*, 733 So. 2d 851 (Miss. Ct. App. 1998).

The “savings” provision of the statute does not apply to suits within the permitted one-year grace period after the same cause of action has been dismissed in a court of another state. *S & H Grocery, Inc. v. Gilbert Constr. Co.*, 724 So. 2d 965 (Ct. App. 1998).

On account of all expired time in particular case, plaintiffs could not avail selves of protection afforded by § 15-1-69. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

This section is applicable to orders dismissing suits for lack of jurisdiction, and thus operated to save a personal injury action which was dismissed for lack of jurisdiction and refiled a few days beyond six years after plaintiff had reached majority, but within one year from the date of dismissal. *Ryan v. Wardlaw*, 382 So. 2d 1078 (Miss. 1980).

This section [Code 1942, § 744] does not apply where the former action was instituted in another state. *C & L Rural Elec. Coop. Corp. v. Kincade*, 175 F. Supp. 223 (N.D. Miss. 1959), *aff’d*, 276 F.2d 929 (5th Cir. 1960).

This section [Code 1942, § 744] does not extend time prescribed for institution of suit under Louisiana compensation laws. *Dunn Constr. Co. v. Bourne*, 172 Miss. 620, 159 So. 841 (1935).

Good faith in the institution of the action dismissed is an element in determining the right to invoke this section [Code 1942, § 744]. *Hawkins v. Scottish Union & Nat’l Ins. Co.*, 110 Miss. 23, 69 So. 710 (1915).

The section [Code 1942, § 744] applies to suits in equity as well as law.

*Weathersly v. Weathersly*, 31 Miss. 662 (1856).

The right given is to the parties to the first suit, and not to different parties. *Ross, Strong & Co. v. Sims*, 27 Miss. 359 (1854).

The section [Code 1942, § 744] does not abridge the time of limitation, but enlarges it. A second suit may be brought after the expiration of the year if the general statutes do not bar. *Lang v. Fatheree*, 15 Miss. (7 S. & M.) 404 (1846).

## 2. Applicability.

Because the wife met every requirement in Miss. Code Ann. § 93-5-31 to have a divorce revoked, the appellate court erred in reversing the chancery court’s revocation of the parties’ divorce; in part, there was sufficient evidence of reconciliation and no statutory reference was made to the death of one of the parties. Because the action was not abated upon husband’s death, Miss. Code Ann. § 15-1-69 was inapplicable. *Carlisle v. Allen*, 40 So. 3d 1252 (Miss. 2010).

Defendants argued that there was substantial ground for difference of opinion as courts in other jurisdictions have come to contrary conclusions as to the application of their own states’ savings statutes in similar circumstances; however, it was of no consequence to the case that Missouri, Kansas, Utah, Colorado, or any other state would choose not to apply its own savings statute in the circumstances. The issue was whether Mississippi would apply its savings statute, and defendants did not present any evidence that there was substantial ground for a difference of opinion as to that issue. *Estate of Boles v. Nat’l Heritage Realty, Inc.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55825 (N.D. Miss. June 23, 2009).

## 3. Defeat of action in general.

Although a second amended malpractice action could be filed under the savings statute, Miss. Code Ann. § 15-1-69 since a letter did not substantially comply with the notice provisions of Miss. Code Ann. § 15-1-36(15), the 60 day tolling period was not triggered, the statute of limitations had run, and the action should have been dismissed with prejudice. *Arceo v. Tolliver*, 19 So. 3d 67 (Miss. 2009).



While the wrongful death beneficiaries' first lawsuit against a railway in federal court when their relative was killed in a railroad crossing accident was timely commenced, and the instant state action was for the same cause of action, dismissal of their state action was proper as their voluntary dismissal of the first federal lawsuit without prejudice did not fall within the protection of Miss. Code Ann. § 15-1-69; a voluntary withdrawal did not constitute the "accidental" or "inadvertent" failure of an action, nor were the beneficiaries "defeated" within the meaning of the savings statute when they were nonsuited upon their own request. *Marshall v. Kan. City Southern Ry.*, 7 So. 3d 265 (Miss. Ct. App. 2007), reversed by, remanded by 7 So. 3d 210, 2009 Miss. LEXIS 106 (Miss. 2009).

In November 1997, plaintiff brought suit for wrongful death, but the record reflected that she failed to properly serve process upon defendant within 120 days. Because process was not served within the 120-day period as provided by Miss. R. Civ. P. 4(h), the running of the statute of limitations resumed; further, the statute of limitations ran in March, 2000, some 14 months prior to defendant's motion to dismiss and some 19 months prior to plaintiff's filing of a second identical wrongful death action, and therefore, when plaintiff filed her second action, the three year statute of limitation set forth in Miss. Code Ann. § 15-1-49 had run. *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. *Jackpot Miss. Riverboat, Inc. v. Smith*, 874 So. 2d 959 (Miss. 2004).

Code 1942, § 744 allowing one to bring an action within one year after a previous action has been defeated for reasons other than upon the merits did not apply to that portion of the plaintiff's suit which was

founded on a cause of action created by Code 1942, § 1075, and therefore that portion of the suit which was founded on § 1075, and brought more than three years after the alleged destruction of trees, although within one year after defeat of the action for a reason other than upon its merits, was barred by the one-year period of limitations contained in Code 1942, § 1087. *Evans v. Broadhead*, 233 So. 2d 771 (Miss. 1970).

An action by a Mississippi employee injured while working in another state for compensation under the workmen's compensation act of such other state, in which the time for making a claim is not a condition attached to the right, is not barred where brought in a Federal court in Mississippi within one year after the dismissal for lack of jurisdiction of a suit for compensation for the aggravation by the injury of the condition caused by a former injury. *Pulliam v. Gulf Lumber Co.*, 312 F.2d 505 (5th Cir. 1963).

Order dismissing suit begun before bar of limitations, with nothing indicating it was near abatement, or that dismissal was for any matter of form, held not to bring the case within this section [Code 1942, § 744]. *W.T. Raleigh Co. v. Barnes*, 143 Miss. 597, 109 So. 8 (1926).

Evidence not disclosing cause of former action held not to bring it within provisions of statute as to commencing new action for same cause as one abated, or in which judgment was reversed on appeal. *Cossar v. Grenada Oil Mill*, 138 Miss. 890, 103 So. 509 (1925).

Where suit is brought after the expiration of the time designated in a fire insurance policy within which suits must be brought, the suit is barred, notwithstanding a previous suit, which was dismissed, had been brought within that time, since this section [Code 1942, § 744] has no application to a contract which fixes its own period of limitation as to time within which a suit may be brought. *Ward v. Pennsylvania Fire Ins. Co.*, 82 Miss. 124, 33 So. 841 (1903).

Where upon the trial of a suit, the court found that the plaintiff did not have the legal title to the claim sued on when the action was commenced, the action was not defeated for any matter of form so as to



bring the case within Code of 1871, § 2163, a former enactment of this provision. *Meath v. Board of Miss. Levee Comm'rs*, 109 U.S. 268, 3 S. Ct. 284, 27 L. Ed. 930 (1883).

A suit dismissed for want of security for costs is not within the section [Code 1942, § 744]. *Memphis & C.R.R. v. Orr*, 52 Miss. 541 (1876).

#### 4. —Matter of form.

Mississippi Supreme Court's analysis as to whether a dismissal is for a matter of form focuses on the content or substance of the record to determine the purpose or reason for the dismissal; within the context of the savings statute, avoidance or defeat for lack of subject matter jurisdiction is avoidance or defeat for a matter of form. Furthermore, standing is an aspect of subject matter jurisdiction. *Estate of Boles v. Nat'l Heritage Realty, Inc.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 55825 (N.D. Miss. June 23, 2009).

Wrongful death case was not time barred under Miss. Code Ann. § 15-1-49 because the savings provision in Miss. Code Ann. § 15-1-69 applied since a voluntary dismissal without prejudice in federal court was considered a matter of form where it was based on subject matter jurisdiction. Several beneficiaries continually and in good faith sought to have the merits of their case heard in Mississippi state court, they sought a Fed. R. Civ. P. 54(b) certified judgment to challenge a federal district court's subject matter jurisdiction, and they timely refiled their second cause of action within one year of the dismissal of the first case. *Marshall v. Kan. City S. Rys.*, 7 So. 3d 210 (Miss. 2009).

Trial court's dismissal of an action for failure to serve process as required by Miss. R. Civ. P. 4 is not a "matter of form" for purposes of the savings statute, Miss. Code Ann. § 15-1-69. Additionally, if service of process is not made upon a defendant in compliance with Miss. R. Civ. P. 4(h), the limitations period beings to run again at the end of 120 days. *Owens v. Mai*, 891 So. 2d 220 (Miss. 2005).

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when

suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action (§ 15-1-69) would apply. *Deposit Guar. Nat'l Bank v. Roberts*, 483 So. 2d 348 (Miss. 1986).

Dismissal of suit for lack of jurisdiction was a matter of form and the plaintiff was entitled to one year thereafter under this section [Code 1942, § 744] within which to file a second suit. *Lowry v. International Bhd. of Boilermakers, Iron Ship Bldrs. & Helpers*, 220 F.2d 546 (5th Cir. 1955).

Dismissal of suit filed in Federal court within limitation period for lack of jurisdiction is a dismissal for matter of form within this section, hence suit filed within month of dismissal of suit in Federal court is within one year saving provision. *Frederick Smith Enter. Co. v. Lucas*, 204 Miss. 43, 36 So. 2d 812 (1948).

Dismissal of a suit in equity because of want of jurisdiction of the subject matter resulting from joinder of independent causes of action is a dismissal for matter of form within the purview of this section [Code 1942, § 744]. *Hawkins v. Scottish Union & Nat'l Ins. Co.*, 110 Miss. 23, 69 So. 710 (1915).

Amended declaration not barred where original filed in time. *Yazoo & Miss. V. Ry. v. Rivers*, 93 Miss. 557, 46 So. 705 (1908).

Where a bill by a ward to review a partition of land, and also to surcharge her guardian's accounts, is, because of multifariousness, dismissed without prejudice as to the partition, relief being given as to the accounts, the dismissal is for "a matter of form," and a new bill of review may be filed within one year thereafter. *Young v. Walker*, 70 Miss. 813, 12 So. 546 (1893).

#### 5. —Reversal of judgment.

The section [Code 1942, § 744] does not apply where the judgment in favor of plaintiff is reversed, and the Supreme Court re-establishes a verdict for the defendant and dismisses the suit. *Wilkes v. Coopwood*, 39 Miss. 348 (1860).

## 6. Action improperly dismissed.

In a case in which plaintiff filed a petition to perpetuate testimony in a circuit court, the matter was then removed to federal court, wherein plaintiff sought dismissal, and plaintiff filed a complaint in the circuit court raising the same claims against the same parties before the federal court had dismissed the matter, the circuit court erred in dismissing plaintiff's post-dismissal complaint because the record supported a finding that the federal court's dismissal was based upon a "matter of form" not affecting the merits—namely, a lack of jurisdiction due to the absence of a complaint—as its order stated that no "civil action" yet existed. Plaintiff had inadvertently found himself in a procedural quagmire, but he made a good-faith effort to preserve his claim, at no time evincing an intent to abandon his claim, and, accordingly, application of the savings statute, Miss. Code Ann. § 15-1-69, to his post-dismissal complaint was appropriate and consistent with the purposes of the statute because he filed the complaint within one year of the federal court's dismissal. *Crawford v. Morris Transp., Inc.*, 990 So. 2d 162 (Miss. 2008).

Dismissal of the wife's second wrongful death suit for death of the deceased, her husband, based on the owner of the mobile

park's employment and negligent supervision of an employee who stabbed and killed the deceased was improper under the Mississippi savings statute, Miss. Code Ann. § 15-1-69, because the wife's suit should not be lost for a matter not affecting the merits of the case when the fault could be remedied merely by new process being issued. *Owens v. Mai*, 881 So. 2d 278 (Miss. Ct. App. 2003).

## 7. Standing.

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, since, at the time she filed the suit, the girlfriend had not yet been formally appointed executrix of the deceased's estate, she did not have standing as his personal representative to bring the present action at that time. The personal representative also lacked standing as the deceased's executrix under the savings statute. *Clark Sand Co. v. Kelly*, — So. 3d —, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), opinion withdrawn by, substituted opinion at 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

## RESEARCH REFERENCES

**ALR.** Estoppel to rely on statute of limitations. 24 A.L.R.2d 1413.

Successive actions as within statutory provision fixing time within which new action may be commenced after nonsuit or judgment not on merits. 54 A.L.R.2d 1229.

Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state. 55 A.L.R.2d 1038.

Determination of beginning of period allowed by statute for commencement of new action after failure, otherwise than on merits, of action timely begun. 79 A.L.R.2d 1270.

Voluntary dismissal or nonsuit as within provision of statute extending time for new action in case of dismissal or

failure of original action otherwise than upon merits. 79 A.L.R.2d 1290.

Character or kind of action or proceeding within operation of statute permitting new action after expiration of period of limitation, upon failure of previous action commenced within the period. 79 A.L.R.2d 1309.

Character or kind of action or proceeding within statute permitting new action after limitation period, upon failure of timely action. 79 A.L.R.2d 1309.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction. 6 A.L.R.3d 1043.

Applicability, as affected by change in parties, of statute permitting commence-



ment of new action within specified time after failure of prior action not on merits. 13 A.L.R.3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations. 13 A.L.R.3d 979.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time

after failure of prior action for cause other than on the merits. 16 A.L.R.3d 452.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action. 47 A.L.R.3d 179.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 251 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 287, 288 et seq.

## § 15-1-71. Limitation of setoff.

All the provisions of this chapter shall apply to the case of any debt or demand on the contract, alleged by way of setoff on the part of a defendant. The time of limitation of such debt or demand shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced. The fact that a setoff is barred shall not preclude the defendant from using it as such if he held it against the debt sued on before it was barred.

**SOURCES:** Codes, 1857, ch. 57, art. 22; 1871, § 2166; 1880, § 2687; 1892, § 2756a; 1906, § 3117; Hemingway's 1917, § 2481; 1930, § 2317; 1942, § 747.

## JUDICIAL DECISIONS

### 1. In general.

Where the defendant held his several items of setoff against the debt sued on by the plaintiff before they were barred by the statutes of limitation, the fact that the defendant's items of setoff may have been barred by the statute of limitation at the time the plea of setoff was filed did not

preclude the defendant from using the items as a setoff against the debt sued on. *Gerald v. Foster*, 251 Miss. 63, 168 So. 2d 518 (1964).

A setoff barred may be used defensively, but it cannot be the basis of a judgment against plaintiff for any excess. *Feld v. Coleman*, 72 Miss. 545, 17 So. 378 (1895).

## RESEARCH REFERENCES

**ALR.** Claim barred by limitations as subject of setoff, counterclaim, recoupment, or cross bill. 1 A.L.R.2d 630.

Right of illegitimate to take under testamentary gift to "heirs". 27 A.L.R.2d 1232.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 100-102.

**CJS.** 54 C.J.S., Limitations of Actions §§ 53, 54.

## § 15-1-73. New promise to be in writing; effect of new promise by one or more joint contractors as against non-promisors.

In actions founded upon any contract, an acknowledgment or promise shall not be evidence of a new or continuing contract whereby to take any case out of the operation of the provisions of this chapter or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or



contained by or in some writing signed by the party chargeable thereby. Where there shall be two or more joint contractors, one or more of them shall not lose the benefit of the provisions of this chapter so as to be chargeable, by reason only of an acknowledgment or promise made or signed by any other or others of them. In actions against joint contractors, if the plaintiff be barred as to one or more of the defendants but be entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendants against the plaintiff.

**SOURCES:** Codes, Hutchinson's 1848, ch. 57, art. 6 (16); 1857, ch. 57, art. 21; 1871, § 2165; 1880, § 2688; 1892, § 2757; 1906, § 3118; Hemingway's 1917, § 2482; 1930, § 2318; 1942, § 748.

**Cross References** — Consideration for new promise founded in formal legal obligation, see § 15-1-3.

Contracts required to be in writing, see §§ 15-3-1 et seq.

## JUDICIAL DECISIONS

1. In general.
2. Acknowledgment or new promise in general.
3. Sufficiency of acknowledgment or new promise.
4. Certainty and definiteness.
5. Evidence.
6. Pleading.

### 1. In general.

When a writing or memorandum is lost or destroyed, both its existence and contents may be proven by parol evidence; the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds. Thus, § 15-1-29, § 15-1-73 and the Statute of Frauds (§ 15-3-1) did not bar an action to enforce a loan agreement which was allegedly destroyed in a fire where the plaintiff sufficiently proved the existence and contents of the destroyed memorandum. *Williams v. Evans*, 547 So. 2d 54 (Miss. 1989).

A judgment is not a contract, and is not embraced in the terms of this section [Code 1942, § 748]. *Berkson v. Cox*, 73 Miss. 339, 18 So. 934, 55 Am. St. R. 539 (1895).

### 2. Acknowledgment or new promise in general.

Statute of limitations, applicable to all but two items on debit and credit open

account, was not tolled by partial payment on the account where there was no written acknowledgment of indebtedness or promise to pay by the debtor. *McArthur v. Acme Mechanical Contractors*, 336 So. 2d 1306 (Miss. 1976).

Contract between corporation and holder of notes and salary claims against it whereby notes were to be held in escrow for two years to abide payment of a new note given by the corporation to such creditor, payment of which would liquidate the original claims but if the lieu note was not paid at maturity, the original notes would be redelivered and the entire account made current, constituted an acknowledgment in writing of the debt removing the claims from the bar of the respective statutes of limitation. *Dyer v. Lowe*, 201 Miss. 516, 29 So. 2d 324 (1947).

Even though partial payment on a note executed and delivered in Alabama might operate in substance as a new promise under the Alabama law, the Mississippi statute relating to the remedy would be applicable in case of an attempt to enforce the obligation in Mississippi, and therefore such payments in Alabama would not toll the running of the limitation period, in view of a statutory provision that in actions founded upon contracts the case would not be taken out of the operation of

the limitation statute, unless an acknowledgment or promise of the indebtedness should be made in writing signed by the party chargeable therewith. *Montgomery v. Yarbrough*, 192 Miss. 667, 6 So. 2d 925 (1942).

The verbal acknowledgment of an account's correctness, making it an account stated, will not avoid the statute applicable to open accounts. *Stephenson v. Louisiana Oil Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938); *Floyd v. Pearce*, 57 Miss. 140 (1879).

Counterproposal altering original agreement, which is accepted, constitutes new written contract and 6-year statute will be applied accordingly. *Edward Thompson Co. v. Foy*, 115 Miss. 848, 76 So. 685 (1917).

### 3. Sufficiency of acknowledgment or new promise.

Buyer's letter to the seller admitting that its account was overdue and promising to pay the open account on a specific date was sufficiently definite and unequivocal to toll the statute of limitations under Miss. Code Ann. § 15-1-73 in the seller's action to collect the money owed. *Harrison Enters., Inc. v. Trilogy Communications, Inc.*, 818 So. 2d 1088 (Miss. 2002).

The fact that the maker of a promissory note in the original amount of \$6,600 made a partial payment of \$100 more than six years after the date it became due and payable and at approximately the same time stated in a telephone conversation with an employee of the payee that he acknowledged the indebtedness and promised to make future payments until the entire balance of the indebtedness was canceled was insufficient, in view of the provisions of this section, to toll the statute of limitations. *United States Fid. & Guar. Co. v. Krebs*, 190 So. 2d 857 (Miss. 1966).

Chattel deed of trust expressly acknowledging secured indebtedness evidenced by note for exact amount of note secured by prior trust deed held sufficient acknowledgment of indebtedness secured by prior trust deed to toll statute of limitations where original note was identified as being included in indebtedness acknowledged. *Richter Phillips Co. v. Phillips*, 175 Miss. 242, 166 So. 393 (1936).

Letter from debtor stating he thought note had been paid, and continuing "but as I noted that the note...had not been stamped with any cancellation stamp, the same certainly must be unpaid," and offering to settle for lump sum, held not sufficient to remove bar of statute. *Philp v. Hicks*, 112 Miss. 581, 73 So. 610 (1917).

Deed of conveyance providing as consideration that grantee is to credit grantor's indebtedness with a certain sum and that such conveyance is not to impair the lien of a clearly identified deed of trust for balance due grantee is a sufficient written acknowledgment of amount secured by deed of trust. *Stewart v. Forman*, 90 Miss. 85, 43 So. 67 (1907).

An acknowledgment signed by a debtor in these words "I hereby acknowledge that the above balance, \$230, is correct," is sufficient. *Tennessee Brewing Co. v. Hendricks*, 77 Miss. 491, 27 So. 526 (1900).

An acknowledgment in writing to a managing partner of a debt to him is a sufficient acknowledgment of a debt to his firm, if the debt be shown to be a partnership debt. *Yarbrough v. Gilland*, 77 Miss. 139, 24 So. 170 (1898).

The following writing was held sufficient, viz: "Credit this on my note in the county treasury. I will be down soon to pay the balance." Written by a debtor of the county to the treasurer. *Heflin v. Kinard*, 67 Miss. 522, 7 So. 493 (1890).

The following writing was held sufficient, viz: "I hereby waive the statute of limitations as to the within note and the deed of trust to secure the same;" indorsed on the back of the note. *Bowmar v. Peine*, 64 Miss. 99, 8 So. 166 (1886).

The following writing was held insufficient, viz: "After hands are paid, appropriate balance due on my account to yourself. I would like to come there and do your work, so I could pay you what I owe you." *Fletcher v. Gillan*, 62 Miss. 8 (1884).

The following writing was held insufficient, viz: "I wrote to Mr. M. about the 1st inst. to know how I should send the money, and have not heard from him. I am going to Aberdeen tomorrow and will send fifty dollars, which is all I can spare at present." *Eckford v. Evans*, 56 Miss. 18 (1878).

The following writing was held insufficient, viz: "It will suit my convenience to



execute my note for the balance due for rent, payable July 1, 1877." Trustees of Canton Female Academy v. Gilman, 55 Miss. 148 (1877).

The following writing was held sufficient, viz: "We do hereby agree and promise to renew the note for which this mortgage is given, and to give a new mortgage whenever the exact amount due upon said note is ascertained;" indorsed on the back of the mortgage. Hart v. Boyt, 54 Miss. 547 (1877).

An acknowledgment is sufficient, though the writing does not embody an express promise; and an acknowledgment and an agreement to waive the limitation will revive the debt previously barred. Beasley v. Evans, 35 Miss. 192 (1858).

The indorsement of a credit on a note, though signed by both parties, is not a sufficient acknowledgment of the balance. Davidson v. Harrison, 33 Miss. 41 (1857).

#### 4. Certainty and definiteness.

Acknowledgment or promise that will save bar of statute must identify debt and acknowledge or promise to pay a definite amount, unless amount can be ascertained by calculation from a written instrument. Taylor v. Desoto Lumber Co., 137 Miss. 829, 102 So. 260 (1924), modified, 137 Miss. 843, 103 So. 82 (1925).

Debtor's statement in response to creditor's statement of account that he was enclosing a check for one thousand dollars, part payment on account, and that he would take care of the balance a little later, held not acknowledgment or promise such as would save bar of statute. Taylor v. Desoto Lumber Co., 137 Miss. 829, 102 So. 260 (1924), modified, 137 Miss. 843, 103 So. 82 (1925).

Letters not written to serve as an acknowledgment or promise in order to prevent the bar of the statute, and not precise and definite as to debt and amount, although they show an acknowledgment of an indebtedness, do not take the case out of the operation of the provisions of this chapter. Allen v. Hillman, 69 Miss. 225, 13 So. 871 (1891).

The new promise need not express the exact amount due, but must specify the particular debt, admit its justice, and indicate an intention to pay it; but the expression of an intent to pay is not nec-

essary if the justice of the debt be admitted without reservation. Hart v. Boyt, 54 Miss. 547 (1877).

An acknowledgment of an indefinite balance will not save the bar as to any amount whatever. Mask v. Philler, 32 Miss. 237 (1856).

#### 5. Evidence.

Parol evidence is admissible to identify debt and apply writing to its subject in determining sufficiency of new promise to toll statute of limitations. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

#### 6. Pleading.

An admission of indebtedness made in a pleading may take the case out of the statute. Kline v. Pearl, 236 Miss. 66, 109 So. 2d 556 (1959).

Statute of limitations begins to run against an acknowledgment of indebtedness made by a pleading, only from the time when the suit was dismissed. Kline v. Pearl, 236 Miss. 66, 109 So. 2d 556 (1959).

Superficial uncertainties as to exact amounts due, desolvable by explanation, are not sufficient to impair identification of an indebtedness under this section [Code 1942, § 478]. Dyer v. Lowe, 201 Miss. 516, 29 So. 2d 324 (1947).

Where defendant, by sworn plea, expressly denies that he wrote, signed, or authorized letter to plaintiff acknowledging correctness of written account sued on, and there is not evidence to contrary, denial must be accepted as true. Stephenson v. Louisiana Oil Ref. Co., 180 Miss. 410, 177 So. 912 (1938).

Where defendant pleaded the general issue and the three-year statute of limitations, the granting of permission to file a sworn plea, at the trial and over plaintiff's objections, denying writing of a letter alleged to constitute acknowledgment of indebtedness removing the bar of the three-year statute was within trial court's discretion. Stephenson v. Louisiana Oil Ref. Co., 180 Miss. 410, 177 So. 912 (1938).

The alleged error in permitting appellant to file a sworn plea at trial denying writing of letter alleged to constitute acknowledgment of debt taking case out of three-year statute of limitations could not



be considered on appeal in absence of cross-assignment of error by appellee. *Stephenson v. Louisiana Oil Ref. Co.*, 180 Miss. 410, 177 So. 912 (1938).

A statement in a letter that the writer owes "merchandise \$9.60," fixing the date,

is not invalid because the articles are not specified. *Yarbrough v. Gilland*, 77 Miss. 139, 24 So. 170 (1898).

### RESEARCH REFERENCES

**ALR.** Validity of contractual waiver of statute of limitations. 1 A.L.R.2d 1445.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay. 21 A.L.R.4th 1121.

**Am Jur.** 51 Am. Jur. 2d, Limitation of Actions §§ 282 et seq.

12 Am. Jur. Legal Forms 2d, Limitation of Actions, § 167:31 (acknowledgement of debt); §§ 167:32 et seq. (new promise to pay).

**CJS.** 54 C.J.S., Limitations of Actions §§ 300, 301 et seq.

## § 15-1-75. Bar of statute of limitations against one does not affect another jointly interested.

In all cases where the interests are joint, one shall not be barred because another jointly interested is, and the statute of limitations provided in this chapter shall be severally applied, and not jointly, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested.

**SOURCES:** Codes, 1906, § 3128; Hemingway's 1917, § 2492; 1930, § 2320; 1942, § 750.

### JUDICIAL DECISIONS

#### 1. In general.

Miss. Code Ann. § 15-1-75 has been interpreted to prevent the relation back of tolling to potentially jointly liable parties subsequently amended into existing litigation. Tolling begins when one is actually sued or brought in by amendment regardless of the status of a potentially jointly liable party; § 15-1-75 means nothing more. *Rainwater v. Lamar Life Ins. Co.*, 381 F. Supp. 2d 581 (S.D. Miss. June 24, 2005).

In Mississippi, suit against one of several persons liable in solido does not interrupt limitation statute as against other not so sued. *Dunn Constr. Co. v. Bourne*, 172 Miss. 620, 159 So. 841 (1935).

Louisiana statute requiring compensation proceedings to be instituted within

one year from time cause of action accrued held to bar proceedings in Mississippi against employer not sued within one-year period notwithstanding that under Louisiana law both employer and insurer were liable in solido for compensation and insurer had been sued within the one-year period and that such suit under Louisiana procedural statutes interrupted prescription against debtors in solido, since one-year limitation period constituted part of substantive law which would be enforced in Mississippi while procedural statutes would not be so enforced. *Dunn Constr. Co. v. Bourne*, 172 Miss. 620, 159 So. 841 (1935).

## RESEARCH REFERENCES

**ALR.** What statute of limitations applies to action for contribution against joint tortfeasor. 57 A.L.R.3d 927.

**§ 15-1-77. Effect upon limitations of concurrent jurisdiction in courts of common law and of equity.**

Whenever there be a concurrent jurisdiction in the courts of common law and in the courts of equity of any cause of action, the provisions of this chapter limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause in a court of chancery.

**SOURCES:** Codes, 1857, ch. 57, art. 30; 1871, § 2174; 1880, § 2695; 1892, § 2762; 1906, § 3124; Hemingway's 1917, § 2488; 1930, § 2321; 1942, § 751.

## RESEARCH REFERENCES

**Am Jur.** 27A Am. Jur. 2d, Equity §§ 161 et seq.

**CJS.** 54 C.J.S., Limitations of Actions §§ 74 et seq.

**§ 15-1-79. Limitations inapplicable to suits on certain obligations of banks and moneyed corporations.**

None of the provisions of this chapter shall apply to suits brought to enforce payment of notes, bills, or evidences of debt issued by any bank or moneyed corporation.

**SOURCES:** Codes, 1857, ch. 57, art. 27; 1871, § 2171; 1880, § 2690; 1892, § 2758; 1906, § 3119; Hemingway's 1917, § 2483; 1930, § 2319; 1942, § 749.

## JUDICIAL DECISIONS

**1. In general.**

Notes issued by a railroad company in 1861 and 1862, made payable on demand, and which could not be re-issued as currency after one year from the close of the

then existing war, are not within the saving of the section [Code 1942, § 749]. *Butts v. Vicksburg & M.R.R.*, 63 Miss. 462 (1886).

**§ 15-1-81. Actions on nonnegotiable promissory notes [For effective date and applicability, see subsection (6)].**

(1) An action to enforce the obligations of a party to pay a nonnegotiable promissory note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the promissory note, or if a due date is accelerated, within six (6) years after the accelerated date.

(2) If demand for payment is made to the maker of a nonnegotiable promissory note payable on demand, an action to enforce the obligation of a party to pay the promissory note must be commenced within six (6) years after

the demand. If no demand for payment is made to the maker, an action to enforce the promissory note is barred if neither principal nor interest on the promissory note has been paid for a continuous period of ten (10) years.

(3) For purposes of this section, a “nonnegotiable promissory note” is an unconditional written undertaking to pay absolutely and in any event a fixed amount of money signed by the person undertaking to pay the money that is not an “instrument” under Section 75-3-104(b). Nonnegotiable promissory notes for purposes of this section include, but are not limited to, promissory notes that: (a) bear a variable rate of interest or provide for interest by reference to information not contained in the promissory note; (b) provide for interest after default; (c) are nonrecourse to the person undertaking to pay the money; or (d) qualify as “instruments” under Section 75-9-102(a)(47).

(4) This section shall not apply to negotiable promissory notes, drafts, checks, certificates of deposit or any other instrument or item for which Section 75-3-118 provides the applicable statute of limitations. Neither a lease nor a security agreement is a promissory note for purposes of this section. A promissory note is not investment property as defined in Section 75-9-102(a)(49), a letter of credit, or writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. It is the intention of this section that a “note,” as defined in Section 75-3-104(e), and nonnegotiable promissory notes, as defined in this section, shall have the same statutes of limitations.

(5) This section shall not apply to obligations arising from retail installment contracts. For purposes of this section, a “retail installment contract” is a contract for the sale of goods under which the buyer makes periodic payments and the seller retains a security interest in the goods. For the purposes of this section, “goods” have the same meaning as the definition of “goods” in Section 75-9-102(a)(44).

(6) This section takes effect on July 1, 2012, and shall apply to all nonnegotiable promissory notes for which the statute of limitations in effect immediately prior to that date has not run. This section shall have no application to promissory notes for which the statute of limitations has run prior to July 1, 2012.

**SOURCES:** Laws, 2010, ch. 506, § 2, eff from and after July 1, 2010.



## CHAPTER 3

### Prevention of Frauds

Article 1.	In General .....	15-3-1
Article 3.	Uniform Fraudulent Transfer Act .....	15-3-101

#### ARTICLE 1.

#### IN GENERAL.

SEC.	
15-3-1.	Certain contracts to be in writing.
15-3-3.	Repealed.
15-3-5.	Fraudulent conveyances, judgments, loans and the like; exceptions.
15-3-7.	Property of improperly disclosed principal or partner to be treated as property of one ostensibly transacting business.
15-3-9.	Creditors to be notified of destruction of insured stock of merchandise by fire.
15-3-11.	Actions on contracts made during infancy.
15-3-13.	Chapter is not applicable to official sales.
15-3-15.	Effect of chapter on rules of evidence or presumptions of law.

#### § 15-3-1. Certain contracts to be in writing.

An action shall not be brought whereby to charge a defendant or other party:

(a) upon any special promise to answer for the debt or default or miscarriage of another person;

(b) upon any agreement made upon consideration of marriage, mutual promises to marry excepted;

(c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or

(e) upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

**SOURCES:** Codes, Hutchinson's 1848, ch. 47, art. 1 (1); 1857, ch. 44, art. 1; 1871, § 2892; 1880, § 1292; 1892, § 4225; 1906, § 4775; Hemingway's 1917, § 3119; 1930, § 3343; 1942, § 264; Laws, 1926, ch. 152.

**Cross References** — Concealed fraud, see § 15-1-67.

Requirement of new promises to be in writing, see § 15-1-73.

Ratification of contracts during infancy, see § 15-3-11.

Statute of frauds applicable to contracts for sale of personal property not otherwise covered by Uniform Commercial Code, see § 75-1-206.

- Requirement that contract for sale of goods be in writing, see § 75-2-201.  
 Statute of frauds applicable to sales contracts which are modified, see § 75-2-209(3).  
 Enforceability of guaranty written on negotiable instrument notwithstanding statute of frauds, see § 75-3-416.  
 Formal written requirements of letters of credit, see § 75-5-104.  
 Requirement of land being conveyed only by writing, see § 89-1-3.  
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## JUDICIAL DECISIONS

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41. Settlement agreements.

### 1. In general.

Constructive trusts are not subject to the statute of frauds. *Allred v. Fairchild*, 785 So. 2d 1064 (Miss. 2001).

A party may waive the protection of the Statute of Frauds. *Canizaro v. Mobile Communications Corp. of Am.*, 655 So. 2d 25 (Miss. 1995).

Security agreements relating to collateral in possession of secured party are not required to be in writing, subject to applicability of the statute of frauds. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

Where plaintiff, recipient of certain scholarship funds as financial assistance for medical school costs and tuition, was required to fulfill 4 year service obligation at approved health care facility, and signed private practice assignment agreement with health care facility, with such agreement stating that it would be "negotiable at the end of one year", and accepted employment there, but was terminated 10 months later with the termination being memorialized as a non-renewal of employment agreement, claim by plaintiff regarding alleged unwritten contract for 4 years is barred by statute of

frauds. Regarding one year contract of employment: duration of plaintiff's contract of employment was not to be confused with existence of an adequate writing to satisfy statute of frauds, and employment agreement relied upon by the plaintiff constitutes sufficient written evidence of a one year contract of employment to satisfy requirement of statute of frauds. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

Statute of frauds does not represent proper basis for dismissal of complaint for wrongful termination prior to end of first year of employment, but conversely, neither does it bar any claim that plaintiff had oral 4 year contract of employment with defendant. *Robinson v. Coastal Family Health Ctr., Inc.*, 756 F. Supp. 958 (S.D. Miss. 1990).

A contract to devise or bequeath property by will is enforceable, but must be in writing pursuant to the statute of frauds. Although a party may satisfy the court of the existence of an unwritten agreement to devise, the statute of frauds precludes specific performance as a remedy, even where the promisee has done all he or she was expected to do under the agreement. *Williams v. Mason*, 556 So. 2d 1045 (Miss. 1990).

The statute of frauds does not bar an action for damages based on fraud even though the promise underlying the fraud is itself unenforceable under the statute of frauds. *Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co.*, 554 So. 2d 884 (Miss. 1989).

The doctrine of equitable estoppel may be pled as an exception in any case where the statute of frauds is asserted as a defense. *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309 (Miss. 1989).

Statute of frauds does not apply to claim arising from negligent misrepresentation made in letter by bank written to importer regarding financial arrangements made by bank with manufacturer purchasing material from importer; even if statute did apply, doctrine of equitable estoppel would take case outside statute. *Shogyo Int'l Corp. v. First Nat'l Bank*, 475 So. 2d 425 (Miss. 1985).

Equitable estoppel is exception to § 15-3-1. *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201 (Miss. 1984).

Even though § 15-3-1(c) provides that no contract for the conveyance of an interest in land is binding unless signed by the party to be charged, equitable estoppel is a well-established exception to the statute of frauds. *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201 (Miss. 1984).

Grantee under deed attempted by interlineation to make his wife additional grantee by writing her name into deed following his signature; such addendum was written without knowledge of original grantor, was not signed by grantee, and was not acknowledged; held, interlineation was ineffective to convey title from either original grantor or from original grantee, as it was in conflict with this section. *Perkins v. Kerby*, 308 So. 2d 914 (Miss. 1975).

The written authorization to enter into a contract may be found in a partnership agreement whereby one of the parties or corporations under his control were empowered to contract in the name of the latter. *Morgan v. Jackson Ready-Mix Concrete*, 247 Miss. 863, 157 So. 2d 772 (1963).

Where trust will result in absence of express agreement, fact that such agreement is made will not prevent trust from arising. *Pitchford v. Howard*, 208 Miss. 567, 45 So. 2d 142 (1950).

The statute of frauds is a personal privilege of the contracting parties sought to be charged, and is not available to anyone else in a collateral proceeding. *Wirtz v. Gordon*, 187 Miss. 866, 184 So. 798 (1938), reinstated, 187 Miss. 882, 192 So. 29 (1939), cert. denied, 309 U.S. 630, 60 S. Ct. 616, 84 L. Ed. 988 (1940); *Grisham v. Lutric*, 76 Miss. 444, 24 So. 169 (1898).

Where defendant's testimony was objected to on ground it was effort to vary terms of note, but objections not ruled on, finding for plaintiff did not constitute holding that agreement had not been made, but indicated such issue was not decided. *Southern Package Corp. v. Beall*, 181 Miss. 740, 180 So. 789 (1938).

Fact that contract of sale was within statute did not relieve carrier from liability for damages caused by negligent delay. *Parish & Co. v. Yazoo & Miss. V.R. Co.*, 103 Miss. 288, 60 So. 322 (1913).

Principal not liable for acts of agent unless within the scope of actual or appar-



ent authority; agent cannot enlarge authority by unauthorized acts. *White v. Lee*, 97 Miss. 493, 52 So. 206 (1910).

## 2. Applicability.

Where an amendment to a building purchase and sale agreement, stipulating that the inspection period had expired and the buyers had no further right to terminate the agreement, was signed by the buyers, and then delivered to the sellers, one of whom assented by his signature and the other two communicated their assent to the buyers via email from their agent, the amendment was enforceable against the buyers; the statute of frauds did not require that each of the sellers sign the document in order to enforce it, much less that they had to sign it in order to manifest assent to its terms. *Heritage Bldg. Prop., LLC v. Prime Income Asset Mgmt.*, 43 So. 3d 1138 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 482 (Miss. 2010).

Trial court's grant of an injunction that prohibited a city from providing water to areas outside the city that had recently been annexed was reversed as the utility company's predecessor in interest had granted the city the right to provide such service. Even though the original agreement was not produced, the agreement was not subject to the statute of frauds as it was not a contract for the sale of land or a lease that ran for longer than a year, and its terms could have been proven by parole evidence. *City of Hernando v. N. Miss. Util. Co.*, 901 So. 2d 652 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Under principle that pre-UCC law is applicable unless displaced by particular provisions of Code, UCC statute of frauds, rather than general statute of frauds, applies to alleged oral agreement and subsequent confirmatory letter, where general statute of frauds and UCC provision are in conflict and mandate different results. *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172 (5th Cir. 1988), reh'g denied, 863 F.2d 882 (5th Cir. 1988).

The statute of frauds has no application to a contract executed by performance by both parties. *Landry v. Moody Grishman*

*Agency, Inc.*, 254 Miss. 363, 181 So. 2d 134 (1965).

The statute does not apply to a promise to make a will. *Boggan v. Scruggs*, 200 Miss. 747, 29 So. 2d 86 (1947), overruled on other grounds, *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

## 3. Oral promises and contracts.

The statute of frauds did not bar a broker's breach of contract action arising from an oral brokerage agreement, under which the broker undertook to secure a particular corporation as a customer of another corporation for the purchase of its products, where the broker had secured the corporation as a customer for those products and had therefore fully performed its part of the agreement. *American Chocolates, Inc. v. Mascot Pecan Co.*, 592 So. 2d 93 (Miss. 1991).

Action for fraud and deceit is not barred by § 15-3-1 notwithstanding that action is for damages incurred in reliance on oral promise that is itself unenforceable under statute of frauds. *Walker v. U-Haul Co.*, 734 F.2d 1068 (5th Cir. 1984), on reh'g, 747 F.2d 1011 (5th Cir. 1984).

Although an action to enforce an oral agreement to devise real property in return for a loan would be unenforceable under the statute of frauds, the claim would be upheld against the estate of the deceased debtor where the claimant did not seek enforcement of the agreement, but probated the agreement for recovery of the indebtedness, which was a consideration for it. *McKellar's Estate v. Brown*, 404 So. 2d 550 (Miss. 1981).

The statute of frauds is a personal right available to the party to an oral contract against whom enforcement is sought by the other party, and the plaintiff cannot invoke the statute for a defendant. *Peaslee Gaulbert Paint & Varnish Co. v. Lumpkin*, 238 Miss. 637, 119 So. 2d 772 (1960).

Generally, an oral agreement to convey land by will or otherwise is within the statute of frauds, and specific performance of such agreement cannot be enforced. *Collins' Estate v. Dunn*, 233 Miss. 636, 103 So. 2d 425 (1958).

Failure of answer to allege that oral contract violated statute did not preclude defendant from invoking such defense on

appeal. *Singletary v. Ginn*, 153 Miss. 700, 121 So. 820 (1929).

Failure to discharge mutual monetary obligations on verbal contract otherwise completed does not render contract unenforceable. *Singletary v. Ginn*, 153 Miss. 700, 121 So. 820 (1929).

Plaintiff cannot rely on law of other state where declaration does not aver that oral promise sued on was made in that state. *Craft v. Lott*, 87 Miss. 590, 40 So. 426, 6 Am. Ann. Cas. 670 (1906).

If in a suit on a promissory note the defendants set up by way of set-off and testify to the terms of a parol contract between the parties and services rendered thereunder, it is competent for the plaintiff to state in evidence his version of the contract, even though the terms thereof, as testified to by plaintiff, make the contract within the statute. *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767 (1898).

#### 4. Parol evidence.

Nothing in the statute of frauds requires that the contract itself be in writing. The statute is satisfied so long as there is "some memorandum or note thereof." For the prevention of frauds, the statute merely prescribes the form a part of the evidence must take. Oral testimony regarding the fact is admissible as well. Where the writing has been destroyed or is presently unavailable, the parties may employ parol evidence to prove "both its existence and contents." The "memorandum or note" serves but to show a basis for believing that the offered oral evidence rests on a real action, and that a contract to sell has been made between the parties. *Putt v. City of Corinth*, 579 So. 2d 534 (Miss. 1991).

When a writing or memorandum is lost or destroyed, both its existence and contents may be proven by parol evidence; the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds. Thus, § 15-1-29, § 15-1-73 and the Statute of Frauds (§ 15-3-1) did not bar an action to enforce a loan agreement which was allegedly destroyed in a fire where the plaintiff sufficiently proved the existence and contents of the destroyed memorandum. *Williams v. Evans*, 547 So. 2d 54 (Miss. 1989).

The rule that a written contract cannot be changed or modified by parol evidence of what was said and done by the parties at the time of making of the contract does not preclude the subsequent parol modification of the written contract, provided the contract is not one which under the statute is required to be in writing. *Nason v. Morrissey*, 218 Miss. 601, 67 So. 2d 506 (1953).

When grantee or devisee obtains possession and title to land intended for another by actual fraud, on proof of the fraud a trust will be raised in favor of the latter, and the trust may be established by parol. *Pitchford v. Howard*, 208 Miss. 567, 45 So. 2d 142 (1950).

#### 5. Sufficiency of writing, generally.

The minutes of a city's public utility commission, which were signed by the president and secretary of the utilities commission, were approved at a subsequent meeting, and evidenced an intent to buy land, identify the land, and set out the purchase price, were sufficient to constitute a "memorandum or note" satisfying the statute of frauds. *Putt v. City of Corinth*, 579 So. 2d 534 (Miss. 1991).

Nonconsenting interest owner in natural gas unit whose interest was force integrated into drilling unit would only be liable for operating expenses upon payout; furthermore, consent by such interest owner to pay expenses sooner must be in writing and signed by owner to comply with statute of frauds in order to be enforceable. *Hunt Energy Corp. v. Crosby-Mississippi Resources, Ltd.*, 732 F. Supp. 1378 (S.D. Miss. 1989), *aff'd*, 979 F.2d 1533 (5th Cir. 1992).

Description of land in a mineral lease as "being a part of the N ½ of SE ¼ and a part of the S ½ of the NE ¼ of Section 9, Township 2 N, Range 2 E, and containing 100 acres, more or less" is too vague to sustain its validity. *Silvey v. Upton*, 202 Miss. 485, 32 So. 2d 267 (1947).

In order to comply with this section [Code 1942, § 264] the memorandum must contain words appropriate to, and indicating an intention thereby, to convey or lease land, must identify the land, set forth the purchase price, or, if a lease, the rent to be paid and the terms of payment. *Gulf Ref. Co. v. Travis*, 201 Miss. 336, 29



So. 2d 100 (1947), error overruled, 201 Miss. 379, 30 So. 2d 398 (1947).

Sale contract must describe land with reasonable certainty or identify other writings by aid of which description can be made reasonably certain. *Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932).

Contract for sale of land which rests partly in writing and partly in parol is void. *Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932).

Memorandum must contain substantial terms of contract so as to be understood from contract itself without resorting to parol evidence. *Kervin v. Biglane*, 144 Miss. 666, 110 So. 232 (1926).

Written memorandum failing to state purchase price and terms was held insufficient to compel specific performance. *Sturm v. Dent*, 141 Miss. 648, 107 So. 277 (1926).

However, acceptance of order free from ambiguity completes a contract. *Allen & Co. v. Monroe County Hay Exch.*, 123 Miss. 502, 86 So. 297 (1920).

Seller accepting telegraph order in clear language cannot set up misunderstanding. *Allen & Co. v. Monroe County Hay Exch.*, 123 Miss. 502, 86 So. 297 (1920).

A writing for the sale of land which designates the promisors as "Phillips & Bro." is not defective, under the statute of frauds, for want of parties. *Langstaff Hdwe. Co. v. Wallace*, 28 So. 871 (Miss. 1900).

Telegrams containing an order for the purchase of goods, and a reply, unless they show the substantial terms of the bargain, including the price, do not meet the requirements of the statute. *Rector Provision Co. v. Sauer*, 69 Miss. 235, 13 So. 623 (1891).

If the writing disclose an uncertainty which parol evidence is not admissible to explain, it cannot be helped by an averment that the parties meant a particular thing. *Fisher v. Kuhn*, 54 Miss. 480 (1877).

The word "promise" is used in the statute. The English originally used the word "agreement." Under our statute, the consideration need not be expressed in the writing, though it was necessary under the English. *Wren v. Pearce*, 12 Miss. (4 S. & M.) 91 (1845).

## 6. —Letters.

In a dispute brought by a father against his son to set aside a deed, had the parties not reached a settlement agreement, a chancery court would have been justified in awarding the son attorney's fees because the father's suit was frivolous; the deed did not reflect that the son was obligated to build a house on the property, and the only document that might have supported the father's argument was a letter that contained no signatures or any other acknowledgement from the son. *Merideth v. Merideth*, 986 So. 2d 363 (Miss. Ct. App. 2008).

Letters held insufficient to take out of the statute of frauds a primary contractor's alleged promise to pay a debt owed by a subcontractor to a subcontractor. *Redd v. L & A Contracting Co.*, 246 Miss. 548, 151 So. 2d 205 (1963).

Letter merely expressing an expectation to pay all claims was not a sufficient written promise to pay debt. *Corinth, Shiloh & Savannah Tpk. Co. v. Gooch*, 113 Miss. 50, 73 So. 869 (1917).

Letter held too vague and indefinite to constitute memorandum taking contract out of statute. *Craft v. Lott*, 87 Miss. 590, 40 So. 426, 6 Am. Ann. Cas. 670 (1906).

## 7. —Receipts.

A receipt reciting a certain sum as payment by the person named "on the place on which he now lives" is not a sufficient memorandum of the sale of land to satisfy the statute. *Culpepper v. Chain*, 202 Miss. 309, 32 So. 2d 266 (1947).

A receipt by one other than the owner, acknowledging a down payment of a purchase price on certain lots and reciting that certain notes and a deed of trust were to be given for the balance, was insufficient as a memorandum of the contract of sale under this section [Code 1942, § 264], in that it failed to state in what county and state such lots were situated and it did not purport to be made on behalf of the owner of the property in question. *Paine v. Mikell*, 187 Miss. 125, 192 So. 15 (1939).

Vendor's receipt for sum "to apply on purchase of land on the south side of the town of Darling, to be measured later and paid for at the rate of \$30 per acre," held void for want of certainty. *Nickerson v.*



Fithian Land Co., 118 Miss. 722, 80 So. 1 (1918).

### 8. —Memoranda.

The promissory note signed by the parties satisfied the Statute of Frauds as a "memorandum or note", and because the grocery store was described both by name and physical address, the land was described with reasonable certainty. *Theobald v. Nosser*, 752 So. 2d 1036 (Miss. 1999).

Writing providing that for a money consideration plaintiff was given limited time within which to purchase from defendant a designated number of acres of timbered land, lying in two specified counties, at a certain price per acre, held insufficient, and parol evidence inadmissible to cure deficiency. *Scherck v. Moyse*, 94 Miss. 259, 48 So. 513 (1909).

Memorandum must include all material features of agreement so that resort to parol testimony will be unnecessary, except to show situation of parties and application of terms of the contract. *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 94 Miss. 904, 48 So. 292, 136 Am. St. R. 607 (1909).

A memorandum of a bargain of sale to the effect that the seller could spare the purchasers a specified quantity of corn, to be delivered at a stated time, is insufficient to take the sale out of the statute of frauds. *Willis v. State*, 27 So. 524 (Miss. 1900).

A memorandum in writing, to take a case out of the statute, must contain the substantial terms of the contract, so that they may be understood from the contract itself or some other writing to which it refers, without resorting to parol evidence. *McGuire v. Stevens*, 42 Miss. 724, 2 Am. R. 649 (1869); *Waul v. Kirkman*, 27 Miss. 823 (1854).

### 9. More than one writing as constituting contract.

Memorandum of promise to answer for debt of another need not be in one writing. *Central Shoe Co. v. J.P. Conn & Co.*, 160 Miss. 151, 133 So. 126 (1931).

Telegrams and letter held sufficient memorandum to bind guarantor for payment of account. *Central Shoe Co. v. J.P.*

*Conn & Co.*, 160 Miss. 151, 133 So. 126 (1931).

If paper signed by party sought to be charged makes such reference to another writing that, construing them together, all terms of bargain are expressed, it is sufficient, and parol evidence is admissible to identify paper referred to and apply reference. *Central Shoe Co. v. J.P. Conn & Co.*, 160 Miss. 151, 133 So. 126 (1931).

Memorandum may consist of several distinct writings, provided they are so related that the paper signed may be held to be an approval of the other documents. *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 94 Miss. 904, 48 So. 292, 136 Am. St. R. 607 (1909).

Statement in letter of defendant held not to constitute acceptance of terms of contract as detailed in letter of plaintiff. *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 94 Miss. 904, 48 So. 292, 136 Am. St. R. 607 (1909).

Statements in private letters of the owner of lands to his broker in regard to the latter's fee that he will sell it to a designated person are not alone sufficient to sustain a bill brought by such person for specific performance of a contract of sale. *Keene v. Lowenthal*, 83 Miss. 204, 35 So. 341 (1903).

Telegrams containing an order for the purchase of goods, and a reply, unless they show the substantial terms of the bargain, including the price, do not meet the requirements of the statute. *Rector Provision Co. v. Sauer*, 69 Miss. 235, 13 So. 623 (1891).

The memorandum may be in two or more writings, if they be connected physically or by internal reference. *Fisher v. Kuhn*, 54 Miss. 480 (1877).

### 10. Delivery of writing as essential.

Stipulations in a contract for performance periods may be made to run from a specified date prior to the date of delivery. *Hughes v. Franklin*, 201 Miss. 215, 29 So. 2d 79 (1947).

Memorandum of sale of standing timber, though complete in all other respects, is not sufficient compliance with statute of frauds, unless delivered to buyer. *Howie v. Swaggard*, 142 Miss. 409, 107 So. 556 (1926).

Oral agreement to sell house and put purchaser in possession, followed by execution but not delivery of deed, was no change of interest. *Osler v. Atlas Assurance Co.*, 127 Miss. 511, 90 So. 185 (1922).

The writing, though complete in all other respects, is not sufficient unless it has been delivered. *Jelks v. Barrett*, 52 Miss. 315 (1876); *Johnson v. Brook*, 31 Miss. 17 (1856).

### 11. Signing of writing.

The statutory signing requirements of §§ 15-3-1, 89-1-3, 89-1-29 and 91-9-1 were satisfied with respect to a deed of trust relating to homestead property, even though the wife neglected to sign the deed of trust document, where her signature appeared on the 2 attachments to the deed of trust-the property description and the adjustable rate mortgage rider-which constituted an integral part of the deed of trust. *United Miss. Bank v. GMAC Mtg. Co.*, 615 So. 2d 1174 (Miss. 1993).

A contract to buy and sell lands signed by only two of the three owners is not null and void under § 15-3-1 where the owners who signed were acting as agents for the third owner who assented to and ratified both their actions and the terms of the contract. *Hamilton v. Bradford*, 502 F. Supp. 822 (S.D. Miss. 1980).

A corporation's contract for architectural services satisfied the statute of frauds and the architectural firm could enforce the contract where it had been initialed by the corporation's vice president, and initialing was his usual way of authenticating a document, and where the same vice president wrote and signed a memorandum expressly referring to the contract; though the contract had subsequently been sent to the corporation's president for him to sign, and he had failed to do so, the vice president's signature was adequate since the jury had found that he had authority to execute the contract. *Affiliated Invs., Inc. v. Turner*, 337 So. 2d 1263 (Miss. 1976).

Where a new highway eliminated an S-curve between the lands of the vendor and the adjoining landowner, and they made an oral exchange, void under the statute of frauds, whereby the title to all of the vendor's lands south of the highway would become vested in the adjoining

landowner, and title to all of the landowner's land north of the present highway would be vested in the vendor, and where the adjoining landowner talked to the purchaser during a survey of the vendor's lot but made no claim to the land until construction of a house by the purchaser was completed, the purchaser having acted in good faith believing that he had title, the landowner was estopped to assert his legal title to the land north of the highway. *Martin v. Franklin*, 245 So. 2d 602 (Miss. 1971).

It is not necessary that the contract should have been also signed by the party seeking to enforce it. *Cooley v. Stevens*, 240 Miss. 581, 128 So. 2d 124 (1961).

A note or memorandum in writing, expressing the consideration, and subscribed by the party to be charged therewith, is not required in a contract of novation. *Peaslee Gaulbert Paint & Varnish Co. v. Lumpkin*, 238 Miss. 637, 119 So. 2d 772 (1960).

Where both the original note and the instalment agreement indorsed on the back of the note were signed by the party charged with the payment of the indebtedness this section [Code 1942, § 264] was not applicable to the case. *Freeman v. Truitt*, 238 Miss. 623, 119 So. 2d 765 (1960).

Officers' and directors' contract to pay all bank's losses held not within statute of frauds because schedule attached thereto was unsigned. *Love v. Dampier*, 159 Miss. 430, 132 So. 439, 73 A.L.R. 1376 (1931).

But unsigned memorandum of terms of sale of standing timber is not covered by signature of vendor on back of check given him by vendee in part payment, unless it is referred to in check, or physically attached thereto in such manner as to be part thereof. *Howie v. Swaggard*, 142 Miss. 409, 107 So. 556 (1926).

Written memorandum to answer debt of another, signed with initials not showing by whom or to whom payable, held within statute. *Postal Tel. & Cable Co. v. Friedhof*, 127 Miss. 498, 90 So. 182 (1922).

Contract to sell timber, not signed by assignee, held enforceable by him against seller. *Young v. Adams*, 122 Miss. 1, 84 So. 1 (1920).

Memorandum must be signed by party to be charged. *Gulfport Cotton Oil, Fertil-*



izer & Mfg. Co. v. Reneau, 94 Miss. 904, 48 So. 292, 136 Am. St. R. 607 (1909).

A written agreement for the sale of land is enforceable against a vendor who signed it, though neither the agreement nor any contract to pay the price was signed by the vendee, where such vendee afterwards offers in writing to perform the contract. *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 48 Am. St. R. 592 (1895), error overruled, 72 Miss. 922, 18 So. 357 (1895).

It is a sufficient compliance with the statute, if only "the party charged" shall have signed the writing, whether the other shall have signed or not. *Marqueze v. Caldwell*, 48 Miss. 23 (1873); *Williams v. Tucker*, 47 Miss. 678 (1873).

## 12. Partial performance, generally.

Part performance of an oral exclusive-dealer agreement will not take it out of the statute. *Stahlman v. National Lead Co.*, 318 F.2d 388 (5th Cir. 1963).

But contract for purchase and sale of corporate stock was held taken out of the statute by part performance. *Pugh v. Gressett*, 136 Miss. 661, 101 So. 691, 38 A.L.R. 678 (1924).

Part performance, or any other thing, will not make an exception. *Fisher v. Kuhn*, 54 Miss. 480 (1877).

## 13. Debt, default, or miscarriage of another, generally.

At the summary judgment stage, it could not be held that promissory and equitable estoppel foreclosed a guarantor's reliance on Miss. Code Ann. § 15-3-1 to avoid liability under a guaranty contract because there remained genuine issues of material fact as to whether the guarantor promised to pay the seller's customer's entire debt; there remained genuine issues of fact as to whether the seller relied to its detriment on the guarantor's signing of a guaranty where the evidence showed that although the seller did not do any further business with the customer, the seller asserted that in reliance on the guaranty, it did not repossess the equipment and materials that the customer had in her possession; and it could not be held as a matter of law that the guarantor could not reasonably have expected that the seller would rely on his

alleged promise in this way. *Sukup Mfg. v. Rushing*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 49088 (S.D. Miss. June 11, 2009).

Where there existed a genuine issue of fact as to whether decedent contracted in his own behalf for claimant to repair his son's bulldozer, or whether the original obligation, which was not in writing, was on behalf of his son, the claimant was entitled to the opportunity to prove at an evidentiary hearing that his claim did not violate § 15-3-1(a). *Crawler Parts, Inc. v. Hill*, 441 So. 2d 1357 (Miss. 1983).

One sued by a guarantor who has discharged its obligation cannot claim that under this statute the guarantor could not have been required to do so. *Powell v. Sowell*, 245 Miss. 53, 145 So. 2d 168 (1962), error overruled, 245 Miss. 64, 146 So. 2d 576 (1962).

The statute does not apply in the case of a sale made to a third person solely upon the credit of the promisor. *Rotenberry v. Quitman County Farmers Ass'n*, 238 Miss. 867, 120 So. 2d 566 (1960).

Where a third party promised to pay for the damage sustained by the plaintiff, if the plaintiff would release second party involved in collision, the oral promise was within the statute of frauds inasmuch as the second party was still subject to suit. *Harris v. Griffin*, 226 Miss. 74, 83 So. 2d 765 (1955).

And the test is whether the other person continues liable. *Wade v. Long*, 168 Miss. 434, 151 So. 564 (1934).

Where promise to pay another's debt arises out of new and original consideration, moving between newly contracting parties, it is "original undertaking" and not within statute. *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).

Where beneficiary of trust deed induced others to make loan to enable borrowers to pay trust deed, his promise to pay indebtedness within two years if borrowers failed to do so was within statute of frauds. *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).

Promise to answer for debt, default, or miscarriage of another person, for which the other person himself continues liable, is within statute of frauds. *Harris v. Griffin*, 226 Miss. 74, 83 So. 2d 765 (1955); *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).



One cannot sue father for services rendered on son's plantation, unless father's promise to pay therefor is in writing. *Hannah v. Covington*, 155 Miss. 825, 125 So. 418 (1930).

Whether one purchasing goods from plaintiff was running business for defendant held for jury. *Ricketts v. Drew Grocery Co.*, 155 Miss. 459, 124 So. 495 (1929).

Surety company held estopped to deny authority of agent delivering appeal bond, or that signature was binding on it. *Champernois & Blanks v. Donald Co.*, 153 Miss. 719, 121 So. 485 (1929).

But agreement between attorney and client fixing amount of former's fee and providing he was to pay costs in the Supreme Court if the case was reversed, held not within statute. *Grace v. Floyd*, 104 Miss. 613, 61 So. 694 (1913).

The fact that goods were bought for and used by a person who is under no legal obligation to pay for them does not afford such a moral obligation as will support his verbal promise to pay, and this, too, though the person legally bound has escaped liability. *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. R. 382 (1879).

Where a person for whose use goods are purchased is liable to pay for them, any other promise by a third person to pay the debt is within the statute. *Wallace v. Wortham*, 25 Miss. 119, 57 Am. Dec. 197 (1852).

#### 14. —Contractors, subcontractors and materialmen.

Once owner wholly satisfies his contract with defaulting contractor, subcontractors, laborers and materialmen have no lien on property or any valid claim against owner for debts owed by contractor, and any promise to pay more than was originally due contractor is gratuitous and is clearly within statute of frauds. *B & G Crane Serv., Inc. v. Dolphin Titan Int'l, Inc.*, 762 F.2d 1292 (5th Cir. La. 1985), cert. denied, 474 U.S. 904, 106 S. Ct. 271, 88 L. Ed. 2d 232 (1985).

A verbal agreement by a property owner to pay materialmen for supplies they had furnished a contractor who abandoned construction of a house for the owner prior to its completion is invalid under the provisions of this section [Code 1942, § 264].

*Phillips v. F.G. & H. Millwork Mfg. Co.*, 190 So. 2d 843 (Miss. 1966).

Prime contractor's oral agreement to pay rental for machinery used by subcontractor is not within the statute where the owner of the machinery supposed that he was renting it to the prime contractor. *GE Co. v. Hans*, 242 Miss. 119, 133 So. 2d 275 (1961).

#### 15. —Oral promises.

As a deceased partner had not been personally liable to repay the other partner for unequal advances he made to the partnership, the former's alleged oral promise to repay the latter was a promise to pay another's debt that was unenforceable under Miss. Code Ann. § 15-3-1(a). *In re Estate of Fitzner*, 881 So. 2d 164 (Miss. 2003).

Assuming promise by president of mortgage company that borrower would not be required to repay loan was agreement to pay borrower's debt if borrower could not afford to do so himself, statute of frauds would be applicable, and borrower could not obtain specific performance of oral agreement; action for fraud can be maintained on basis of contract or promise that is itself unenforceable under statute of frauds, and therefore, while borrower could not recover on contract itself, assuming one existed, damages incurred in reliance on president's fraudulent oral promise are recoverable. *Southern Mtg. Co. v. O'Dom*, 699 F. Supp. 1223 (S.D. Miss. 1987).

The oral contract by which a rice growers' association agreed to reimburse a warehouseman for certain handling-out charges in connection with the sale of stored grain belonging to the association's grower-members was not a special promise to answer for the debt or default of another where there was no binding and subsisting obligation on the part of the growers, or any other third party, to pay the charges, was not a contract of guaranty, but an enforceable contract binding upon the association. *Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott*, 191 So. 2d 399 (Miss. 1966).

An oral agreement among creditors of an insolvent firm, including the holder of a trust deed to the firm's property, that all operating expenses incurred before a fixed

date would be paid in cash was not a special promise to answer for the debt of another, but enforceable as a waiver of the mortgagee's prior claim to a suspended credits account which estopped the mortgagee, when operations ceased, from appropriating the fund to its own use in disregard of the respective claims of such other creditors who had deferred action to collect their overdue accounts on the strength of the agreement. *Smaller War Plants Corp. v. Queen City Lumber Co.*, 200 Miss. 627, 27 So. 2d 531 (1946).

Oral agreement by adult patient's father and brother that they would pay patient's hospital and medical bill if patient died held unenforceable as special promise to answer for another's debt. *Wade v. Long*, 168 Miss. 434, 151 So. 564 (1934).

Where defendant orally promised plaintiff that if plaintiff would furnish certain third parties with goods she would see her paid, the promise was within the statute of frauds. *Wray v. Cox*, 86 Miss. 638, 38 So. 344 (1905).

#### 16. — Collateral obligation.

If party to whom consideration moves becomes personally liable for debt, another's promise to pay it, though made at same time, and upon same consideration, is "collateral undertaking" within statute. *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).

Defendant contractor's promise to plaintiff subcontractor was unenforceable pursuant to the statute of frauds, Miss. Code Ann. § 15-3-1, as any promise by the contractor to pay a second subcontractor's debt was a collateral obligation subject to the statute of frauds; because plaintiff subcontractor was not harmed by relying on the contractor's alleged promise to satisfy the second subcontractor's debt, equitable estoppel was not applicable. *McLane Servs. v. Alstom Power, Inc.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 39973 (S.D. Miss. June 5, 2006).

If person making promise enters into original obligation, statute of frauds does not apply, and if he enters into collateral obligation, it does. *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).

#### 17. — Consideration.

In an action on an open account wherein it was alleged that the plaintiff had

agreed with a third party, which was indebted to the defendants in an amount in excess of the account, to transfer the defendants' account and to look to the third party for payment, the contract of substitution, if consummated, constituted a novation, and it was not necessary for the third party to sign a writing for the purpose of showing consideration. *Peaslee Gaulbert Paint & Varnish Co. v. Lumpkin*, 238 Miss. 637, 119 So. 2d 772 (1960).

Where the assumption is simultaneous with the creation of the debt, the test of liability is whether the person who received the consideration was or was not bound. *Bloom v. McGrath & Compton*, 53 Miss. 249 (1876).

The receipt or nonreceipt of the consideration by the party promising does not determine, in every case, whether the promise be within or without the statute, but the question remains whether he assumed an independent obligation or whether responsibility be contingent. *Olive v. Lewis*, 45 Miss. 203 (1871).

#### 18. — Consideration or benefit flowing to promisor.

The agreement of an employer to pay for the debt, default, or miscarriage of his employee failed not only for want of consideration but also because it was not in writing. *Forrest County Coop. Ass'n v. McCaffrey*, 253 Miss. 486, 176 So. 2d 287 (1965).

Oral modification of contract between principal contractor and subcontractor, whereby principal contractor guaranteed payment of premiums on subcontractor's liability insurance in consideration of agreement that they should be paid out of monthly earnings, did not violate statute of frauds, since he was binding himself to answer in a special manner for his own debt. *Hartford Accident & Indem. Co. v. Hewes*, 193 Miss. 850, 11 So. 2d 309 (1943).

Oral agreement of second mortgagee that if mortgagor would pay part of indebtedness secured by first trust deed, and if third party would advance remainder of indebtedness to prevent foreclosure of first trust deed, third party should have first lien on land covered, held valid and binding. *Taylor v. Phillips*, 182 Miss. 539, 181 So. 855 (1938).



Alleged oral promise of president of lessor of golf course to pay laborers and materialmen who contracted with lessee to make repairs and improvements was void, since it was promise to answer for debt or miscarriage of another person which promise had to be in writing. *Wenger v. First Nat'l Bank*, 174 Miss. 311, 164 So. 229 (1935).

Entries showing goods were charged to tenant could be explained by showing original agreement for sale on credit to landlord; oral agreement to sell goods on credit to landlord for himself and tenant, but to enter charges against tenant, made landlord primarily liable and did not violate statute of frauds. *Benson v. Berry-Dampeer Co.*, 158 Miss. 237, 130 So. 157 (1930).

Promise to answer for another's debt or default supported by independent consideration flowing to promisor is not within statute; statute does not apply to novation. *True-Hixon Lumber Co. v. McDonough*, 154 Miss. 720, 123 So. 855 (1929).

Agreement to pay for cars furnished by railroad to third party for promisor, if destroyed by fire, held not within statute. *Home Ins. Co. v. Moore & Rawls*, 151 Miss. 189, 117 So. 524 (1928).

Promise of vendor's agent to purchaser to pay taxes out of purchase money received from purchaser held not promise to answer for debt or default or miscarriage of another. *Palmer v. Bridges*, 151 Miss. 12, 117 So. 328 (1928).

Performance of duty of third person involving only application of funds or discharge of duty owing by promisor is not within statute. *Palmer v. Bridges*, 151 Miss. 12, 117 So. 328 (1928).

Agreement of owner of building to become liable as surety for material furnished contractor is within statute. *Vicksburg Mfg. & Supply Co. v. J.H. Jaffray Constr. Co.*, 94 Miss. 282, 49 So. 116 (1909).

Agreement of traveling salesman to pay 50 per cent of losses on customers dealt with by him, being part of his contract of employment, is not within statute. *Meyer-Bridges Co. v. Badeau*, 90 Miss. 27, 43 So. 609 (1907).

Where a debtor conveyed his stock of goods in consideration of a promise of the

buyer to pay certain of the debtor's debts, the promise is not within the statute of frauds. *Wear & Boogher Dry Goods Co. v. Kelly*, 84 Miss. 236, 36 So. 258 (1904).

A promise made to a debtor to pay a debt which he owes to a third person is not within the statute. *Ware v. Allen*, 64 Miss. 545, 1 So. 738, 60 Am. R. 67 (1887).

Where the vendee of land agreed to pay a part of the purchase-money to a creditor of the vendor, the agreement is, not to pay the debt of another, but to pay his own debt to a person other than his own creditor, and it is not within the statute. *Lee v. Newman*, 55 Miss. 365 (1877).

### 19. —Promise to indemnify surety.

Oral promise to reimburse plaintiff as surety on bond of defendant's father for any loss he might incur by reason of his suretyship held within statute. *Craft v. Lott*, 87 Miss. 590, 40 So. 426, 6 Am. Ann. Cas. 670 (1906).

An oral promise to indemnify a person for becoming surety on another's bail bond is within the statute. *May v. Williams*, 61 Miss. 125, 48 Am. R. 80 (1883).

### 20. Agreement upon consideration of marriage.

Oral agreement of prospective husband to renounce rights in realty of prospective bride is void. *Pardue v. Ardis*, 101 Miss. 884, 58 So. 769 (1912).

An agreement to convey, in consideration of marriage, a tract of land of a certain value, is void under the statute, where the promisor has four tracts of that value, and the writing contains nothing to identify the one referred to, except that it was to be chosen by the promisee, although the marriage is consummated on the faith of the promise. *Cole v. Cole*, 99 Miss. 335, 54 So. 953, Am. Ann. Cas. 1913E,332 (1911).

An agreement is not within the statute, as upon consideration of marriage, where it is made after the contract to marry has become binding, though it is in contemplation of marriage. *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140 (1904).

An agreement made in contemplation of marriage after the contract to marry has become binding is not an agreement in consideration of marriage within the meaning of this section [Code 1942,



§ 264]. *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140 (1904).

### 21. Sale or lease of land, generally.

Appellate court affirmed the grant of summary judgment in favor of defendant as there was no intent to form a joint venture to buy property by defendant and plaintiff, and thus, Miss. Code Ann. § 15-3-1(c) required a written document to transfer an interest in land which did not exist here. *Roffman v. Wilson*, 914 So. 2d 279 (Miss. Ct. App. 2005).

The principal purpose of the statute of frauds is to require the contracting parties to reduce to writing the specific terms of their contract, especially an agreement affecting lands for more than one year, and thus to avoid dependence on the imperfect memory of the contracting parties, after the passage of time, as to the terms of the contract. *Sharpsburg Farms, Inc. v. Williams*, 363 So. 2d 1350 (Miss. 1978).

A contract to furnish sand is not one pertaining to the sale of lands. *Morgan v. Jackson Ready-Mix Concrete*, 247 Miss. 863, 157 So. 2d 772 (1963).

The defense of the statute is personal and may not be raised by a third party. *Davis v. Stegall*, 246 Miss. 593, 151 So. 2d 813 (1963).

The statute [Code 1942, § 264] does not make a contract void but only allows the defense to its enforcement. *Davis v. Stegall*, 246 Miss. 593, 151 So. 2d 813 (1963).

An option to purchase land is required to be in writing. *Nason v. Morrissey*, 218 Miss. 601, 67 So. 2d 506 (1953).

Memorandum agreement for sale of land which does not expressly promise merely quitclaim deed raises presumption that warranty deed was intended, as it is general usage and custom of purchasers to demand and receive warranty deeds. *Jones v. Hickson*, 204 Miss. 373, 37 So. 2d 625 (1948).

The payment of the purchase price for land, or the agreed rental therefor, does not eliminate the need for a proper written instrument. *Gulf Ref. Co. v. Travis*, 201 Miss. 336, 29 So. 2d 100 (1947), error overruled, 201 Miss. 379, 30 So. 2d 398 (1947).

Defendant held estopped from asserting invalidity of his oral agreement to pay

materialman where because of such agreement materialman failed to protect his lien. *Delta Lumber Co. v. Wall*, 119 Miss. 350, 80 So. 782 (1919).

Where an offer to purchase land presents two alternative propositions a mere acceptance of the offer without specifying which proposition is accepted does not create a contract which can be specifically enforced. *Welsh v. Williams*, 85 Miss. 301, 37 So. 561 (1904).

Two persons, each owner of land under bond for title, cannot exchange the tracts by changing possession and delivering their respective title-bonds to each other. *Connor v. Tippet*, 57 Miss. 594 (1880).

### 22. —Applicability.

Any modification of a contract that comes under the statute of frauds must be in writing, including modifications to contract for the purchase of land. *Favre Prop. Mgmt., LLC v. Cinque Bambini*, 863 So. 2d 1037 (Miss. Ct. App. 2004).

The statute of frauds pertaining to a claim for an interest in real property does not apply as a bar to a suit seeking adjudication of the existence of a partnership and for an accounting, since the partnership was a fiduciary relationship. *Kelly v. Windham*, 204 So. 2d 477 (Miss. 1967).

The statute [Code 1942, § 264] applies to the sale of realty at auction. Though the auctioneer act as the agent of both parties, seller and buyer, yet, in order to make the sale valid, the auctioneer or his clerk must, at the time of the sale, make a sufficient memorandum. *Jelks v. Barrett*, 52 Miss. 315 (1876).

Parol partition of lands between co-owners, followed by occupancy in severalty, is valid. *Pipes v. Buckner*, 51 Miss. 848 (1876); *Willey v. Bonney's Lessee*, 31 Miss. 644 (1856).

And it does not embrace cases of trust. *Jones v. M'Dougal*, 32 Miss. 179 (1856).

This part [Code 1942, § 264] of the statute has reference alone to the sale of lands, and not to a contract to purchase by one person for the benefit of another. *Soggins v. Heard*, 31 Miss. 426 (1856).

The statute [Code 1942, § 264] does not apply to a contract for the parties to become jointly interested in a purchase about to be made. *Evans v. Green*, 23 Miss. 294 (1852).

A sheriff's sale is not within the statute. He is the agent of both parties, and his memorandum is sufficient to take the case out of it. *Endicott v. Penny*, 22 Miss. (14 S. & M.) 144 (1850).

### 23. —Necessary terms.

The chancellor properly refused to order specific performance of a contract for the sale of land where the description within the contract was ambiguous, referring to both the east-west and north-south dimensions of the land in approximate terms, and referring to no monument establishing the northern boundary of the lot in question, and where both the plaintiff's interpretation and the defendant's interpretation of the lot dimensions from the description were too vague and uncertain to justify a judicial sanction. *McCarty v. Lawrence*, 231 So. 2d 775 (Miss. 1970).

Memorandum of agreement to sell realty interest, to satisfy this section [Code 1942, § 264] must contain the substantial terms of the contract expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence, and when reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another. *Hamilton v. Morrison*, 146 F.2d 533 (5th Cir. 1945).

One of the necessary terms of contract to sell interest in land is a sufficient description of the land. *Hamilton v. Morrison*, 146 F.2d 533 (5th Cir. 1945).

An agreement to convey, in consideration of marriage, a tract of land of a certain value, is void under the statute, where the promisor has four tracts of that value, and the writing contains nothing to identify the one referred to, except that it was to be chosen by the promisee, although the marriage is consummated on the faith of the promise. *Cole v. Cole*, 99 Miss. 335, 54 So. 953, Am. Ann. Cas. 1913E, 332 (1911).

### 24. —Oral promises and contracts.

In an action by the buyers for specific performance of a real estate contract, the court rejected the sellers' contention that the statute of frauds barred relief because the buyers failed to submit a written con-

tract within 30 days after an oral agreement for the purchase of the property was read into the record in court, as a written contract had already been entered into by the parties that contained sufficient terms to withstand the statute of frauds, and the oral agreement merely contained elaborations on the contract. *Brown v. Thomas*, 757 So. 2d 1091 (Miss. Ct. App. 2000).

In action by plaintiff timber company against defendant timber company alleging that defendant fraudulently induced plaintiff to purchase certain property by orally promising that defendant, which had previously acquired timber rights on such property, would sell or trade such timber to plaintiff after plaintiff subsequently purchased such property, plaintiff's fraudulent inducement claim was barred even if it could have been raised under state's general statute of frauds, because alleged promise to convey timber rights was contract for sale of "goods" subject to statute of frauds. *T.K. Stanley, Inc. v. Scott Paper Co.*, 793 F. Supp. 707 (S.D. Miss. 1992), *aff'd*, 5 F.3d 529 (5th Cir. 1993).

In an action to recover the purchase price for the sale of borrow material from plaintiff seller's land, the oral contract was governed by the statute of frauds affecting the transfer of an interest in land. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

Code 1942, § 264 does not require a cancellation of a lease to be in writing. *Perkins v. Blackledge*, 285 So. 2d 761 (Miss. 1973).

An oral agreement on the part of mother that if her daughter would return to Mississippi and there operate a flower shop and discharge the construction lien thereon she would convey the flower shop property to the daughter was unenforceable under the statute of frauds. *Fletcher v. Nemitz*, 186 So. 2d 232 (Miss. 1966).

Where a landowner expressly consents or agrees that the building erected on his land does not become realty but remains the property of the person annexing it, the agreement may be oral and is not within the statute of frauds since this agreement involves no sale of interest of land. *Connolly v. McLeod*, 212 Miss. 133, 52 So. 2d 473 (1951).



Contracts by parol for land are generally regarded as voidable merely, and when vendor is able and willing to perform, vendee cannot recover what he has paid if vendee avoids contract. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578 (1949).

Earnest money paid by vendee on making of oral contract for purchase of realty is liquidated damages and not a penalty, and if vendor is willing and able to perform contract it cannot be recovered back on repudiation of transaction by vendee. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578 (1949).

Purchaser under parol contract for sale of land may recover any amounts paid vendor as for money had and received, when vendor refuses to complete transaction by execution of necessary deed, but he cannot sue for specific performance, since the oral contract is unenforceable under statute of frauds. *Hardy v. Candelain*, 204 Miss. 328, 37 So. 2d 360 (1948).

A suit to establish a resulting trust arising out of the conveyance of land to a third party pursuant to an oral agreement whereby one person was to advance all funds necessary to purchase the land and another was to repay him half of the amount, each to acquire an undivided one-half interest, with an understanding that the deed would be executed to such third party to be held by her until the loan was repaid, was not an effort to enforce an oral contract for the purchase of land. *Shepherd v. Johnston*, 201 Miss. 99, 28 So. 2d 661 (1947).

This section [Code 1942, § 264] did not preclude relief to the complainant by way of a conveyance of the land involved where a money lender paid the purchase price of land on behalf of the complainants who were then lessees in possession thereof, and took title thereof in his own name as security for the purchase price under an oral agreement to convey it to the complainant upon payment of the purchase price. *Tanous v. White*, 186 Miss. 556, 191 So. 278 (1939).

Where the executrix under the will of the grantor in a deed of trust, which will devised the land secured by such deed of trust to the executrix and two minor children, and vested the executrix with power

to convey the land by deed or otherwise, entered into an oral agreement with a holder of bonds issued under such deed of trust, to consent to a foreclosure thereof, and purchase of the property at such foreclosure sale by the bondholder, the oral agreement was not within the purview of the statute of frauds in view of the fact that such agreement was fully performed by the bondholder by advancing the tax redemption money and a loan to the executrix, the institution and completion of the foreclosure proceeding, consented to by all of the parties to the agreement, and the delivery of possession of the land by the executrix to the purchaser at such sale. *Wirtz v. Gordon*, 187 Miss. 866, 184 So. 798 (1938), reinstated, 187 Miss. 882, 192 So. 29 (1939), cert. denied, 309 U.S. 630, 60 S. Ct. 616, 84 L. Ed. 988 (1940).

A prenuptial parol contract as to the rights of the parties about to be married, in the real estate of each other, is not enforceable. *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140 (1904).

A lender of money to a borrower to pay off a mortgage on his homestead, on his verbal promise to secure the debt by a deed of trust on the land, cannot enforce the verbal promise, nor will he be subrogated to the right of the mortgagee whose mortgage was satisfied. *Berry v. Bullock*, 81 Miss. 463, 33 So. 410 (1903).

An agreement between plaintiff and defendant in an action of ejectment, by which judgment was entered for the plaintiff for the whole of the land sued for, but the execution was to be restricted to a part, is not within the statute. *Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581 (1856).

## 25. —Abstract of title.

Where contract for sale and purchase of land contains stipulation obligating vendor to furnish abstract of his title to vendee, but no particular time is fixed in which it is to be furnished, implication arises that abstract is to be furnished within reasonable time in view of all circumstances, and compliance by vendor with this implication is obligatory. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578 (1949).

When vendor has reason to believe that abstract of his title will not be required at



all by vendee, he is entitled to reasonable time for furnishing it when thereafter demanded, and vendee has no right to rescind contract to purchase without giving reasonable time for the furnishing of abstract of title. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578 (1949).

#### 26. —Latent defects.

Extrinsic evidence may be used to repair a latent defect in a description to land if the clue to certainty, and thus avoidance of the statute of frauds, is contained in the writings. *Frostad v. Kitchens*, 377 F.2d 475 (5th Cir. 1967).

Memorandum agreement for sale of 120 acres, "Old Hatcher Place" is not void for failure to meet requirements of statute of frauds, since omission of state and county is latent defect which may be repaired by extrinsic evidence where there are other means of local identification. *Jones v. Hickson*, 204 Miss. 373, 37 So. 2d 625 (1948).

#### 27. —Mortgages.

Summary judgment was properly awarded to a mortgagee in a mortgagor's action for wrongful foreclosure because an alleged agreement between the mortgagor and a bank teller that the mortgagor's two payments on the loan would stop foreclosure proceedings was barred by the statute of frauds; there was no additional consideration for the alleged forbearance by the mortgagee. *Thompson v. First Am. Nat'l Bank*, 19 So. 3d 784 (Miss. Ct. App. 2009).

In a suit by grantors for cancellation of deed alleged to have been given as a mortgage, where the deed was in fact a mortgage, and not a sale with all obligation to resell the land reconveyed, the grantee could not use the statute of frauds as a defense and equity had the power to cancel the deed, as well as a subsequent deed from the grantee to a person not innocent purchaser for value. *Emmons v. Emmons*, 217 Miss. 594, 64 So. 2d 753 (1953).

A lender of money to a borrower to pay off a mortgage on his homestead, on his verbal promise to secure the debt by a deed of trust on the land, cannot enforce the verbal promise, nor will he be subrogated to the right of the mortgagee whose

mortgage was satisfied. *Berry v. Bullock*, 81 Miss. 463, 33 So. 410 (1903).

#### 28. —Miscellaneous.

Where defendant, an industrial plant seller, had ongoing discussions with plaintiff potential purchasers after the potential purchasers' closing date had passed, and there was no evidence that an agreement was actually reached as to a change in financing, a change in financing was a substantial change that could not be enforced under Miss. Code Ann. § 15-3-1(c)'s statute of frauds, and thus, when the seller sold the property to different buyer, the seller was granted summary judgment on the potential purchaser's breach of contract claim. *Fibre Corp. v. GSO Am., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37906 (S.D. Miss. Dec. 8, 2005).

In an action by a homeowners' association to enforce a lien on defendant's property after defendant had failed to pay an annual assessment to the association for maintenance of common areas, the chancery court properly ruled that the assessment was a covenant running with the land and that defendant was liable, despite defendant's contentions that the action was barred by the statute of frauds since there was no signed writing binding defendant to pay the fee, and since the amount of the assessment was not set forth in the deed; the deed provided that defendant was required to pay an assessment, and defendant could not claim the benefit conferred by the deed and renounce the covenant. The statute of frauds has no application to a covenant running with the land even though the covenant imposes a burden on the land. *William W. Bond, Jr. & Assocs. v. Lake O'The Hills Maintenance Ass'n*, 381 So. 2d 1043 (Miss. 1980).

Where a brother, who had no written authorization to represent his sister, without mentioning the sister's name entered into a contract to sell to another a parcel of the sister's land, the contract was not enforceable as against the sister. *Leavenworth v. Lloyd*, 229 Miss. 880, 92 So. 2d 224 (1957).

Signed receipts indicating a sale for \$8,000, \$20 cash and balance due at a named date, of "¼ royalty under 113 acres of land" in a named county, did not consti-

tute a sufficient memorandum to satisfy this section [Code 1942, § 264] as neither the land nor the kind of royalty was described, and fact that purchaser in seller's presence folded the first receipt and transfer form together and kept them was unavailing. *Hamilton v. Morrison*, 146 F.2d 533 (5th Cir. 1945).

Land contract, though within statute of frauds and unenforceable, not void; until its affirmance by vendor of land contract within statute of frauds, relation of parties, that of vendor and purchaser, and not that of landlord and tenant; vendor, disaffirming land contract within statute of frauds, not entitled to recover from purchaser for use and occupation of premises for period between making of contract and disaffirmance. *Harvey v. Daniels*, 133 Miss. 40, 96 So. 746 (1923).

A written agreement for the sale of land is enforceable against a vendor who signed it, though neither the agreement nor any contract to pay the price was signed by the vendee, where such vendee afterwards offers in writing to perform the contract. The offer makes the contract mutual, and it cannot be said that there is a want of consideration. *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 48 Am. St. R. 592 (1895), error overruled, 72 Miss. 922, 18 So. 357 (1895).

## 29. —Part performance of contract of sale.

Neither part performance of an oral contract with respect to the sale of land, nor the expenditure of money in reliance upon it, are sufficient to take it out of the statute of frauds. *Reid v. Horne*, 187 So. 2d 316 (Miss. 1966).

Under an oral contract for the cutting and hauling of pulpwood to the railroad and loading the same on cars for shipment to defendants, with a guarantee to the plaintiff of employment under the contract for a period of not less than two years, the supplying of pulpwood for a period of four months did not constitute such part performance as to take the case out of the operation of statute of fraud. *Poole v. Johns-Manville Prods. Corp.*, 210 Miss. 528, 49 So. 2d 891 (1951).

Statute of frauds was inapplicable to preclude enforcement of a will executed in complainant's favor pursuant to an oral

agreement to make such will in return for the caring of deceased by complainant, even though the agreement and the will contemplated the transfer of land, where the complainant performed her part of the agreement but the deceased subsequently executed a new will leaving all his property to another, since the oral agreement was completely executed. *Johnston v. Tomme*, 199 Miss. 337, 24 So. 2d 730 (1946).

Part performance of oral contract for sale of land does not take case out of statute requiring such contracts to be in writing. *Wells v. Brooks*, 199 Miss. 327, 24 So. 2d 533 (1946); *Milam v. Paxton*, 160 Miss. 562, 134 So. 171 (1931).

Parol promise that deceased's realty and personality would some day belong to the promisees if they continued to look after deceased's property, was unenforceable under the statute of frauds, where the promisees were never placed in possession of such property, irrespective of whether the transfer of the property was to be by will, deed or otherwise, and regardless of whether the promisees performed their part of the arrangement. *Wells v. Brooks*, 199 Miss. 327, 24 So. 2d 533 (1946).

Where parol agreement that deceased's property will someday belong to certain persons if they continue looking after such property, includes both realty and personality, the transaction is not separable in respect to enforceability under statute of frauds. *Wells v. Brooks*, 199 Miss. 327, 24 So. 2d 533 (1946).

Unpaid purchase money gives rise to enforceable equitable vendor's lien independent of contract. *Haden v. Sims*, 168 Miss. 64, 150 So. 210 (1933).

Provision of contract that purchaser bought on conditions announced by auctioneer held not to entitle vendor to specific performance on parol showing that land which vendor could not convey was excepted by auctioneer. *Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932).

In the absence of writing identifying land, stating purchase price and terms of payment, vendee under oral contract was not entitled to specific performance. *Milam v. Paxton*, 160 Miss. 562, 134 So. 171 (1931).



Part performance will not take parol sale of lands out of statute of frauds; exceptions to statute of frauds on account of part performance will not be ingrafted on statute; fact that vendor fraudulently evaded part of agreement to reduce part of contract to writing is not sufficient to take case out of statute. *Howie v. Swaggard*, 142 Miss. 409, 107 So. 556 (1926).

Acceptance of part of purchase price does not render valid parol contract for sale of land, nor estop acceptor from refusing to carry out contract. *Howie v. Swaggard*, 142 Miss. 409, 107 So. 556 (1926).

The statute does not prevent recovery from the vendee of land, who has taken possession under a conveyance for part cash and part to be paid in installments, to secure which a lien is reserved on the unpaid purchase money, although the vendee may have signed no written promise to pay. *Washington v. Soria*, 73 Miss. 665, 19 So. 485, 55 Am. St. R. 555 (1896).

### 30. —Promise to reconvey.

Oral agreement by purchaser of land at foreclosure sale, to reconvey property to former owner upon payment of purchase price plus interest within 90 days of sale, was unenforceable option contract under statute of frauds; former owner failed to satisfy burden of proving exception to statute of frauds. *Dew v. Langford*, 666 So. 2d 739 (Miss. 1995).

An oral agreement between the grantor and grantee to cancel a deed does not satisfy the statute of frauds even though an attorney purporting to represent both parties enters a notation on the margin of the record to the effect that the deed is so cancelled. *Wilson v. Combs*, 203 Miss. 286, 33 So. 2d 830 (1948).

An oral executory promise by grantee to reconvey land to grantors if latter not satisfied is void under the statute of frauds. *Carter v. Dabbs*, 196 Miss. 692, 18 So. 2d 747 (1944).

Alleged oral agreement between former owner of tax forfeited land and holders of patents thereto from state, that the latter would reconvey to him upon payment by him of the moneys expended for the patents, was not effective to create a constructive trust and was unenforceable under this section [Code 1942, § 264]. *Lewis*

*v. Williams*, 186 Miss. 701, 191 So. 479 (1939).

An oral agreement between the parties to reduce the parol promise to reconvey to writing is void and does not take the case out of the statute. *Lewis v. Williams*, 186 Miss. 701, 191 So. 479 (1939).

Nor can an oral contract to sell or reconvey, or for the sale of land, be specifically enforced in a court of equity, even though it be partially performed. *Lewis v. Williams*, 186 Miss. 701, 191 So. 479 (1939).

Oral agreement of grantee to make reconveyance of land conveyed held within statute of frauds and unenforceable. *Palmer v. Spencer*, 161 Miss. 561, 137 So. 491 (1931).

Parol agreement to reconvey land bid in at sale under deed of trust is within the statute. *Campbell v. Bright*, 87 Miss. 443, 40 So. 3 (1906).

A promise to reconvey lands is within the statute, whether made before or after the conveyance to the promisor. *Clearman v. Cotton*, 66 Miss. 467, 6 So. 156 (1889).

A contract by a judgment-creditor who has purchased the land of his debtor at execution-sale, that the latter may redeem the land by payment of the debt, is within the statute. *Rutland v. Brister*, 53 Miss. 683 (1876).

### 31. —Boundary and party wall agreements.

Oral agreement, under which adjacent owners erected a two story building with party wall on ground floor and common hallway on second story, did not create an easement by grant. *Binder v. Weinberg*, 94 Miss. 817, 48 So. 1013 (1909).

A parol agreement between coterminous owners, fixing an uncertain and disputed boundary between their lands, followed by possession, is valid and binding. *Archer v. Helm*, 69 Miss. 730, 11 So. 3 (1892).

It is competent to establish boundaries by parol, yet the establishment of a boundary between two government survey subdivisions in conflict with the official survey cannot be by parol. It is within the statute. *May v. Baskin*, 20 Miss. (12 S. & M.) 428 (1849).

### 32. —Licenses.

An oral agreement allegedly granting one party an "irrevocable license" to con-



struct and maintain a road across the lands of another is unenforceable by reason of the statute of frauds. *Reid v. Horne*, 187 So. 2d 316 (Miss. 1966).

An oral grant of a license to cut and remove timber is not one of an interest in realty within the statute of frauds. *Towles v. Hodges*, 235 Miss. 258, 108 So. 2d 884 (1959).

A verbal agreement to convey land to a county for school purposes, by which third parties are induced to erect a schoolhouse thereon, is an irrevocable license for the purpose for which it was made as long as the house is used for the purpose specified. *Agnew v. Jones*, 74 Miss. 347, 23 So. 25 (1897).

The statute [Code 1942, § 264] does not prevent a defendant, sued in trespass, from showing a parol license. *New Orleans, J. & G.N.R.R. v. Moye*, 39 Miss. 374 (1860).

### 33. —Timber contracts.

Oral contract to supply timber to paper mill was contract for sale of timber not a brokerage contract and was therefore unenforceable due to lack of writing evidencing contract; agreement did not fall within any exceptions to UCC Statute of Frauds. *Futch v. James River-Norwalk, Inc.*, 722 F. Supp. 1395 (S.D. Miss. 1989), *aff'd*, 887 F.2d 1085 (5th Cir. 1989).

An oral contract for the sale of standing timber is unenforceable. *Dobson v. Masonite Corp.*, 359 F.2d 921 (5th Cir. 1966).

An agreement for services in cutting and clearing land of timber is not within the statute of frauds. *Dobson v. Masonite Corp.*, 359 F.2d 921 (5th Cir. 1966).

The question of whether an oral contract for clearing 9,200 acres of land of all oak trees whether dead, diseased, or merchantable, was an agreement for the sale of timber or one for the performance of personal services was a question of fact to be determined by the jury. *Dobson v. Masonite Corp.*, 359 F.2d 921 (5th Cir. 1966).

An oral grant of a license to cut and remove timber is not one of an interest in realty within the statute of frauds. *Towles v. Hodges*, 235 Miss. 258, 108 So. 2d 884 (1959).

One who merely sells property to which he has no title is not liable for trespass committed by his vendee and therefore

purchaser of standing timber under oral agreement was not liable for trespass in cutting the timber committed by person to whom purchaser sold the standing timber by oral agreement. *Hudson v. Landers*, 215 Miss. 447, 61 So. 2d 312 (1952).

Oral contract for sale of growing timber is within statute of frauds and is merely license which authorizes entry upon land and cutting and removal of timber thereon, but license is revocable at will of seller. *Rowan v. Rosenblatt*, 206 Miss. 259, 39 So. 2d 873 (1949).

Purchaser of growing timber under oral contract cannot recover damages for loss of profits for alleged breach of contract when owner of timber revokes oral agreement and sells land and uncut timber to another. *Rowan v. Rosenblatt*, 206 Miss. 259, 39 So. 2d 873 (1949).

Written agreement, unenforceable as conveyance of standing timber, is sufficient to constitute valid license or permit for cutting and removal of timber and when timber is cut into logs for removal from lands, title to logs passes to purchaser, subject to right of seller to enforce lien for purchase money thereon. *Dixie Pine Prods. Co. v. Breland*, 205 Miss. 610, 39 So. 2d 265 (1949).

Written agreement for sale of standing timber which does not describe land is unenforceable under statute of frauds after license, or permit, as evidenced by the writing, to cut and remove timber is revoked by seller. *Dixie Pine Prods. Co. v. Breland*, 205 Miss. 610, 39 So. 2d 265 (1949).

Contract of sale of standing timber, which is unenforceable under statute of frauds, attaches to trees as chattels as fast as they are severed from realty, and purchaser is entitled to remove them as his own, and owner of land has no right to take the timber without due process of law. *Dixie Pine Prods. Co. v. Breland*, 205 Miss. 610, 39 So. 2d 265 (1949).

Purchaser of standing timber who cuts timber before his license or permit for cutting is terminated by revocation or expiration by limitation of time is entitled to reasonable time in which to cut up timber felled and to remove it. *Dixie Pine Prods. Co. v. Breland*, 205 Miss. 610, 39 So. 2d 265 (1949).

Contract for purchase of standing timber is within statute. *Queen City Hoop Co. v. Barnett*, 127 Miss. 66, 89 So. 819 (1921).

But contract for the purchase of all timber on certain land to be cut into logs and delivered by seller at a certain place was not within statute requiring writing. *Turner v. Planters' Lumber Co.*, 92 Miss. 767, 46 So. 399, 131 Am. St. R. 552 (1908).

A parol agreement authorizing the cutting of standing timber on lands is within the statute of frauds. A sale of growing timber by parol is a license and authorizes an entry upon the land, which is revocable at the will of the seller. *Walton v. Lowrey*, 74 Miss. 484, 21 So. 243 (1897).

The term "land" embraces not only the soil, but its natural produce, growing upon and affixed to it; hence a sale of growing timber is within the statute. *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 151 (1858).

### 34. —Leases.

In suits involving alleged oral agreements assertedly made by agents for the renewal or extension of written leases, the burden of proof is on the person asserting such an agreement not only to establish agency, but he must establish the agent's authority as well. *Stilley v. Illinois Cent. R.R.*, 209 Miss. 414, 47 So. 2d 840 (1950).

The date specified in a mineral lease, not the date of delivery or actual signing by the various owners, is the effective date of the lease. *Hughes v. Franklin*, 201 Miss. 215, 29 So. 2d 79 (1947).

This section, and not 1930, § 2949, applies to contracts by an attorney in fact for the making of a lease. *Hytken v. Bianca*, 186 Miss. 323, 186 So. 624 (1939), error overruled, 186 Miss. 343, 188 So. 311 (1939).

Under this section [Code 1942, § 264] a lease, if otherwise void, is valid in equity as a contract to make a lease, where the agent's appointment is in writing. *Hytken v. Bianca*, 186 Miss. 323, 186 So. 624 (1939), error overruled, 186 Miss. 343, 188 So. 311 (1939).

The court is without the power to engraft upon the statute an exception which would exclude from its provisions an oral lease for three years because of money expended on the leased premises by the lessee upon reliance of the oral promise of

the lessor. *Tanner v. Walsh*, 184 Miss. 147, 183 So. 278 (1938).

Where written ten-year lease gave lessee option of renewal for additional five years on same terms, was assigned and lessee's assignee remained in possession after expiration of original term, exclusion of lease and assignment from evidence in action for rent by lessor's successor in interest held error, since original parties to lease did not contemplate execution of new lease as necessary for renewal, and therefore original lease included the renewal term as covenant running with the land and satisfied statute of frauds after oral renewal. *Economy Stores, Inc. v. Moran*, 178 Miss. 62, 172 So. 865 (1937).

Tenant, entering under contract unenforceable under statute of frauds, held to become a tenant from year to year. *Montgomery v. Hollingsworth*, 127 Miss. 346, 90 So. 79 (1921).

Appointment of agent executing lease for more than one year must be by deed. *Hutchinson v. Platt*, 119 Miss. 606, 81 So. 281 (1919).

Surrender of lease and possession by landlord rendered lease having more than year to run a completed, executed contract, unaffected by statute of frauds. *Bradbury v. McLendon*, 119 Miss. 210, 80 So. 633 (1919).

Mortgagee taking for value without notice held not chargeable with unrecorded assignment of lease. *Corinth Bank & Trust Co. v. Wallace*, 111 Miss. 62, 71 So. 266 (1916).

Tenant holding under five-year oral agreement was tenant from year to year. *Scruggs v. McGehee*, 110 Miss. 10, 69 So. 1003 (1915).

One who has verbally leased lands for three years, who intends to enter and cultivate the same, may, before actual entry, execute a valid deed of trust or mortgage upon the crops to be grown during the coming year. *Grisham v. Lutric*, 76 Miss. 444, 24 So. 169 (1898).

The clause relating to leases has reference to the duration of the term, and not to the time of its commencement. A verbal lease for a term not more than a year is good, even if the term is to begin in the future. *McCroy v. Toney*, 66 Miss. 233, 5 So. 392 (1889).



A verbal lease of land "for the crop season of 1880," which might or might not be for more than one year, is not within the statute. *John Chaffe & Sons v. Benoit*, 60 Miss. 34 (1882).

### 35. —Contract of employment of agent.

A contract to sell the land of another for a commission is not required to be in writing. *Lowe v. Hodges*, 726 So. 2d 1289 (Miss. Ct. App. 1998).

Authority from owner of land in favor of another to sell the same is not required to be in writing, and the expiration date thereof may later be waived by parol or by conduct of the parties. *Partee v. Pepple*, 197 Miss. 486, 20 So. 2d 73 (1944), but see *Mitchell v. Rawls*, 493 So. 2d 361 (Miss. 1986).

Under this section [Code 1942, § 264] a lease, if otherwise void, is valid in equity as a contract to make a lease, where the agent's appointment is in writing. *Hytken v. Bianca*, 186 Miss. 323, 186 So. 624 (1939), error overruled, 186 Miss. 343, 188 So. 311 (1939).

However, the appointment of agent executing lease for more than year, must be by deed. *Hutchinson v. Platt*, 119 Miss. 606, 81 So. 281 (1919).

The statute does not affect an agent's right to compensation for selling land pursuant to oral instructions. *Cook v. Smith*, 119 Miss. 375, 80 So. 777 (1919); *Hancock v. Dodge*, 85 Miss. 228, 37 So. 711 (1904).

A contract that complainant is to find a purchaser for defendant's land and receive therefor a part of the proceeds of the sale is not a contract for the sale of land, and therefore need not be in writing. *Lesley v. Rosson*, 39 Miss. 368, 77 Am. Dec. 679 (1860).

### 36. Contract not to be performed within fifteen months, generally.

Appellate court affirmed the grant of summary judgment in favor of defendant because the alleged contract between plaintiff and defendant violated the statute of frauds in Miss. Code Ann. § 15-3-1(c) and (d), as it was not in writing, it dealt with the leasing of real estate, and the term of the contract extended for more

than 15 months. *Glinsey v. Newson*, 911 So. 2d 661 (Miss. Ct. App. 2005).

Oral agreement not performable within statutory period is not taken out of the statute by providing that it may be terminated by either party within such period. *Stahlman v. National Lead Co.*, 318 F.2d 388 (5th Cir. 1963).

Possibility of performance within 15 months takes an oral contract out of the statute. *Morgan v. Jackson Ready-Mix Concrete*, 247 Miss. 863, 157 So. 2d 772 (1963).

To bring a particular contract within the statute there must be a negation of the right to perform it within 15 months. *United States Fin. Co. v. Barber*, 247 Miss. 800, 157 So. 2d 394 (1963).

An oral agreement to be performed within the statutory period is not within the statute of frauds although it is a modification of an earlier agreement. *Flowood Corp. v. Chain*, 247 Miss. 434, 152 So. 2d 915 (1963).

Where the time for performance is not fixed, the contract will not be presumed to be within the statute. *Duff v. Snider*, 54 Miss. 245 (1876).

### 37. —Employment.

An oral contract of employment which extends for more than 15 months is subject to the statute of frauds and thus unenforceable. *Floyd v. Segars*, 572 F.2d 1018 (5th Cir. 1978).

Contracts of present employment and of indefinite duration are not within this provision, being terminable at any time and therefore susceptible of performance within 15 months. *United States Fin. Co. v. Barber*, 247 Miss. 800, 157 So. 2d 394 (1963).

Where complaint alleged that shortly prior to specified date complainant entered into an oral contract of employment as manager of manufacturing plant from one year from date thus specified with provision for employment from year to year thereafter using the words shortly prior as meaning more than three months. *Greer v. Crawford Corp.*, 220 Miss. 97, 70 So. 2d 69 (1954).

In action for the amount due under oral contract of employment for one year, trial court erred in overruling motion to require specific allegations in complaint as



to when and where the alleged contract was consummated, in view of the fact that such information was necessary to determine whether the Alabama statute of frauds, under which the contract could not have been performed within the required time, or the Mississippi statute was applicable. *Edmondson v. Edmondson*, 209 Miss. 596, 48 So. 2d 121 (1950).

Verbal contract of employment to begin in future and continue for year is void. *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 94 Miss. 904, 48 So. 292, 136 Am. St. R. 607 (1909).

### 38. —Sales.

But oral exclusive sales agency contract for no specific period, but considered as permanent so long as buyer paid for goods, was held invalid. *Gerachi v. Sherwin-Williams Co.*, 156 Miss. 36, 125 So. 410 (1930).

An oral agreement to buy goods from a person exclusively for five years if he sell as reasonably as others, is within the statute. *Mallett v. Lewis*, 61 Miss. 105 (1883).

### 39. —Miscellaneous.

A bankruptcy debtor's pre-petition payment to law firms, and their retention of retainers without further action, created valid security interest in favor of law firms; perfection of security interest was achieved by law firms' continuous possession of debtor's funds, subject to the status of frauds and amounts of compensation actually allowed by court. *In re Viscount Furn. Corp.*, 133 B.R. 360 (Bankr. N.D. Miss. 1991).

An action on an oral agreement to purchase a saw mill's entire output of railroad crossties, evidenced only by a promissory note, was properly barred by the statute of frauds where the promissory note did not contain the substantial terms of the contract and where the contract was intended to last for as long as the sawmill was in business. *Roberts v. Southern Wood Piedmont Co.*, 571 F.2d 276 (5th Cir. 1978).

The statute of frauds did not operate to preclude a suit on a corporate merger agreement, merely because a contemplated oral employment contract was never committed to writing, where the plaintiff did not attempt to enforce the

employment contract, but only the basic merger agreement itself, and where the contemplated employment arrangement was merely a condition precedent to closing, and a collateral matter separate and apart from, the binding bilateral merger agreement. *Mid-Continent Tel. Corp. v. Home Tel. Co.*, 319 F. Supp. 1176 (N.D. Miss. 1970).

An oral agreement between two parties to acquire jointly the corporate stock owned by another as soon as possible, or whenever the shares could be obtained, was a contract possible of performance within 15 months and did not violate this section. *Jones v. McGahey*, 187 So. 2d 579 (Miss. 1966), error overruled, 191 So. 2d 532 (Mis. 1966).

Oral dealership agreement, capable of performance within 15 months, is not within the statute of frauds though parties contemplated possible duration for an indefinite period. *Hazell Mach. Co. v. Shahan*, 249 Miss. 301, 161 So. 2d 618 (1964).

Oral agreement that one party shall have a permanent right to distribute the other's products is one not performable within 15 months, and hence unenforceable. *Stahlman v. National Lead Co.*, 318 F.2d 388 (5th Cir. 1963).

Where testator executes will in compliance with oral agreement with the devisee that the latter will render unique and necessary personal services to testator involving a substantial change in the status and manner of living of the promisee, and such services have been performed, so that a revocation of the will amounts to fraud upon the devisee rendering it impossible or impracticable to restore devisee to prior situation, equity will hold such will to be irrevocable and the rights thereunder may be established. *Johnston v. Tomme*, 199 Miss. 337, 24 So. 2d 730 (1946).

Suit based on oral agreement in 1929 that, until terminated by either party, insurer would renew fire policy yearly, under which policy was renewed for 1930 and 1931 but not 1932, held within statute of frauds barring action on agreement not to be performed within fifteen months. *Fireman's Fund Ins. Co. v. Williams*, 170 Miss. 199, 154 So. 545 (1934).

Oral agreement to keep fire insurance policy in force and renew policy three years from date of agreement was within statute of frauds. *Green v. Hartford Fire Ins. Co.*, 157 Miss. 316, 128 So. 107, 69 A.L.R. 554 (1930).

One cannot be held chargeable to physicians for services to another plantation owner's tenants not rendered within year of making oral contract. *Hannah v. Covington*, 155 Miss. 825, 125 So. 418 (1930).

Appointment of agent executing lease for more than one year must be by deed. *Hutchinson v. Platt*, 119 Miss. 606, 81 So. 281 (1919).

#### 40. —Possibility of performance within fifteen months.

In an action arising out of an oral agreement between cotton merchants to enter into a joint venture with no definite date for its termination, the action was not barred by the statute of limitations where the last transaction of the venture took place on July 24, 1970, and the action was commenced sometime prior to December 12, 1972; nor was the action barred by § 15-3-1 where the oral agreement had been of an indefinite duration and susceptible of performance within 15 months and where the agreement had been substantially performed by both parties. *Beane v. Bowden*, 399 So. 2d 1358 (Miss. 1981).

An oral contract for the cutting and hauling of pulp wood to the railroad and loading the same on cars for shipment to the defendant with a guarantee to the plaintiff of employment under the contract for a period of not less than two years, whether regarded as a contract for employment or a contract for the purchase of pulp wood, could not be performed within a space of fifteen months from the making thereof and the contract is unenforceable under this section [Code 1942, § 264]. *Poole v. Johns-Manville Prods. Corp.*, 210 Miss. 528, 49 So. 2d 891 (1951).

A promise to wash, iron and cook for another in return for a promise of a devise of property may be performed in less than fifteen months and, therefore, is not within the statute. *Boggan v. Scruggs*, 200

Miss. 747, 29 So. 2d 86 (1947), overruled on other grounds, *Talbert v. Ellzey*, 203 Miss. 612, 35 So. 2d 628 (1948).

But oral contract for personal services not performable within fifteen months is unenforceable. *Moore v. Smart*, 171 Miss. 248, 157 So. 467 (1934).

Where oral contract is unenforceable under statute of frauds, parties thereto may thereafter enter into new oral contract identical in terms with former, but recognition of former contract does not result in formation of new contract unless parties intended thereby to enter into new contract. *Moore v. Smart*, 171 Miss. 248, 157 So. 467 (1934).

Where oral contract for personal services was unenforceable because not performable within fifteen months, evidence that in subsequent conversation employer declined to put contract in writing, but stated what he had thereunder agreed to pay and that he would comply therewith, held not to show formation of new contract which would be enforceable. *Moore v. Smart*, 171 Miss. 248, 157 So. 467 (1934).

A contract which may or may not be performed in one year is not within the statute. *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140 (1904).

A contract by a railroad company to give a designated person employment for the life of such person is not within the statute, since it may be fully performed within a year. *Jackson v. Illinois Cent. R. Co.*, 76 Miss. 607, 24 So. 874 (1899).

A contract of employment which is possible to be performed within the space of one year from the making thereof is not within the statute. *A.B. Smith Co. v. Jones*, 75 Miss. 325, 22 So. 802 (1897).

#### 41. Settlement agreements.

To hold that a settlement agreement dictated into the record in the presence of a presiding judge 'but which required the execution of a deed to real estate' is not enforceable would undermine the inherent power of the court to enforce settlement agreements reached in the presence of the court. Nothing in the statute of frauds requires such a holding. *Scarborough v. Long*, 112 F. Supp. 2d 609 (S.D. Miss. 2000).



## RESEARCH REFERENCES

**ALR.** Oral agreement restricting use of real property as within statute of frauds. 5 A.L.R.2d 1316.

Performance as taking contract not to be performed within a year out of the statute of frauds. 6 A.L.R.2d 1053.

Sale or contract for sale of standing timber as within provisions of statute of frauds respecting sale or contract of sale of real property. 7 A.L.R.2d 517.

Statutory necessity and sufficiency of written statement as to amount of compensation in broker's contract to procure purchase, sale, or exchange of real estate. 9 A.L.R.2d 747.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds. 12 A.L.R.2d 508.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds. 15 A.L.R.2d 1330.

Sufficiency of memorandum of lease agreement to satisfy the statute of frauds, as regards terms and conditions of lease. 16 A.L.R.2d 621.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another. 20 A.L.R.2d 246.

Sufficiency of description or designation of land in contract or memorandum of sale, under statute of frauds. 23 A.L.R.2d 6.

Necessity and sufficiency of statement of consideration in contract or memorandum of sale of land, under statute of frauds. 23 A.L.R.2d 164.

Construction and effect of exception making statute of frauds provision inapplicable where goods are manufactured by seller for buyer. 25 A.L.R.2d 672.

Rights as between vendor and vendee under land contract in respect of interest. 25 A.L.R.2d 951.

Rights of parties under oral agreement to buy or bid in land for another. 27 A.L.R.2d 1285.

Oral contract for personal services so long as employee is able to continue in work, to do satisfactory work, or the like,

as within statute of frauds relating to contracts not to be performed within a year. 28 A.L.R.2d 878.

Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds. 30 A.L.R.2d 972.

What constitutes part performance sufficient to take agreement in consideration of marriage out of statute of frauds. 30 A.L.R.2d 1419.

Effect of attempted cancelation or erasure in memorandum otherwise sufficient to satisfy statute of frauds. 31 A.L.R.2d 1112.

Statute of frauds: promise by stockholder, officer, or director to pay debt of corporation. 35 A.L.R.2d 906.

Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed. 46 A.L.R.2d 894.

What constitutes promise made in or upon consideration of marriage within statute of frauds. 75 A.L.R.2d 633.

Oral surrender of written lease. 78 A.L.R.2d 933.

Doctrine of part performance with respect to renewal option in lease not complying with statutes of frauds. 80 A.L.R.2d 425.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds. 81 A.L.R.2d 991.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit. 21 A.L.R.3d 9.

Statute of frauds: validity of lease or sublease subscribed by one of the parties only. 46 A.L.R.3d 619.

Comment Note.—Statute of frauds and conflict of laws. 47 A.L.R.3d 137.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable. 54 A.L.R.3d 715.

Promissory estoppel as basis for avoidance of statute of frauds. 56 A.L.R.3d 1037.

Exceptions to rule that oral gifts of land are unenforceable under statute of frauds. 83 A.L.R.3d 1294.



Liability for interference with invalid or unenforceable contract. 96 A.L.R.3d 1294.

Check given in land transaction as sufficient writing to satisfy statute of frauds. 9 A.L.R.4th 1009.

Promise by one other than principal to indemnify one agreeing to become surety or guarantor as within statute of frauds. 13 A.L.R.4th 1153.

Promissory estoppel as basis for avoidance of UCC statute of frauds (UCC § 2-201). 29 A.L.R.4th 1006.

Antenuptial contracts: parties' behavior during marriage as abandonment estoppel, or waiver regarding contractual rights. 56 A.L.R.4th 998.

Sufficiency of showing, in establishing boundary by parol agreement, that boundary was uncertain or in dispute before agreement. 72 A.L.R.4th 132.

Applicability of statute of frauds to promise to pay for legal services furnished to another. 84 A.L.R.4th 994.

Satisfaction of statute of frauds by e-mail. 110 A.L.R.5th 277.

Sufficiency of description of terms and conditions of lease, or lease provision, so as to comply with statute of frauds. 12 A.L.R.6th 123.

**Am Jur.** 72 Am. Jur. 2d, Statute of Frauds §§ 4 et seq.

23 Am. Jur. Pl & Pr Forms (Rev), Statute of Frauds, Forms 11 et seq. (answer that agreement not in writing).

19 Am. Jur. Pl & Pr Forms, Statute of Frauds, Forms 19:8 et seq. (answer that agreement not in writing).

1 Am. Jur. Proof of Facts 2d, Part Performance of Oral Land Contract, §§ 8 et seq. (proof of possession by purchaser); §§ 17 et seq. (proof of improvements made by purchaser); §§ 26 et seq. (proof of payment by purchaser of consideration and of property taxes).

38 Am. Jur. Proof of Facts 2d 91, Fraudulent Misrepresentation as to Use to Which Real Property Could be Put.

**CJS.** 37 C.J.S., Frauds, Statute of §§ 3-29, 33-109, 110-153.

**Law Reviews.** 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

## § 15-3-3. Repealed.

Repealed by Laws of 2006, ch. 371, § 13, effective from and after July 1, 2006.

[Codes, Hutchinson's 1848, ch. 47, art. 1 (2); 1857, ch. 44, art. 2; 1871, § 2893; 1880, § 1293; 1892, §§ 4226, 4227; 1906, §§ 4776, 4777; Hemingway's 1917, §§ 3120, 3121; 1930, §§ 3344, 3345; 1942, §§ 265, 266.]

**Editor's Note** — Former § 15-3-3 was entitled: "Fraudulent conveyances, judgments, loans and the like." For present similar provisions, see the Uniform Fraudulent Transfer Act, §§ 15-3-101 et seq.

## § 15-3-5. Fraudulent conveyances, judgments, loans and the like; exceptions.

Section 15-3-3 shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common, or profit out of the same, which shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, bodies-politic or corporate, nor shall it in any case extend to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them, and though a conveyance or contract be decreed void as to prior creditors, it shall not, on that account, be void as to subsequent creditors or purchasers.

**SOURCES:** Codes, Hutchinson's 1848, ch. 47, art. 1 (3); 1857, ch. 44, art. 3; 1871, § 2894; 1880, § 1294; 1892, § 4228; 1906, § 4778; Hemingway's 1917, § 3122; 1930, § 3346; 1942, § 267.

**Editor's Note** — Section 15-3-3, referred to in the section, was repealed by Laws of 2006, ch. 371, § 13, effective from and after July 1, 2006.

## JUDICIAL DECISIONS

1. In general.
2. Husband and wife.
3. Mortgages and deeds of trust.

### 1. In general.

Transfer not fraudulent under statute where conveyance was to satisfy antecedent debts and advancements; to induce wife to put up money for husband's bail and lawyer in murder case; [to settle property rights related to divorce,] where wife had filed for divorce earlier with property settlement unresolved, and as result of signing over property this removed any such issue from dispute concerning divorce, it having been held that transfer of money or property in good faith between husband and wife as settlement of property rights and in lieu of alimony in contemplation of divorce proceedings is not without sufficient consideration where divorce is subsequently obtained. *Barbee v. Pigott*, 507 So. 2d 77 (Miss. 1987).

When immediate family member is preferred as creditor, clear and satisfactory proof of valid and subsisting debt which would be enforced and payment exacted regardless of fortune or misfortune of debtor must be shown. *Barbee v. Pigott*, 507 So. 2d 77 (Miss. 1987).

Fraudulent conveyance with sole purpose of cheating creditors is void as to such creditors whether supported by consideration or not. *Barbee v. Pigott*, 507 So. 2d 77 (Miss. 1987).

If a bank withholds deed to it from record by agreement with its president, the grantor, to give him a fictitious credit, it is fraudulent in fact as against the president's creditors who became such without notice of the deed, and the bank's claim thereunder will be postponed to the rights of such creditors. *Robertson & Co. v. Columbus Ins. & Banking Co.*, 85 Miss. 234, 38 So. 100 (1905).

It has been held that this section [Code 1942, § 267] applies only to Code 1942,

§ 265 being inconsistent with Code 1942, § 266. *Jennings v. Wilson*, 71 Miss. 42, 14 So. 259 (1893).

The change of the form of the debt, or the renewal of its evidence, does not make a prior creditor a subsequent one. *Thomson v. Hester*, 55 Miss. 656 (1878); *Cook v. Ligon*, 54 Miss. 652 (1877).

Under this statute [Code 1942, § 267] a subsequent purchaser cannot set aside a conveyance made to defraud existing creditors only. *Prestidge v. Cooper*, 54 Miss. 74 (1876).

And a subsequent creditor must show that the deed was intended to defraud him. *Hilliard v. Cagle*, 46 Miss. 309 (1872).

A conveyance to secure a pre-existing debt does not make the person so secured a bona fide purchaser under the section [Code 1942, § 267]. *Pope v. Pope*, 40 Miss. 516 (1866).

### 2. Husband and wife.

A trial court properly dismissed a former wife's fraudulent conveyance claim against her former husband, based upon the former husband's conveyance of 15.2 acres of farm property to his father for inadequate consideration, where the husband had tendered the amount of the child support judgment owed to the former wife. However, since the matter was to be remanded for a determination of an additional amount of child support owed by the former husband, the judgments would be vacated to the extent necessary to provide the lower court with the opportunity to consider the need for security with regard to the child support arrearage or any of the father's further obligations to and for the benefit of his children. *McPhail v. McPhail*, 564 So. 2d 839 (Miss. 1990).

Debtor has right to prefer one creditor over another, even if creditor is wife, and conveyance to satisfy pre-existing debt

which equals value of property conveyed is valid over claim of other creditors. *Barbee v. Pigott*, 507 So. 2d 77 (Miss. 1987).

Conveyance was not fraudulent where, when deed was executed, husband and wife did not have close family relationship, but were instead hostile and adverse, and wife was creditor trying to protect interest; while joint tenant or tenant in common could violate fraudulent conveyance statute in conveyance to remaining owner, this was not classic case of harried debtor transferring all of this property to third party, but was case where husband transferred his interest in their property to wife. *Barbee v. Pigott*, 507 So. 2d 77 (Miss. 1987).

Deeds which were executed without consideration were not fraudulent conveyances within the meaning of § 15-3-5, where they were executed before the date on which debtor-creditor relationships arose, and where they were clearly not executed with the intent to defraud the creditors in question. *Morgan v. Sauls*, 413 So. 2d 370 (Miss. 1982).

Where a husband conveyed real estate to his father, to whom he was indebted, allegedly for the purpose of placing the property beyond the ordinary process of the court, and for the purpose of withholding from the wife and her two minor children the property rights therein under the law, and the deed was executed only a few days before, and not recorded until a few days after, wife filed a bill for divorce

and maintenance, the chancellor could set aside the conveyance without incorporating in the decree a specific finding that the value of the property conveyed was substantially in excess of the amount of the indebtedness actually owing by the grantor to the grantee. *Blount v. Blount*, 231 Miss. 398, 95 So. 2d 545 (1957).

A transfer by a husband to his wife, with intent to defraud existing creditors, is valid as to a subsequent creditor of the husband who had knowledge of the transaction and consented thereto, and dealt with the wife as the real owner for several years before the debt with the husband was contracted. *Donoghue v. Shull*, 85 Miss. 404, 37 So. 817 (1905).

### 3. Mortgages and deeds of trust.

Oral agreement of second mortgagee that if mortgagor would pay part of indebtedness secured by first trust deed, and if third party would advance remainder of indebtedness to prevent foreclosure of first trust deed, third party should have first lien on land covered, held valid and binding. *Taylor v. Phillips*, 182 Miss. 539, 181 So. 855 (1938).

Deed of trust on firm property to secure existing indebtedness and indebtedness that may accrue in the future, held mere security and valid. *Lawrence Lumber Co. v. A.J. Lyon & Co.*, 93 Miss. 859, 47 So. 849 (1908).

Deed of trust to wife to secure a valid debt while grantor was financially embarrassed and indebted to others, held not fraud on other creditors. *Godfrey, Frank & Co. v. Dougherty*, 47 So. 643 (Miss. 1908).

## RESEARCH REFERENCES

**ALR.** Assumption of mortgage as consideration for conveyance attacked as in fraud of creditors. 6 A.L.R.2d 270.

Transaction in consideration of discharge of antecedent debt owed by one other than grantor as based on "fair consideration" under Uniform Fraudulent Conveyance Act. 30 A.L.R.2d 1209.

Conveyance as fraudulent where made in contemplation of possible liability for future tort. 38 A.L.R.3d 597.

**Am Jur.** 38 Am. Jur. Proof of Facts 2d 91, Fraudulent Misrepresentation as to Use to Which Real Property Could be Put.

39 Am. Jur. Proof of Facts 2d 733, Gift Rather Than Loan.



### § 15-3-7. Property of improperly disclosed principal or partner to be treated as property of one ostensibly transacting business.

If a person shall transact business as a trader or otherwise, with the addition of the words “agent,” “factor,” “and company,” or “& Co.,” or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if a person shall transact business in his own name without any such addition, all the property, stock, money and choses in action used or acquired in such business shall, as to the creditors of such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property. However, the provisions of this section shall not apply to a refrigerated box, vending machine or other container when placed by a person, firm, or corporation in a store, mercantile establishment, or other place of business to be used therein, where said refrigerated box, vending machine, or other container is plainly marked with a sign, painted on or attached to and prominently displayed on such property, showing said property to be the property of the person, firm, or corporation, placing the same therein.

**SOURCES:** Codes, 1880, § 1300; 1892, § 4234; 1906, § 4784; Hemingway's 1917, § 3128; 1930, § 3352; 1942, § 273; Laws, 1956, ch. 208.

**Cross References** — Use of words “bank,” “banking,” “bankers,” “trust company”, etc., see § 81-3-3.

### JUDICIAL DECISIONS

1. In general.
2. Construction, generally.
3. Reservation of title to property by seller.
4. Assignment.
5. Use of property as essential to application of statute.
6. Trading in own name.
7. Trading with undisclosed principal.
8. Particular businesses.

#### 1. In general.

Trustee of debtor corporation held title to all equipment in debtor's store premises, free and clear of any interest claimed therein by debtor's incorporators, who had never conveyed the equipment to the corporation, where incorporators failed to comply with statute by posting a sign on debtor's premises indicating such ownership, and there was nothing on record in Mississippi Secretary of State's office or chancery clerk's office showing such claim to ownership. *Pongetti v. Lackley* (In re

*Elvis Presley Heights Supermarket, Inc.*), 13 B.R. 956 (Bankr. N.D. Miss. 1981).

The Business Sign Statute (§ 15-3-7) does not violate the Due Process Clause of the Fourteenth Amendment and was not repealed by implication in § 75-10-103, but was virtually continued by express direction in § 75-2-326(3)(a); furniture and office equipment “used or acquired” in the business was subject to execution and sale under the statute. *Date Shoe, Inc. v. Nichols*, 642 F.2d 146 (5th Cir. Miss. 1981), rehearing denied, 647 F.2d 1121 (5th Cir. 1981).

This section [Code 1942, § 273] does not apply where the contract creating the lien is recorded prior to the attachment by the creditors. *NCR v. Thompson*, 210 Miss. 37, 48 So. 2d 608 (1950).

This section [Code 1942, § 273] fixes the ownership in the property, but takes no part in a contest between creditors of the common debtor who used or acquired

the property which is the subject of the contest. *NCR v. Thompson*, 210 Miss. 37, 48 So. 2d 608 (1950).

Accordingly, purchase money liens on automobile trailers which were seized and removed from leased premises of the purchaser by landlord under attachment writ seeking to collect unpaid rent were not displaced by landlord's lien and were not affected by the fact that there was no sign on the trailers indicating that the seller had any lien thereon. *Dorsey v. Latham*, 194 Miss. 253, 11 So. 2d 897 (1943).

The state tax collector could not attach the truck of one engaged in the restaurant and cattle business but which was owned by another under an unrecorded conditional sales contract, to subject it to the payment of penalties for violation of the intoxicating liquor laws, since this section [Code 1942, § 273] applied only to contract debts and was not intended to cover such an obligation as that incurred under the intoxicating liquor statute. *GMAC v. Gully*, 194 So. 473 (Miss. 1940); *International Harvester Co. v. Gully*, 188 Miss. 115, 194 So. 472 (1940).

The forfeiture provided by the intoxicating liquor statute (Code 1942, § 2639) is not within the purview of this section [Code 1942, § 273], although in a broad sense it might be a debt constituting the state, county and municipality creditors, since this section was intended to cover only contract debts and has nothing to do with fines and forfeitures for violation of the criminal laws of the state. *International Harvester Co. v. Gully*, 188 Miss. 115, 194 So. 472 (1940).

Statute providing that all property used or acquired in business transacted by person without disclosure of principal shall be liable for debts of such person held not to prevent such person from selling or pledging property used and acquired by him in his business; hence only right pledgor's general creditors have in pledge is to subject interest of pledgor to payment of debts. *Wood Preserving Corp. v. Coney Grocery Co.*, 176 Miss. 406, 168 So. 864 (1936).

Under this statute [Code 1942, § 273] a merchant's agreement to return goods to the manufacturer when requested is inoperative as to the merchant's creditors, and

as to his trustee in bankruptcy who is entitled to all the rights and remedies of a creditor who has a lien by attachment or otherwise. In *re Matheny*, 57 F.2d 330 (S.D. Miss. 1932).

When property was shipped into Mississippi, placed on sale in the store of a purchaser doing business as a trader under a sign, and there permitted to remain in his undisturbed possession as his property until the date of filing of a petition in bankruptcy, the lien or privilege for the purchase money given to the seller by a Louisiana statute was lost, and the vendor cannot prevail as against the trustee in bankruptcy vested with all the rights, remedies, and powers of creditors holding a lien thereof by equitable proceedings. In *re Smith*, 51 F.2d 290 (S.D. Miss. 1931).

Automobile conditionally delivered to dealer and used in dealer's business must be treated as dealer's property, as against creditors. *Durant Motor Co. v. Simpson*, 160 Miss. 313, 133 So. 672 (1931).

Notwithstanding Louisiana statute giving purchase-money lien, Louisiana seller held not entitled to priority where merchandise was sold to Mississippi buyer who had undisturbed possession thereof until buyer's bankruptcy petition. In *re Caver, Caver & Co.*, 42 F.2d 293 (S.D. Miss. 1930).

This statute [Code 1942, § 273] does not invalidate the conditional sales contract as between the parties, and therefore a vendor may not be allowed upon the purchaser's bankruptcy to waive the benefit of a conditional sales contract and obtain priority over other creditors by claiming a vendor's lien. In *re Whatley*, 30 F.2d 979 (S.D. Miss. 1929).

Business Sign Statute does not derange priority of lien between creditors of common debtor. *Campbell Paint & Varnish Co. v. Hall*, 131 Miss. 671, 95 So. 641 (1923); *Crump v. Hill*, 105 F.2d 124, 124 A.L.R. 165 (5th Cir. 1939); *Dodds v. Pratt*, 64 Miss. 123, 8 So. 167 (1886).

The section [Code 1942, § 273] has no application in a contest between creditors of the common debtor. *Kinney v. Paine*, 68 Miss. 258, 8 So. 747 (1891).

Where a person undertook to form a stock company, but failed to do so, and carried on the business individually, with-



out any sign indicating the company, the property used by him in the prosecution of such business is not liable to a judgment recovered against the fictitious company. *Adams v. Berg*, 65 Miss. 3, 3 So. 465 (1888).

The section [Code 1942, § 273] does not apply in favor of the creditors of the trader so as to prevent a rescission of the sale and recovery of the goods by one induced to sell the same to such trader under his fraudulent representations. *Frank v. Robinson*, 65 Miss. 162, 3 So. 253 (1887).

Where property is placed in the custody of a trader, to be sold by him as part of his stock, or under such circumstances as to appear to be his, and furnish him a basis of credit, it is within the section [Code 1942, § 273]. *Shannon v. J.C. Blum & Co.*, 60 Miss. 828 (1883).

## 2. Construction, generally.

This statute, being highly penal, is to be strictly construed against any claim thereunder. *State Tax Comm'n v. Mitchell*, 235 Miss. 264, 109 So. 2d 154 (1959).

This section [Code 1942, § 273] is highly penal and is to be strictly construed against any claim thereunder. *Yellow Mfg. Acceptance Corp. v. AMOCO*, 191 Miss. 757, 2 So. 2d 834 (1941); *Merchants Grocery Co. v. Gulley Grocery Co.*, 210 Miss. 33, 48 So. 2d 606 (1950).

The purpose of the statute [Code 1942, § 273] is to defeat secret liens, and should not be tortured into a strained construction to defeat honest transactions entered into in accordance with upright business practices. *Floyd v. C. Nelson Mfg. Co.*, 93 F.2d 857 (5th Cir. 1938).

## 3. Reservation of title to property by seller.

This statute does not preclude the assertion of rights under a duly recorded title retention contract adequately describing the property. *Floyd v. C. Nelson Mfg. Co.*, 93 F.2d 857 (5th Cir. 1938).

But it does cut off and defeat lien claimants under instruments describing the property claimed insufficiently to identify it. *Liquid Carbonic Corp. v. Phillips*, 68 F.2d 515 (5th Cir. 1934).

The exception made by the courts from the operation of this statute [Code 1942, § 273] of liens created by duly recorded

instruments presupposes that the description in such instrument must have been such as to enable a third person to identify the property to the exclusion of all other property without the assistance of external evidence. *In re Caver, Caver & Co.*, 42 F.2d 293 (S.D. Miss. 1930).

Descriptive words in instruments retaining title held insufficient within statute providing that property used in business shall be liable for debt. *In re Caver, Caver & Co.*, 42 F.2d 293 (S.D. Miss. 1930).

Recorded instrument retaining title without specifically describing property was void as to trustee in bankruptcy for buyers. *In re Caver, Caver & Co.*, 42 F.2d 293 (S.D. Miss. 1930).

Landlord cannot subject for rent due by person transacting business as trader property which he acquired under recorded contract of sale reserving title. *Fitz Gerald v. American Mfg. Co.*, 114 Miss. 580, 75 So. 440 (1917).

This section [Code 1942, § 273] has no application against the original seller, who, to secure the purchase money, reserves title by an instrument signed by the purchaser and duly acknowledged and recorded. *Tufts v. Stone*, 70 Miss. 54, 11 So. 792 (1892).

Where a hotel keeper purchased a cooking range under a recorded agreement that the title was to remain in the seller until the price was paid, one who succeeded him as owner of the hotel could not hold the range by virtue of this section [Code 1942, § 273]. *John Van Range Co. v. Allen*, 7 So. 499 (Miss. 1890).

## 4. Assignment.

Successive assignments of book accounts as security for a loan, the assignee having exercised complete dominion over the accounts, are not invalidated as to other creditors of the assignor by failure to comply with the statute. *Crump v. Hill*, 105 F.2d 124, 124 A.L.R. 165 (5th Cir. 1939).

Assignment of fire insurance policies on a stock of goods before loss are not within the operation of the statute. *In re Star Grocery Co.*, 2 F. Supp. 21 (N.D. Miss. 1933).

The right of a seller to retake property upon default in the payment of the pur-



chase-price, the title to which was reserved in him, is not destroyed by an assignment by the purchaser for the benefit of his creditors, and is not affected by the statute. *Gayden v. Tufts*, 68 Miss. 691, 10 So. 53 (1891).

##### **5. Use of property as essential to application of statute.**

Articles repossessed by a dealer's assignee of conditional sales contracts and mingled by him, with a view to resale, with the stock in trade of the dealer without disclosing such assignee's ownership, are "used or acquired" in the dealer's business within the meaning of the statute [Code 1942, § 273] and therefore subject to claims of the dealer's creditors. *State Tax Comm'n v. Mitchell*, 235 Miss. 264, 109 So. 2d 154 (1959).

The mere permissive possession of property by a trader, where he has no right to use it in his business, does not bring him within the operation of the sign statute, and therefore, upon the default of purchasers of automobiles under conditional sales contracts held by a foreign credit corporation, the permissive possession of the automobiles by a dealer did not bring him within the operation of the statute. *Yellow Mfg. Acceptance Corp. v. AMOCO*, 191 Miss. 757, 2 So. 2d 834 (1941).

Bankrupt's trustee held not entitled to recover value of automobile repossessed by finance company, which was conditionally sold to bankrupt, who represented in finance papers that automobile was for personal use, but who used automobile in his business in violation of his agreement, in absence of evidence that finance company knew bankrupt was using automobile in his business or that it authorized him to do so. *Archibald v. GMAC*, 172 Miss. 278, 159 So. 843 (1935).

In action by bankrupt's trustee to recover value of automobile repossessed by finance company, evidence that bankrupt, in application for credit, stated automobile was for personal use, that conditional seller's title was assigned to finance company with bankrupt's consent, and that finance company did not know bankrupt was using automobile in his business, sustained burden imposed on finance company, to defeat trustee's recovery, of showing it owned automobile and that automo-

bile was not acquired or used by bankrupt with its consent. *Archibald v. GMAC*, 172 Miss. 278, 159 So. 843 (1935).

This section [Code 1942, § 273] does not apply to property neither used nor acquired in the trader's business. *Longino v. Delta Bank*, 76 Miss. 395, 24 So. 901 (1899).

Unless the property be "used or acquired" in the business with the consent of the real owner, it does not become liable under the section [Code 1942, § 273]. *Adams v. Berg*, 67 Miss. 234, 7 So. 225 (1890).

The mere permissive possession by a trader of property, where he has neither an interest in nor right to "use" it in his business, does not bring it within the section [Code 1942, § 273]. *Hall's Self-Feeding Cotton Gin Co. v. Berg*, 65 Miss. 184, 3 So. 372 (1888).

##### **6. Trading in own name.**

Where trustee showed that bankrupt transacted business in own name, used automobile in business, displayed it for sale, and showed adjudication in bankruptcy, finance company which resold automobile had burden of showing that automobile belonged to it, was not acquired or used by bankrupt in his business with its consent, or that finance company had such lien, of which trustee had actual or constructive notice, as would make statute inoperative. *Archibald v. GMAC*, 172 Miss. 278, 159 So. 843 (1935).

Where a decedent had conducted the business of trader in his own name, although the money for purchasing the stock had been furnished by another, his administratrix had the presumptive right of possession of the stock until all creditors of the decedent had been paid, and could maintain replevin therefor, although no actual debts against the estate were shown, where the time allowed creditors to probate accounts had not expired. *Hunter v. Forrest*, 115 Miss. 7, 75 So. 753 (1917).

In such case, the right of possession of the administratrix was superior to that of the true owner of the stock. *Hunter v. Forrest*, 115 Miss. 7, 75 So. 753 (1917).

Creditors held entitled to treat gas engine in hands of hardware company as property of the hardware company where

the place of business bore no sign showing it was agent for the manufacturer. *Gallaspy v. International Harvester Co. of Am.*, 109 Miss. 136, 67 So. 904 (1915).

Person operating business for sale of pianos in own name was a trader, and pianos acquired individually were liable for his debts. *Merchants' & Farmers' Bank v. Schaaf*, 108 Miss. 121, 66 So. 402 (1914).

The goods of a merchant whose business sign does not specify ownership in the defendant in execution are not liable to his creditor because the merchant caused the goods purchased by him to be shipped in the defendant's name and carried on the business correspondence and paid a privilege tax in his name, but without his knowledge or consent. *Albin v. Howard*, 74 Miss. 370, 20 So. 844 (1896).

One carrying on business in his own name, under a sign bearing his name, with the addition of the word "proprietor," although insolvent, may sell in good faith the property employed in such business to a creditor in satisfaction of his debt, inasmuch as the creditor might, under this section, have enforced such application by law. *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 19 So. 232, 55 Am. St. R. 550 (1896).

Where wagons are placed in the custody of a merchant and kept in a lot adjoining his store, to be sold as a part of his stock, they are subject to his debts, though sold on commission for a manufacturer, who reserves the legal title as security for the price. *Citizens' Bank v. Studebaker Bros. Mfg. Co.*, 71 Miss. 544, 14 So. 733 (1893).

The requirement of a sign applies only to him who appends to his name in business such words as "agent," "factor" or "company," or the like; and where a married woman transacts a mercantile business in her own name and with her own means, though it be conducted by her husband as her agent, the goods are not liable for the husband's debts for want of a sign. *Harris v. Robson*, 68 Miss. 506, 9 So. 829 (1891); *Schoolfield, Hananer & Co. v. Wilkins*, 60 Miss. 238 (1882).

It is erroneous to assume that the debtor, by "conducting" the business, was "transacting business in his own name," within the meaning of the statute [Code 1942, § 273]. *Harris v. Robson*, 68 Miss. 506, 9 So. 829 (1891).

The goods of a principal are not liable to the debts of a mere clerk. To make the goods liable to the debts of one not the owner, under the statute, he must have "transacted the business in his own name." *Carberry v. Worrell*, 68 Miss. 573, 9 So. 290 (1891).

The name on a business sign on the house in which a mercantile business is conducted does not, per se, fix the ownership of the goods in him whose name is on the sign and make them liable for his debts. *Wolf & Marks v. Kahn*, 62 Miss. 814 (1885).

But if one transacts business in his own name for the secret benefit of another, the property used or acquired in the business will be liable for the debts of the former. *Wolf & Marks v. Kahn*, 62 Miss. 814 (1885).

A cotton-buyer transacts "business" within the meaning of the section [Code 1942, § 273] if he have an office in a town, and on the door of which is an advertisement of his business signed by himself. *Gumbel v. Koon*, 59 Miss. 264 (1881).

## 7. Trading with undisclosed principal.

Where judgment debtor conducted filling station under agreement with third party who furnished gas and oil for sale at fixed commission, and no sign was posted disclosing ownership of property, gas and oil found at filling station held subject to execution taken out by judgment creditor to satisfy judgment, notwithstanding ownership of such oil and gas by third party. *Louisiana Oil Corp. v. Robbins*, 169 Miss. 39, 152 So. 846 (1934).

Automobiles repossessed by a finance company, displayed for sale by a dealer with the finance company's consent under a sign bearing only the dealer's name, are to be treated in favor of his creditors, and therefore in favor of his trustee in bankruptcy, as his property. *In re Waynesboro Motor Co.*, 60 F.2d 668 (S.D. Miss. 1932).

Evidence held not to warrant finding that wife violated the law in failing to change sign over place of business after purchase from husband. *Whittington v. Yazoo Delta Mtg. Co.*, 148 Miss. 861, 114 So. 752 (1927).

Conduct of business by bankrupt's wife with husband as manager without sign on



building held not a violation of the Sign Statute. *Rubenstein v. Lynchburg Shoe Co.*, 125 Miss. 528, 88 So. 14 (1921).

Upon buying given commodity from H. & B. partnership defendant became debtor of H. & B., and fact that B. did not disclose he was also member of B. Bros. Co. which was indebted to defendant, did not authorize instructed verdict for defendant. *Hobbs & Buck v. Herman Grocer Co.*, 113 Miss. 332, 74 So. 26 (1916).

Creditors of clerk who had same name as one of partners and frequently drew checks on partnership account, could not hold partnership property liable for their debts because there was no sign on the building naming members of the firm. *J.M. Robinson, Norton Co. v. Godsey*, 111 Miss. 171, 71 So. 312 (1916).

Receiver held entitled to possession of gasoline engines in hands of hardware company acting as agent of harvester company without sign indicating agency, although the harvester company commenced a replevin action before appointment of the receiver. *P.E. Payne Hdwe. Co. v. International Harvester Co.*, 110 Miss. 783, 70 So. 892 (1916).

The name of the principal or the real owner was not disclosed by a sign, "McAdams & Sons, Agents for Sheldon, Dale & Co.," and therefore an execution against the agents was good as against property in their possession and belonging to their principals. *F.M. Dale & Co. v. Harrahan*, 85 Miss. 49, 37 So. 458 (1904).

Where a mercantile business was conducted under the name of "Ormond Grocery Company," without a sign disclosing the real owner, the property used and acquired therein is subject to the debts of the party transacting the business, although he was in fact the agent of an undisclosed principal. *Meridian Land & Indus. Co. v. J.B. Ormond & Co.*, 82 Miss. 758, 35 So. 179 (1903).

The proceeds of a policy of fire insurance on goods acquired and used in such business, and burned, are liable to the creditors of the party who transacted the business and may be garnished by them. *Meridian Land & Indus. Co. v. J.B. Ormond & Co.*, 82 Miss. 758, 35 So. 179 (1903).

Where one transacts business in his own name, without a sign disclosing that

another owns an interest therein, all the property used in the business is liable for his debts; and this although such other is interested as a silent partner and personally assists in carrying on the business, ostensibly as clerk. *Howe v. Kerr*, 69 Miss. 311, 13 So. 730 (1891).

Where a merchant sold his stock of goods and remained in the store as clerk of the buyer, who had no sign, it not appearing who was transacting the business, the goods were not liable for the debts of the seller. *Bufkin v. Lyon*, 68 Miss. 255, 10 So. 38 (1890).

But the husband in such a case will be allowed to claim property as exempt under § 307, Code 1942. *Stein v. Hamblett*, 66 Miss. 112, 5 So. 524 (1889).

Where the wife is the actual partner in a mercantile firm, and makes her husband her agent and manager, he thereby becomes her agent within the meaning of the section [Code 1942, § 273], and must disclose the name of his principal in the sign. *Evans v. Henley*, 66 Miss. 148, 5 So. 522 (1889).

A business conducted by the husband, who usually superintended and managed it, having a sign in the words "Carr's Stable," and advertising the same as "Carr's Stable," managed by him, is within the section [Code 1942, § 273] as his property, even though the wife owns the property, leased the building, and paid the privilege license, which was posted in the office of the stable, and the books and accounts were in her name. *Hamblet v. Steen*, 65 Miss. 474, 4 So. 431 (1888).

The effect of the statute [Code 1942, § 273] is to make all of the property used or acquired in the business the property of him who transacts the business, and liable for his debts, without regard to the sign under which the business is conducted, unless by a proper sign the name of the true owner be disclosed. *Paine v. Hall's Safe & Lock Co.*, 64 Miss. 175, 1 So. 56 (1887); *Loeb & Bloom v. John P. Morton & Co.*, 63 Miss. 280 (1885).

Creditors, whether antecedent or subsequent, and with or without notice of the undisclosed principal, can avail themselves of the section [Code 1942, § 273]. *Quin v. Myles*, 59 Miss. 375 (1882); *Gumbel v. Koon*, 59 Miss. 264 (1881).



Property used in a bar and billiard-room, conducted under the sign of "Empire Saloon," is liable to the satisfaction of judgment against an employee who conducts the business under the name of the owner "& Co.," under a written contract with the owner that he is to receive a part of the profits for his services. *Quin v. Myles*, 59 Miss. 375 (1882).

#### 8. Particular businesses.

Electrical appliance dealer is a "trader" within this provision [Code 1942, § 273]. *State Tax Comm'n v. Mitchell*, 235 Miss. 264, 109 So. 2d 154 (1959).

The integration of the services and activities of a business, which included a gas filling station, the sale of soft drinks, beer, and cigarettes, and the operation of bar and dance hall, subjected the property used or acquired therein to liability to creditors under the business sign statute, as against the claim of the conditional seller of electric refrigerators used in such business. *Ellzey v. Frederic*, 191 Miss. 633, 3 So. 2d 849 (1941).

One who carries on the business of a gasoline filling station is a "trader" within the meaning of the business sign statute. *Ellzey v. Frederic*, 191 Miss. 633, 3 So. 2d 849 (1941).

The statute [Code 1942, § 273] applies only where the business transacted is that of a trader or one ejusdem generis, and where there are separate or distinct lines of business carried on by the same corporation the property of the non-trading one is not within the statute. In re *Hemming*, 51 F.2d 850 (S.D. Miss. 1931).

Bankrupt wagon manufacturer was "trader" as to road-building machines purchased by him for resale, so as to entitle

trustee to their possession for benefit of general creditors. In re *Hemming*, 51 F.2d 850 (S.D. Miss. 1931).

Business Sign Statute held not applicable to sale of restaurant operated under name of "Elite Cafe" where merchandise was not sold in usual mercantile way, and there was no claim against property conveyed. *Carnaggio Bros. v. City of Greenwood*, 142 Miss. 885, 108 So. 141 (1926).

Undertaker not merchant or trader within Business Sign Statute. *Sayers & Scovill Co. v. Doak*, 127 Miss. 216, 89 So. 917 (1921).

Acquisition and use of jitney buses for hire does not come within this section [Code 1942, § 273]. *Orr v. Jackson Jitney Car Co.*, 115 Miss. 140, 75 So. 945 (1917).

Statute [Code 1942, § 273] inapplicable to woman keeping restaurant and boarding house. *Oliver v. Ferguson & Allen*, 112 Miss. 521, 73 So. 569 (1917).

A single sale does not make one a trader. *Durham v. Slidell Liquor Co.*, 94 Miss. 140, 49 So. 739 (1909).

This section [Code 1942, § 273] has no application to a person transacting business solely as an insurance agent. *I.L. Lyons & Co. v. S.S. Steele & Co.*, 86 Miss. 261, 38 So. 371 (1905).

The section [Code 1942, § 273] does not apply to a person engaged in the business of buying rough lumber, planing it for building purposes, and reselling it. *Willis v. Memphis Grocery Co.*, 19 So. 101 (Miss. 1896).

The section [Code 1942, § 273] does not apply to a person conducting the business of milling and ginning in the country, for the public, but only to traders and persons ejusdem generis. *Yale & Bowling v. Taylor Mfg. Co.*, 63 Miss. 598 (1886).

#### RESEARCH REFERENCES

**Am Jur.** 59A Am. Jur. 2d, Partnership §§ 54 et seq.

### § 15-3-9. Creditors to be notified of destruction of insured stock of merchandise by fire.

In case of the destruction of a stock of merchandise by fire upon which there is insurance against such loss, the holder of such insurance policies shall within five days after such loss notify his creditors to whom he is indebted for

merchandise, of his loss and the amount of insurance carried, and no such policy or policies of insurance shall be transferred or assigned for ten days after such notice, and no such insurance shall be paid for fifteen days next after the occurrence of any such fire.

**SOURCES:** Codes, Hemingway's 1917, § 3130; 1930, § 3354; 1942, § 276; Laws, 1908, ch. 100.

**Cross References** — Notice of loss of mortgaged cattle, see § 69-29-13.

Protection of mortgages in order of priority, see § 83-13-7.

Insurance mortgage clause, see § 83-13-9.

Proof of loss, see § 83-13-13.

## JUDICIAL DECISIONS

### 1. In general.

The intent of the legislature and the force and effect of this section [Code 1942, § 276] is to freeze the proceeds of the insurance in the hands of the insurance companies until creditors of the holder of the insurance have had an opportunity to protect themselves in regard to the loss. *Doty v. Atkinson*, 262 F. Supp. 477 (N.D. Miss. 1966).

Where, in violation of this section [Code 1942, § 276], the insured did not give notice to his creditors of the amount of insurance which he carried on his stock of goods within five days after sustaining a fire loss and assigned the proceeds of the policy within eight days after loss, the assignment was void and the assignee held the proceeds of the policy as trustee

for the insured's creditors, and this was true despite the fact that the assignee had paid the insured the face value of the policy. *Doty v. Atkinson*, 262 F. Supp. 477 (N.D. Miss. 1966).

This provision [Code 1942, § 276] has no application except to transfers or assignments made after the fire occurs. In *re Star Grocery Co.*, 2 F. Supp. 21 (N.D. Miss. 1933).

Assignment of proceeds of fire insurance policy 8 days after loss without notice to creditors and payment to assignee less than 15 days after fire, renders assignee a trustee of the funds for all creditors including assignee. *Citizens' Nat'l Bank v. Yazoo Grocery Co.*, 113 Miss. 87, 73 So. 877 (1916).

## § 15-3-11. Actions on contracts made during infancy.

An action shall not be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the person to be charged therewith.

**SOURCES:** Codes, 1857, ch. 44, art. 8; 1871, § 2898; 1880, § 1298; 1892, § 4232; 1906, § 4782; Hemingway's 1917, § 3126; 1930, § 3350; 1942, § 271.

**Cross References** — Saving rights of infants, see § 11-5-115.

Saving in favor of those under disabilities, see § 15-1-59.

Requirement that certain contracts be in writing, see § 15-3-1.

Assailing chancery decree collaterally, see § 91-1-31.

Competency of persons eighteen years of age or older to contract in matters affecting personal property, see § 93-19-13.

## JUDICIAL DECISIONS

### 1. In general.

A finance company could not maintain an action against the minor maker of a note for default of a car finance contract, even though he made several payments after achieving maturity, where the minor did not ratify the contract in writing after reaching the age of maturity, as required by statute, and where he expressly disaffirmed the contract. *Ray v. Acme Fin. Corp.*, 367 So. 2d 186 (Miss. 1979).

Where a minor lost her life during the time in which she had a right to rescind a contract made during her infancy for the purchase of an automobile, the administrator of the minor's estate could properly disaffirm the claim against the estate based on a conditional sales contract for the purchase of the automobile and was

not estopped to rescind the contract or to deny ratification of the contract. *Johnson Motors, Inc. v. Coleman*, 232 So. 2d 716 (Miss. 1970).

The administrator of a minor's estate seeking to disaffirm a claim against the estate based on the conditional sale of an automobile, was entitled to a judgment against the automobile dealer for the value of an automobile which the minor had inherited and traded in on the purchase of a new automobile. *Johnson Motors, Inc. v. Coleman*, 232 So. 2d 716 (Miss. 1970).

A mere acknowledgment in writing is not sufficient. There must be an express promise to pay. *Edmunds v. Mister*, 58 Miss. 765 (1881).

## RESEARCH REFERENCES

**ALR.** Failure to disaffirm as ratification of infant's executory contract. 5 A.L.R.2d 7.

Liability of surety on infant's contract or obligation, where contract is disaffirmed by infant. 44 A.L.R.3d 1417.

### § 15-3-13. Chapter is not applicable to official sales.

Nothing in this article shall apply to official sales by sheriffs, constables, executors, administrators, guardians, receivers, commissioners, trustees in bankruptcy, or any public officer.

**SOURCES:** Codes, Hemingway's 1917, § 3131; 1930, § 3355; 1942, § 277; Laws, 1908, ch. 100.

**Cross References** — Sales under decrees of chancery courts, see §§ 11-5-93 et seq. Sales under execution, see §§ 13-3-161 et seq.

## RESEARCH REFERENCES

**ALR.** Implied power of executor or testamentary trustee to sell real estate. 23 A.L.R.2d 1000.

Power of sale given trustee by will or trust instrument as surviving termination of trust. 43 A.L.R.2d 1102.

**CJS.** 37 C.J.S., Frauds, Statute of §§ 213-227.



## § 15-3-15. Effect of chapter on rules of evidence or presumptions of law.

Except as especially provided, nothing contained in this article, nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law.

**SOURCES:** Codes, Hemingway's 1917, § 3132; 1930, § 3356; 1942, § 278; Laws, 1908, ch. 100.

**Cross References** — Presumption attending certificates, see § 13-1-81.

### JUDICIAL DECISIONS

#### 1. In general.

When a writing or memorandum is lost or destroyed, both its existence and contents may be proven by parol evidence; the loss or destruction of a memorandum does not deprive it of effect under the Statute of Frauds. Thus, § 15-1-29, § 15-1-73 and the Statute of Frauds (§ 15-3-1) did not bar an action to enforce a loan agreement which was allegedly destroyed in a fire

where the plaintiff sufficiently proved the existence and contents of the destroyed memorandum. *Williams v. Evans*, 547 So. 2d 54 (Miss. 1989).

In proceeding under bulk sales statute to hold purchaser for debt, value of goods when sold must be alleged and proved. *McLendon v. People's Bank*, 111 So. 843 (Miss. 1927).

### ARTICLE 3.

#### UNIFORM FRAUDULENT TRANSFER ACT.

##### SEC.

- |           |                                                                                                                           |
|-----------|---------------------------------------------------------------------------------------------------------------------------|
| 15-3-101. | Definitions.                                                                                                              |
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| 15-3-109. | Determination of when a transfer is made or obligation incurred.                                                          |
| 15-3-111. | Creditor remedies.                                                                                                        |
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| 15-3-119. | Rules of construction.                                                                                                    |
| 15-3-121. | Short title.                                                                                                              |

## § 15-3-101. Definitions.

The following words and phrases shall have the meanings ascribed herein, unless the context clearly indicates otherwise:

(a) "Affiliate" means:

(i) A person who directly or indirectly owns, controls or holds with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

1. As a fiduciary or agent without sole discretionary power to vote the securities; or

2. Solely to secure a debt, if the person has not exercised the power to vote;

(ii) A corporation twenty percent (20%) or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls or holds with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

1. As a fiduciary or agent without sole power to vote the securities; or

2. Solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(b) "Asset" means property of a debtor, but the term does not include:

(i) Property to the extent it is encumbered by a valid lien;

(ii) Property to the extent it is generally exempt under nonbankruptcy law; or

(iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(c) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(d) "Creditor" means a person who has a claim.

(e) "Debt" means liability on a claim.

(f) "Debtor" means a person who is liable on a claim.

(g) "Insider" includes:

(i) If the debtor is an individual,

1. A relative of the debtor or of a general partner of the debtor;

2. A partnership in which the debtor is a general partner;

3. A general partner in a partnership described in clause 2; or

4. A corporation of which the debtor is a director, officer or person in control;

(ii) If the debtor is a corporation,

1. A director of the debtor;

2. An officer of the debtor;

3. A person in control of the debtor;

4. A partnership in which the debtor is a general partner;

5. A general partner in a partnership described in clause 4; or

6. A relative of a general partner, director, officer or person in control of the debtor;

(iii) If the debtor is a partnership,

1. A general partner in the debtor;  
2. A relative of a general partner in, or a general partner of, or a person in control of the debtor;

3. Another partnership in which the debtor is a general partner;

4. A general partner in a partnership described in clause 3; or

5. A person in control of the debtor;

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) A managing agent of the debtor.

(h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(i) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity.

(j) "Property" means anything that may be the subject of ownership.

(k) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(l) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance.

(m) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

**SOURCES:** Laws, 2006, ch. 371, § 1, eff from and after July 1, 2006.

**Cross References** — Attorney General may institute and prosecute suits to vacate fraudulent conveyances, see § 7-3-35.

Creditors may attack fraudulent conveyances, see § 11-5-75.

Fraudulent conveyances, judgments, loans and the like, and exceptions, see § 15-3-5.

Attorney general giving approval to district attorney to prosecute suits to vacate fraudulent conveyances, see § 25-31-25.

Fraudulent purchases of public land being declared void, see § 29-1-11.

Insurance rehabilitation and liquidation — voiding of fraudulent transfers, see § 83-24-27.



**§ 15-3-103. Debtor insolvency; partnership insolvency; excluded assets; excluded debts.**

(1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.

(2) A debtor who generally is not paying his or her debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed or removed with intent to hinder, delay or defraud creditors or that has been transferred in a manner making the transfer voidable under this article.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

**SOURCES:** Laws, 2006, ch. 371, § 2, eff from and after July 1, 2006.

**§ 15-3-105. Value specified.**

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of Section 15-3-107(2)(l), (m) and (n), a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

**SOURCES:** Laws, 2006, ch. 371, § 3, eff from and after July 1, 2006.

**§ 15-3-107. Fraudulent transfers as to present and future creditors; determination of actual intent; rebuttable presumption of fraud.**

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor.

(2) In determining actual intent under subsection (1), consideration may be given, among other factors, to whether:

- (a) The transfer or obligation was to an insider;
- (b) The debtor retained possession or control of the property transferred after the transfer;
- (c) The transfer or obligation was disclosed or concealed;
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (e) The transfer was of substantially all the debtor's assets;
- (f) The debtor absconded;
- (g) The debtor removed or concealed assets;
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred;
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor;
- (l) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

- (ii) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due;

- (m) A transfer made or obligation incurred by a debtor may be fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation; and

- (n) A transfer made by a debtor may be fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(3) If there exists a combination of facts such as described in subsection (2)(l), (m) or (n) only, then there will be a strong presumption of fraud which can be rebutted only by clear and convincing evidence.

**SOURCES:** Laws, 2006, ch. 371, § 4, eff from and after July 1, 2006.

## JUDICIAL DECISIONS

**1. No fraudulent transfer.**

During the pending of divorce proceedings, a chancery court erred in setting aside the transfer of sale proceeds of a husband's business to his mother under Miss. Code Ann. § 15-3-107(1) (Supp. 2009) as a fraudulent conveyance as there

was clear and convincing evidence the funds were to pay a well-documented debt he owed his mother. *Carroll v. Carroll*, 78 So. 3d 332 (Miss. Ct. App. 2010), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 40 (Miss. 2012).

**§ 15-3-109. Determination of when a transfer is made or obligation incurred.**

For the purposes of this article:

(a) A transfer is made:

(i) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this article that is superior to the interest of the transferee;

(b) If applicable law permits the transfer to be perfected as provided in paragraph (a) and the transfer is not so perfected before the commencement of an action for relief under this article, the transfer is deemed made immediately before the commencement of the action;

(c) If applicable law does not permit the transfer to be perfected as provided in paragraph (a), the transfer is made when it becomes effective between the debtor and the transferee;

(d) A transfer is not made until the debtor has acquired rights in the asset transferred;

(e) An obligation is incurred:

(i) If oral, when it becomes effective between the parties; or

(ii) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

**SOURCES:** Laws, 2006, ch. 371, § 5, eff from and after July 1, 2006.

**§ 15-3-111. Creditor remedies.**

(1) In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in Section 15-3-113, may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee;



(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

**SOURCES:** Laws, 2006, ch. 371, § 6, eff from and after July 1, 2006.

### **§ 15-3-113. Transferee defenses, liability and protection.**

(1) A transfer or obligation is not voidable under Section 15-3-107(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 15-3-111(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this article, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) A lien on or a right to retain any interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Section 15-3-107(2) (l), (m) or (n) if the transfer results from:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(6) A transfer is not voidable under Section 15-3-107(2) (n):

(a) To the extent the insider gave new value to or for the benefit of the

debtor after the transfer was made unless the new value was secured by a valid lien;

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

**SOURCES:** Laws, 2006, ch. 371, § 7, eff from and after July 1, 2006.

**Cross References** — Uniform Commercial Code — Secured Transactions, see §§ 75-9-101.

### § 15-3-115. Extinguishment of cause of action.

A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:

(a) Under Section 15-3-107(1), within three (3) years after the transfer was made or the obligation was incurred or, if later, within one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under Section 15-3-107(2)(l) or (m), within three (3) years after the transfer was made or the obligation was incurred; or

(c) Under Section 15-3-107(2)(n), within one (1) year after the transfer was made or the obligation was incurred.

**SOURCES:** Laws, 2006, ch. 371, § 8, eff from and after July 1, 2006.

### § 15-3-117. Supplementary general principles of law applicable.

Unless displaced by the provisions of this article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency or other validating or invalidating cause, supplement its provisions.

**SOURCES:** Laws, 2006, ch. 371, § 9, eff from and after July 1, 2006.

### § 15-3-119. Rules of construction.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**SOURCES:** Laws, 2006, ch. 371, § 10, eff from and after July 1, 2006.

**§ 15-3-121. Short title.**

Sections 15-3-101 through 15-3-121 may be cited as the “Uniform Fraudulent Transfer Act.”

**SOURCES:** Laws, 2006, ch. 371, § 11, eff from and after July 1, 2006.





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